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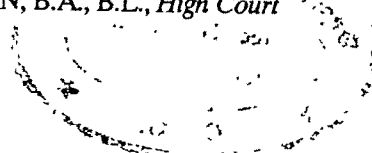
Mr.R.SRINIVASAN, B.A., B.L., *High Court*

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Mr.B.SANKARANARAYANAN, B.A., B.L., *High Court*

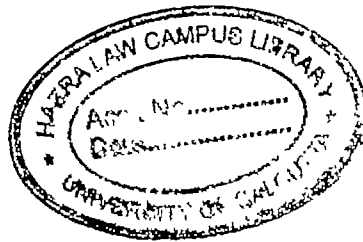
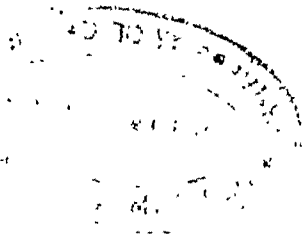


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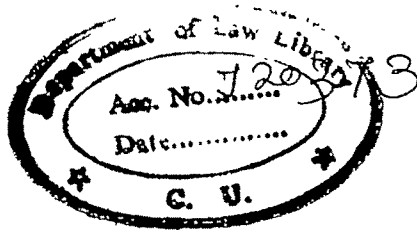
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JUDGES OF THE HIGH COURT
JANUARY TO JUNE, 1994.

CHIEF JUSTICE

The Hon'ble Mr. Justice K.A. Swami, M.A., LL.B.

PUISNE JUDGES

The Hon'ble Mr. Justice V. Ratnam, B.Sc., B.L. (Upto 27.1.1994)

- " " P.S. Mishra, M.Sc., B.L.
- " " G.C. Gupta, B.A., LL.M. (from 28.4.1994)
- " " K. Venkataswami, B.A., B.L.
- " " K.M. Natarajan, B.A., B.L. (Retd. on 13.3.1994)
- " " E.J. Bellie, B.A., B.L. (Retd. on 11.5.1994)
- " " M. Srinivasan, B.A., B.L.
- " " S. Ramalingam, B.Sc., M.L. (Assumed as Chairman of Tamil Nadu Land Ceiling
Appellate Tribunal)
- " " T.S. Arunachalam, B.Sc., B.L.
- " " K.S. Bakthavatsalam, B.A., B.L. (upto 10.5.1994)
- " " K.A. Thanikachalam, B.A., B.L.
- " " Abdul Hadi, B.Com. (Hons.), B.L.
- " " M.S. Janarthanam, M.A., B.L.
- " " K. Swamidurai, B.Sc., B.L. (Retd. on 7.4.1994)
- " " T. Somasundaram, B.Sc., B.L.
- " " J. Kanakaraj, M.A., B.L.
- " " S.V. Patil, B.Sc., LL.B. (From 28.4.1994)
- " " D. Raju, B.A., B.L.
- " " N. Arumugham, B.A., B.L.
- " " A.R. Lakshmanan, B.A., B.L.
- " " A. Thangamani, B.Com. (Hons.), B.L.
- " " S. Pratap Singh, B.A., B.L.
- " " C. Shivappa, M.A., B.L. (From 28.4.1994)
- " " S.M. Ali Mohammed, M.A., B.L.
- " " C.V. Govardhan, B.Sc., B.L.
- " " V. Rangaswamy, B.Sc., B.L.
- " " T. Jayarama Chouda, B.A., B.L. (From 18.3.1994)
- " " R. Jayasimha Babu, M.A., B.L. (From 18.3.1994)

The Hon'ble Mr. Justice Kumar Rajaratnam and the Hon'ble Mr. Justice T.N.C. Rangarajan were sworn in as Judges of Madras High Court and subsequently transferred to Karnataka High Court and Andhra Pradesh High Court.

Advocate General

Mr. K. Subramanian, B.Sc., B.L. (Upto 20.4.1994)
Mr. R. Krishnamoorthy, M.A., B.L. (From 21.4.1994)

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Read Ram Prasad Panda, B.Sc., L.L.M.,
Lecturer in Law, The Central Law College, Salem.

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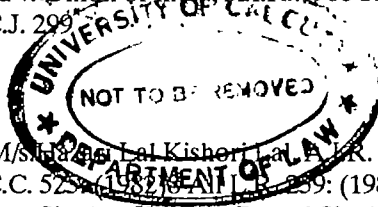
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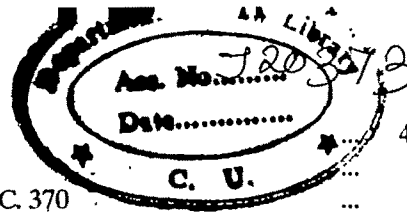


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LEGISLATIVE INTENTION AND DUTY OF THE COURT

By

Ram Prasad Panda, B.Sc., LL.M.

The interpretation of Statute is the primary function of the Court. The function of the court is not to make law but to interpret the law, enacted by the legislature. The principal function of the legislature is the law creation and that of the Judiciary is law interpretation.

The Legislature can pass an enactment and its interpretation is entirely within the province of the judiciary. In this respect courts are to be guided by well established canons of interpretation. It gives effect to the intention of the legislature.

The courts have no power to modify the provisions of the law, even if those provisions appear to be unreasonable to the court. The courts are to interpret the law as enacted.

A judge is sworn to determine, not according to his own thinking, but according to the Law and Customs of Land.

"If as Judges", said Das Gupta, J. of Calcutta High Court, "we use our power to interpret Law to alter Laws which we may not like; and to make new law's which we think, should be made, that would be a corrupt use of our power. We have to observe constant vigilance against such corrupt use of power by ourselves" *Sadan & Pyne v. Hariham Shah, A.I.R. 1950 S.C. 179.*

The court has no concern with the wisdom of Legislature and it would be a dangerous precedent to allow the views of the members of the Court as to the serious consequences of excessive taxation to lead, to a conclusion that the law is *ultra vires*. *Y.V.Srinivasamurthy v. State of Mysore, A.I.R. 1957 S.C. 894.*

Where the words of a statute are clear and unambiguous; there can arise no question of construction, such words ordinarily speak for themselves. A court should give effect to the plain words because plain word may be expected to convey plainly the intention of the legislature.

According to Sir Allen, the creative power of the court is limited by existing legal material at their command. They find the material and shape it.

When a statute is capable of two construction the court must choose the one which is consistent with good sense and fairness and eschew. The other which makes its operation unduly oppressive, unjust or unreasonable, which could lead to strange, inconsistent result or otherwise introduce an element of building uncertainty and practical inconvenience in the working of the statute. The leading case on the subject is *Dilip Kumar v. State of Madhya Pradesh, A.I.R. 1976 S.C. 135.*

In construing a welfare legislation; the court should adopt a beneficent rule of construction; if a section is capable of two constructions; that construction should be preferred which further the policy of the act; and is more beneficial of the debtors in whose interest the Act has been passed.

A LAW NEEDS LEGISLATURE'S ATTENTION

By

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The Mohamedans are divided into two sects, namely, the Sunnis and the Shias. The Sunni Mohamedans of India belong principally to the Hanafi School. The great majority of Mohamedans of India being Sunnis, the presumption will be that the parties to a suit of proceeding are Sunnis, unless it is shown that the parties belong to the Shia sect. As most Sunnis are Hanafis the presumption is that a Sunni is governed by Hanafi Law. In respect of succession, inheritance and divorce the courts are expressly directed by legislature to follow Mohamedan Law to Mohamedans'. Is that Law a perfect one as per natural justice and social justice to follow in this 21st century? No, it is not a perfect one, it contains a lot of defects caused disparities between Mohamedan female and Mohamedan male and among Indians. We will see some of the defects which are to be rectified as early as possible.

There is no distinction in the Mohamedan Law of inheritance between movable and immovable property or between ancestral and self-acquired property. Birth right is not recognised. The right of a heir-apparent or presumptive comes into existence for the first time on the death of the ancestor and he is not entitled until then to any interest in the property to which he could succeed as an heir if he survived the ancestor. Principle of representation does not apply to Mohamedan Law. Hence the expectant right of an heir-apparent cannot pass by succession to his heir nor can it pass by bequest to a legatee under his will.

A, a sunni Mohamedan has two sons and a daughter B, C and D. B dies in the life time of A leaving a son E. A then dies leaving C his son D his daughter and E his grand son. The whole of A's property will pass to C and D to the entire exclusion of E. It is not open to E to contend that he is entitled to B's share as representing B. In the absence of self acquired property of B, C, D and E, C and D would enjoy the property of A and live all with status as rich men and E would live as a poor man. In Hindu Law the undivided ancestral property only be devolved like this. In respect of other properties of the deceased, the Hindu Law is perfect. Hence here the position of other Indians such as Hindus, Christians and Shia sect Mohamedan etc. is fully saved by their sound laws. To bring justice, equality and to save the position of a son of pre deceased son, the legislature's attention has to be brought.

Further more, in the above case all B, C and D die in the life time of A leaving E a son of B, F a son of C and G a son of D, A then dies leaving E, F & G his grandsons. The whole of A's property will pass to E and F and not to G. Since the heirs of predeceased daughter are neither sharers nor residuaries but just distant kindred. Is it not injustice to female? Here the legislature's attention has to be brought to bring justice and equality between male and female.

In the above case, if B and C die in the life time of A leaving a son of B and F a son of C. A then dies leaving D his daughter and E and F, his grandsons. The whole of A's property will not pass to B as in the case of sons but her share is only half in the absence of son. The remaining half share will go to the children of predeceased sons. Here is a disparity between male and female.

What is the share of a daughter? Is there any equality between a son and daughter? In the presence of a son the daughter is not a sharer and the daughter cannot inherit as a sharer when there is a son. With the son she becomes a residuary. Daughter takes as a residuary with the son, the son taking a double portion. Is there any legal or moral liability on the son towards his father or any dependents of the father? No. There is no special liability on him, then why the son should be given a double portion? Is it not injustice to differentiate a son and daughter in succession? To bring justice the legislature's attention is wanted.

The share of husband is $\frac{1}{2}$ when there is no child or child of a son h.l.s. $\frac{1}{4}$ if there is any child or child of son h.l.s. in the properties of his wife, but the share of a wife is only $\frac{1}{4}$ if there is no child or child of a son h.l.s., $\frac{1}{8}$ if there is any child or child of a son h.l.s. Likewise the share of brother and sister etc., are all fixed or determined differently on the basis of sex. How these disparities and inequalities are allowed by our Indian Constitution?

According to the Mohamedan Law a marriage is not a sacrament but a civil contract. A Mohamedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void but merely irregular. But it is not lawful for a Mohamedan woman to have more than one husband at the same time. We may think that this restriction on female may be only to save the legitimacy of children and to avoid confusion of the parentage. But the real fact is that a Mohammedan woman marrying again in the life time of her husband is also liable to be punished under Sec. 494 of Indian Penal Code like others. How did Sec. 494 of I.P.C. allow a Mohammedan husband at the same time to have as many wives as he wants?

The Shia Law recognizes 'muta' marriage. It is very hard to differentiate Muta marriage from prostitution. The only thing is the children born out of Muta marriage are legitimate and capable of inheriting from both parents. There are some murmuring sound from our muslim friends that these things such as having four wives, Muta marriage are actually not in practice now, then why it should not be taken out from the law?

Where a wife without lawful cause ceases to cohabit with her husband the husband may sue for restitution of Conjugal rights. This right has not been given to a wife. Any Mohamedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause and without intervention of a court. What it means? A husband can compel his wife to live with him by filing suit, if he wants; if he does not want, he can easily divorce her at his will. But the wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after marriage. The wife has to rush to court for divorce that too on certain limited valuable and acceptable grounds. Is it not injustice? Is it not the duty of our legislature to provide a sound and good law to the Indian Muslims? Are they neglected citizens of India?

Further the recognition of oral gift gives loop-holes to Mohamedans to cheat their creditors. To treat every one of the citizen equally, the existing Mohamedan Law should be suitably amended by the Legislature of India.

***Mr. Justice Viswanatha Ratnam appointed as
Chief Justice of Himachal Pradesh High Court.***

Mr. Viswanatha Ratnam, the Second Judge of the *Madras High Court* is appointed as *Chief Justice* of the *Himachal Pradesh High Court*. All the friends, well-wishers and admirers of Mr. Justice V. Ratnam are very happy about this appointment. The appointment of Mr. Justice V. Ratnam as *Chief Justice* was long awaited.

THE MADRAS LAW JOURNAL has written on two earlier occasions about Mr. Justice V. Ratnam one at the time of his elevation as a Judge and the other at the time of his appointment as *Acting Chief Justice*. We are sorry we will be missing a Good Judge and at the same time we are happy that Mr. Justice V. Ratnam will serve in another State as *Chief Justice*. His rich experience as a Lawyer and as a Judge will enable him to prove his worth. We trust and hope that *Mr. Viswanatha Ratnam* will be appointed as a Judge of the Apex Court shortly and we convey our respectful felicitations and good wishes on his appointment as *Chief Justice of Himachal Pradesh High Court*.

TWO MORE JUDGES APPOINTED TO THE HIGH COURT

The year 1994 has made a good beginning by appointing two *Judges* to the *High Court* one from the Bar and the other from the Income Tax Appellate Tribunal. Mr. Justice *Kumar Rajarathinam* and Mr. Justice *T.N.C. Rangarajan*.

Mr. Justice *Kumar Rajarathinam* a Barrister at Law, was enrolled as an Advocate in the year 1971. He had a good practice in the Criminal Side. He appeared in some of the leading criminal cases such as Corporation Muster Roll case and the Leela Rani Double Murder case. He had appeared in the Original Side of the High Court and in number of writ petitions. Mr. Justice *Kumar Rajarathinam* appeared regularly in Supreme Court also. He worked in the Chambers of Mr. S. Rathinavel Pandian (Now Supreme Court Judge) and assisted him in number of criminal cases. He was a Senior Standing Counsel to Central Government for sometime. Mr. Justice *Kumar Rajarathinam* is a fine gentleman. He is soft spoken and always has a smile in his lips and is friendly with all the members of the Bar. He hails from a good family and has an excellent antecedent. He was the President of the Madras Bar Association till his elevation. We are sure with his rich experience at the Bar, he will prove himself to be an able Judge.

Mr. Justice *T.N.C. Rangarajan* is the illustrious son of an illustrious father. His father late Mr. T.N.C. Srinivasa Varadhachary served in the Subordinate Judiciary for many years. Mr. Justice *Rangarajan* was enrolled as an advocate of the High Court in the year 1959. He worked as a Junior to Sri A. Alagirisamy, who was a Government Pleader and who later became a Judge of the Supreme Court. Mr. T.N.C. Rangarajan joined the Income Tax Appellate Tribunal as a Judicial Member and served in that capacity in various places. He became the Vice President of the Tribunal in June, 1991. Mr. Justice *T.N.C. Rangarajan* is a man of few words. He is hard working and exhibits his eagerness to know and understand the law. With the vast experience he gained by serving in various places, we are sure he will make his mark as a Judge of the High Court.

The two newly appointed Judges are transferred to the Karnataka High Court and Andhra Pradesh High Court respectively immediately after their appointments.

The Spreading Wings

By

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Introduction: It is indeed naive to conceive that the law relating to specific relief is confined to the precincts of Specific Relief Act. On a considered reading of various judgments on variety of statutes, it is clear that specific performance of a legal obligation can be insisted upon under unique circumstances controlled by different enactments. The judgments on specific performance, apart from being brilliant, carry their pronounced proclivity for searching out new facets. They, with all their traditions and rituals are of most virile and persistent inspiration to the bench and bar alike. In such judgments, one perceives a process of deliberate search that has led on to the awakening of a sense of wonderment of the majesty of law itself. The meat of the matter is the basis of specific relief is defined not by the bounds it is within - but by what is outside its bounds.

The law of specific performance rests on one dictum - complusion. Complusion to do an act can be gathered from contracts reduced into writing or in majority of cases from the inherent stringent dictates of the statutes themselves.

It is illogical and over ambitious to reduce the very essence of all aspects of specific performance in one article and this is principally due to the extensive coverage it offers. This writer wishes to deal with two topics - restitution and restoration - topics which are myraid and majestic and not motely.

Restitution: The law of restitution, as encompassed in Sec.144 of C.P.C, is based on an avowed principle of compelling the party to restore the advantage he gained over his adversary on the ground of a judicial verdict later found wrong. The sanctity attached to the rule of resititution is so pure and intense that the party cannot be allowed to retain the benefit of an erroneous judgment. Though there are numerous judgments on the definition of restitution, the same has been best spelt out by a division bench of Madras High Court in *A.I.R. 1984 Mad. 37*. Holding that the tenant, who has been dispossessed pursuant to an order of eviction, is entitled to resititution when his appeal was allowed, Padmanabhan, J., has the following to say:

‘It is a cardinal principle of law that the acts of courts should not be allowed to work injury on the suitor. *Actus curiae neminem gravabit* - an act of court shall prejudice no man. The moment the court finds that a mistake has been committed, it will rectify the error and put the suitor as far as possible in the possession he would have occupied on the wrong order being made. In such a case the law raises an obligation on the party who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and this obligation, it is the duty of the courts to enforce unless it is shown that the restitution would be clearly contrary to the real justice of the case.’

Before dealing with the variety of instances attracting the rule of restitution, it is necessary to note one important aspect that restitution can be prayed for only in cases of reversal, modification, variance or setting aside of a decree or order. Nainar Sundaram, J. in *(1988)1 M.L.J. 387: A.I.R. 1988 Mad.174: (1988)I L.W. 179*, repelling the contention of the defendant that the benefit of rule of restitution would ensure to him, had held that resititution cannot be ordered in cases where a person has been dispossessed forcibly or unlawfully. It may not be redundant to submit that such instances do not involve the mischief or an erroneous order later found wrong.

One comes across a situation where there was no reversal of the order. The tenant, who submitted himself to a compromise order of eviction, filed a suit challenging the order. The suit having been dismissed, he preferred an appeal which also met with the same fate. The landlord, who took possession of the tenanted premises in the meantime, was asked by the tenant to reconstitute on the ground that the compromise order of eviction was beyond the controller's powers. The Madras High Court in (1983) 1 M.L.J. 292, had held that restitution cannot be ordered since the suit ended in favour of the landlord, confirming the order of eviction based on compromise.

A.I.R. 1982 Raj. 269, makes interesting reading. The landlord, taking *ex parte* order of eviction, put the same into execution and took possession of the tenanted premises. The tenant, who preferred an appeal, had obtained an order of stay of operation of the *ex parte* order of eviction. The rent controller permitted the landlord to take possession of the premises despite the order of stay. The landlord, in the meantime, inducted a new tenant into possession who filed a suit for injunction against the previous tenant restraining him from taking possession of the property under the rule of restitution. The new tenant was rightly refused an order of injunction.

If the Rajasthan case cited supra is an instance of induction of new tenant, *A.I.R. 1975 A.P. 310*, is a case where a wily landlord, after obtaining a possession under an erroneous decree which suffered a reversal on appeal, sold the property. It has been laid down in unmistakable terms that the purchaser must reconstitute the tenant once the order of eviction was reversed by the appellate authority.

Another field of law, where the rule of restitution reigns supreme, is the field of execution. *A.I.R. 1966 S.C. 948*, is a classical piece of a judgment by a Full Bench of Four Judges. In pursuance of an *ex parte* decree, the plaintiff/decree-holder himself purchased the property in court auction. On appeal, the *ex parte* decree was set aside and the matter was remanded for fresh disposal. It was held by the court that the judgment debtor was entitled to restitution even though a fresh decree would be passed after a fresh disposal. The expression of the Apex Court only points at the urgency of restitution since an erroneous judgment was looming large in its mind.

Another Apex Court judgment (1990) 1 L.W. 309, deals with an instance where the judgment-debtor had applied for setting aside the court sale on the ground of restitution because of reversal of the decree on appeal. It had been convincingly proved that the auction purchaser knew of the pendency of the appeal during which period he purchased the property in court auction. The Supreme Court of India, with utmost conviction, had held that since the auction purchaser knew of the pendency of the appeal, he cannot retain the property of the judgment-debtor and hence must surrender possession. It is of great importance to note that the judgment debtor would not have been entitled to restitution if the auction purchaser never knew of the pendency of appeal, the Apex Court continued to observe.

A recent judgment of far reaching consequence has been laid down by the Madras High Court in (1991) 1 L.W. 84, Raju, J., had rightly held that the claim for the value of improvements made cannot render nugatory the rule of restitution. The short but important passage runs as follows:

'Under the pretext of claiming value of the improvements claimed to have been made, the party who is entitled to restitution, should not be made to suffer any disability...'

The rule of restitution, as governed by the Civil Procedure Code, is a corrective measure and a remedial redressal and hence a critical component of law of specific relief.

Restoration: If restitution is to set right an action based on an erroneous judgment later found wrong, restoration is a process to mend an act by compelling an unauthorised dispossessor to restore possession in favour of the dispossessed. Law, till not very long ago, envisaged the recovery process only by way of

regular suit. Of late, courts have recognised redressal in the form of petitions (pending suit) with an intent to discourage violation of interim orders. The reader will agree with this writer's contention that such simplification of procedure is a step in the right direction so that the orders are honoured and implemented.

Sec.6 of the Specific Relief Act deals with the contingency when a person is dispossessed except by due process of law. All the High Courts have laid down law under different circumstances. For the landmark judgment, one has to look into *Chokkalingam's case*, (1974) 2 M.L.J. (S.C.) 27: A.I.R. 1974 S.C. 104. The Apex Court deals with an extreme case by holding that a person even if he is the landlord of the premises even after expiry of lease cannot forcibly evict a tenant except by due process of law. This judgment frowns upon forcible dispossession and one can vouch that the said judgment is the basis for thousands of litigations by tenants who want to protect their possession. Useful reference may be made to A.I.R. 1989 S.C. 2097, also.

A.I.R. 1988 Ori. 141, is important in the sense that a person dispossessed cannot maintain a suit for declaration but must maintain a suit for possession only. In this light, one cannot lose sight of A.I.R. 1990 Gau. 85 and A.I.R. 1990 M.P. 348. While the first decision states that under Sec.6 court's power is limited to granting the prayer for possession only without any need for adjudication upon title, the second decision clarifies that the plaintiff need not prove his title to succeed in an action for recovery of possession.

For all practical purposes, one can look into A.I.R. 1991 Karn. 51. After dispossessing the plaintiff, the defendant (owner) demolished a wall in the house. Karnataka High Court ordered not only restoration of possession but also the reconstruction of the demolished wall by the defendant.

One of the most resourceful judgments has been reported in A.I.R. 1992 Ori. 76. The expression 'other relief' as envisaged in O.7, Rule 7, C.P.C., came to be fully discussed and the necessary passage runs as follows:

"Where in a suit for mandatory injunction for demolition of unauthorised construction by the defendant, though the plaintiff did not specifically ask for recovery of possession in the prayer, the plaint read as a whole, showed that the plaintiff desired that unauthorised construction be removed and the land be put back to his possession in the former condition and the parties were quite aware of their respective cases, the recovery of possession can be brought within the expression of 'other relief' as contained in O.7, Rule 7, C.P.C., and the court would be competent to grant such relief to the plaintiff even though there was no specific prayer for such relief in the prayer portion of the plaint on payment of court-fee required for such relief."

Taking the clue and setting up the right type of trend, Pratap Singh, J., in (1992) 1 M.L.J. 297, had invoked the inherent powers of court under Sec.151, C.P.C., to hold the following two points:

- (a) In a suit for bare injunction for protection of possession, if the plaintiff is dispossessed pending suit, the plaintiff can have his possession restored even without amending the plaint.
- (b) Such a relief can be granted under Sec.151, C.P.C.

Last but not least, reversing a judgment of the Hon'ble Subordinate Judge, Tirupur, in *Raju v. Raju*, (1993) 1 M.L.J. 518, Abdul Hadi, J., had placed the law of restoration in its eminent place. The crux of the judgment is that a valid notice to quit under Sec.106 of Transfer of Property Act does not clothe the landlord with the automatic authority to force unlawful dispossession of the tenant. The operative portion of the judgment runs as follows:

'Can it be said that though there is unlawful dispossession of the plaintiff from the demised property, the plaintiff cannot seek redelivery since there is lawful termination of tenancy? The answer to this question should only be in the negative. In other words, even in such a situation, the plaintiff can seek redelivery'.

The eventual value of judgments on restoration can never be undermined.

Conclusion: The edict of specific performance being compulsion, this writer wishes to refer to some recently sprouted out judgments of Madras High Court which are eloquent enough for their stunning virtuosity and versatility. K.M.Natarajan, J. in *Gnanasundaram's case*, *A.I.R. 1989 Mad. 343*, had rightly held that a transferee of a plaintiff *pendente lite* can compel the defendant/ judgment-debtor/ tenant to surrender possession in his favour even without taking an assignment of the decree from the transferor/ plaintiff.

The venerable Venkataswamy, J., always proceeding along the highroad of honour and rectitude, had the enviable pleasure of laying down on this point rather convincingly on more than one occasion. Spreading the canvas of O.21, Rule 16 and Sec.146, C.P.C., to eviction matters as well, the learned Judge in *A.I.R. 1992 Mad. 89*, has the following to say:

'The fact that the purchaser got himself impleaded in revision petition and continued the proceedings would not make any difference. The order of eviction which has become final can be put into execution by the purchaser from the landlord. The purchasers of the subject-matter of the suit property can apply for execution of the decree without a separate assignment of the decree'.

The latest Supreme Court judgment on this aspect in *A.I.R. 1991 S.C. 373: (1991) 1 L.W. 7 (S.C.)*, puts the matter beyond controversy. Venkataswamy, J., relying upon the said judgment, had held in *(1992) 1 L.W. 473*, that even a third party agreement holder from the plaintiff/agreement holder (in whose favour the suit for specific performance is decreed) can execute the decree obtained by the plaintiff even though the plaintiff never got the sale deed executed in his favour through court.

To conclude to test the advancement of law, the field of specific performance is an ideal laboratory. The law of specific performance, with all its spectacular growth, is venturing ahead into unexplored regions taking one on an exciting voyage. Judgments, as they come by, only confirm that the relief of specific performance has spanned to unknown arenas, ushering us into an era of new vistas. To put it more aesthetically, the soft swift spreading wings have taken law to uncharted destinations.

Efficacy of Legal Control in Abortion of Minor Girls.

By

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According to a recent and memorable judgment of the High Court of Madras, abortion cannot be enforced on a minor girl; especially when the girl herself is not willing for such a course. The Child Marriage Restraint Act as it stands amended; fixes the marriageable age of a girl at 18 years and that of

a boy at 21 years. But a careful reading of the Act would indicate that any marriage which is performed in violation of the above rule does not render the marriage as invalid.

A strict interpretation of the above rule in the said Act may give the suggestion that a boy who marries a girl in contravention of the age rule postulated by the Act can be made punishable. But in practice; this may not be the ordinary course adopted by the people in society for a breach of the age rule fixed in the said Act.

It need not be emphasised that the said case of the Madras High Court is a rare that has come to the notice of that Court and hundreds of such cases go unnoticed or get unreported by the court. Afterall, law is laid down by a court only when the need arises in the decision to be taken by the court; when a case is presented to that court.

It therefore, seems that a more stringent probation is necessary for the application of the age rule contained in the said Act in the matter of performance of marriages; where the minority of the girl is of importance. The interest of a minor have got to be protected only because that minor has not attained the age of discretion-the sense of differentiating good from the bad; the just from unjust and the right from the wrong.

To achieve this end; the Legislature must take remediable steps after getting the considered opinion of the Society in their matter.

A Note on (1993)2 M.L.J. 368.

By

S.Ramakrishnan, B.Sc., B.L., Advocate, Srivaikuntam.

His Lordship Abdul Hadi, J. has held that the pendency of tenancy matter before the Tahsildar is no ground for stay of suit under Sec.10, Code of Civil Procedure. The reasoning of the learned Judge is that the petition before the Tahsildar is subsequent to the filing of the suit. The learned Judge has also held that Sec.151, cannot be invoked. His Lordship relied upon *A.I.R. 1976 S.C. 1209*, *A.I.R. 1962 S.C. 527* and *A.I.R. 1964 S.C. 993*. These Supreme Court decisions do not directly in point with the case dealt by the learned Judge. What these decisions say is that inherent power cannot be invoked when there is express provision or when the exercise of it is in conflict with the section. But, it is to be seen that whether invoking the provision of Sec.151, C.P.C., in the present case is expressly provided or it is in conflict with the express provision prohibiting the invoking of Sec.151, C.P.C. in the Code of Civil Procedure. Sec.10 does not say that an earlier suit cannot be stayed. It does not say that only a subsequent suit should be stayed. Moreover, the section does not contemplate a situation like this where the subsequent decision is final and it is to be followed by the Civil Court. Sec.16-A of the Record of Tenancy Act gives finality to the decision of the Tahsildar or if there is any appeal or revision to the decision of the appellate authority or revisional authority. So the decision has to be followed by the civil court. In other words, the civil court has to wait for the decision of the Tahsildar. There is a direct ruling rendered by a Division Bench of our High Court, on this point. This Division Bench ruling is not in conflict with the Supreme Court Rulings. Moreover, the Division Bench has stated that when ends of justice requires Sec.151 has to be invoked. So in this case the ends of justice requires the stay of suit till disposal of the matter by the Tahsildar. If the suit is disposed of earlier and the Tahsildar holds it differently the parties will be put to great hardship.

*A critical note on Thangavelu v. Marappa Gounder,
reported in 1991 T.N.L.J. 96.*

By

K.Chandra Mouli, M.A., B.L., Senior Advocate, Madras.

The question that arose for consideration was whether 2 documents Exs.B-1 and B-2 were inadmissible in evidence for want of stamp duty and registration. In the Rent Control proceedings, the tenant sought to file the said 2 documents. Objection was taken by the landlord regarding the admissibility of the documents on the ground of its not being duly stamped and registered. The Rent Controller upheld the objection of the landlord and directed the tenant to pay stamp duty and penalty on these documents amounting to Rs.11,010. The order of the lower court was sustained in revision by Mr.Justice Venkataswamy.

The only point that was canvassed before the learned Judge was, whether the 2 documents having been already received in evidence, can be called in question at subsequent stage of the proceedings on the ground of not being duly stamped, in view of the bar in Sec.36 of the Stamp Act. On facts, the learned Judge found that the 2 documents have not been admitted in evidence within the meaning of Sec.36 of the Stamp Act. Consequently, Sec.33 of the Act was attracted with the concomitant result viz. impounding of the documents and payment of stamp duty and penalty.

It is unfortunate that no other point was argued. Had the attention of the learned Judge been drawn to the judgment of Rajamannar, C.J. in *Devasigamani Gowndar v. Andanathu Gowndar*, (1955)1 M.L.J. 457, the decision might have been otherwise. A similar question arose in that case, viz. whether the agreement of partition is admissible in evidence, in the absence of proper stamp and registration. The lower court, without deciding the question about the necessity of registration, held that the document has to be properly stamped and penalty paid and called upon the plaintiff to furnish particulars. In revision, the learned Chief Justice set aside the order of the lower court and held that if an objection is taken that a document is not stamped and registered, the court must decide both the questions. The court cannot first direct the document to be stamped and then decide whether it requires registration. For, if the court finds that the document comes within any of the categories enumerated in Sec.17 of the Registration Act, it requires registration and is therefore, inadmissible on account of non-registration under Sec.49 of the Act and is liable to be rejected.

In the present case, the nature of the documents is not clear from the Short Notes of the judgment, but as objection is taken as to registration, probably Exs.B-1 and B-2 are deeds coming within the purview of Sec.17 of the Registration Act. If the 2 documents come within the mischief of Secs.17 and 49 of the Registration Act, the documents have to be rejected and the payment of stamp duty and penalty may not arise. If however, the two documents do not come within the ambit of Sec.17 of the Registration Act and therefore the bar under Sec.49 is not attracted, then only the court can impound the documents under Sec.33 of the Stamp Act and call upon the party to pay stamp duty and penalty.

**Denial of Title of the Landlord by the Tenant
Under The Tamil Nadu Rent Control Act.**

By

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Several phenomenal changes have been brought in the general law by statutes. One such phenomenon is giving a statutory protection to tenants and also obliterating the twin principles of estoppel and forfeiture.

Sec.10(1) changes the basic structure of the relationship of landlord and tenant, as it protects the tenant, whose relationship is snapped as soon as he denies the title of the landlord. The tenant becomes a statutory tenant under the enactment. The section further postulates that the Controller shall go into the question of *bona fides* of the denial by the tenant, which are alien under the General law. Furthermore, the proviso to that section gives a right to the landlord to move the civil court for declaration of his title in case the Controller finds that the denial by the tenant is *bona fide* and further more fetters the civil court limiting its right to give a decree for possession on any one of the grounds postulated under the Act. This inarticulate proviso has led to the strange phenomenon unknown to the general law and also made the litigation circumambulatory.

In an earliest case, a situation arose in which the landlord obtained a decree for possession on the denial of title by the tenant and when the landlord tried to get possession in pursuance of the decree, the Rent Control Act came into force and the tenant claimed protection of the Act. The case came before the Division Bench consisting of two eminent Judges P.V.Rajamannar, C.J. and T.L.Venkatrama Iyer, J. (who later adorned the Supreme Court with lustre) in *D.V.Sanjeevi Naidu v. Chittibabu Mudaliar, (1953) 1 M.L.J. 260*. It was contended before them that because of the disclaimer as a tenant, he could not after failure in the suit, be permitted to fall back upon his original position. According to the counsel a person who denied that he was a tenant, could not after such denial, be treated as a tenant within the meaning of the Act. The learned judges held that he could be a tenant holding over and the definition of tenant in the Rent Control Act expressly includes a person continuing in possession after the termination of the tenancy in his favour and that he is entitled to the protection of the Act. The learned judges further said "though the proviso in terms will not have any application to the facts of this case, the principle of the proviso supports the view which we have already taken as regards Chittibabu as a tenant under the Act. The effect of the proviso is that even if a civil court finds that the claim of the tenant is not well founded, the tenant can be evicted on one of grounds under Sec.7. In other words, even when the tenant has denied the title of the landlord and his denial has been found to be without foundation, he will be entitled to the benefits of Sec.7(2)".

In this context it is necessary for us to know the nature and character of the enquiry by the Rent Controller Regarding the *bona fides* of the fact of denial of title by the tenant. The Rent Controller has to decide whether there exists a doubt in the mind of the tenant regarding the title of the landlord and also he has to find out whether the landlord has a right to collect the rent to satisfy the definition of the landlord as contained in the Rent Control Act. In case the landlord does not get a proper remedy, he has to seek his remedy before the civil court for a declaration of his title and for possession and in that case also the civil court's right to grant the relief of possession is discretionary and fettered by the provisos of the Act. As I understand the language of the section is such, that the civil court may even direct the landlord to seek his remedies before the Rent Controller.

Another aspect that strikes our mind is whether the finding by the Rent Controller regarding the *bona fides* of denial of title is *res judicata* in civil proceedings as the question of title of the landlord and the *bona fides* of the denial by the tenant is so interwoven that one cannot be dissociated from the other and the Rent Controller has no other option but to give a finding regarding the title of the landlord and then only he can go into the question of the *bona fides* of the denial by the tenant.

On the above aspect I would bring to the notice of the readers the case in *L.I.C. of India v. India Automobiles Co.*, (1990)4 S.C.C. 286: (1990)2 L.W. 569, wherein Justice Ranganathan has opined as follows: "All that the Rent Controller has to do is to satisfy himself that the person seeking eviction or fair rent is a landlord who has *prima facie* the right to receive the rents of the property in question. That the jurisdiction of the Rent Controller is limited is clear from the proviso to Sec.10(1) of the Act". Further down in para.1, the learned judge held "A question of title may be a complex one involving difficult issues. For instance the "owner" may claim title under an adoption or a will or a trust deed or a gift and there may be contentious claims among several persons which it will not be possible for the Rent Controller to decide. It is important to remember that when an owner filed a suit for arrears of rent it is open to the tenant, under the general law, to plead that no rent is payable in respect of the premises, as indeed, it belongs to him. The right to raise the issue cannot be taken away without a specific statutory provision. The terms of Sec.11, C.P.C. including *Explanation VIII* are not comprehensive enough to cover the case".

This section drives us to face another dilemma in that whether the landlord has to proceed under this section before going to the civil court. Whether the decision of the Rent Controller regarding the *bona fides* of the denial of title by the tenant is a *sine qua non* for the landlord to proceed before the civil court to seek redress.

I would refer to the decision of the Madras High Court reported in 1978 T.L.N.J. 272 on the same question wherein Justice Ramaswami held as follows: "But the question for consideration is in a case where the denial of title is found to be *bona fide* or not, but the court comes to the conclusion that the plaintiff is the landlord and there is a relationship of landlord and tenant between the plaintiff and the defendant, whether it could order eviction and give an executable decree for eviction. The clue to be found in the second proviso to Sec.110(1). In a case where the suit is filed subsequent to the decision of the Rent Controller that the denial of title was *bona fide*, the court could order eviction by giving a declaration that there is a relationship of landlord and tenant between the plaintiff and the defendant and there is also a ground of eviction under Sec.10(2). Therefore, even if the denial of title is *bona fide*, but there is a relationship of landlord and tenant between the plaintiff and the defendant, if the defendant had wilfully defaulted in the payment of rent or has committed such act of waste or on the existence of such conditions mentioned in Sec.10(2) the court would grant a decree for eviction and such a decree will be outside the provisions of Sec.10(1) and would be executable. If that were the case, I do not find any distinction if the suit was filed originally by the landlord without invoking the jurisdiction of the Rent Controller for getting a declaration that the denial of title was *bona fide*. Since it is the option of the landlord either to invoke the jurisdiction of the Rent Controller firstly or directly come to the court where there is a denial of title to establish the relationship of landlord and tenant even in a case where he directly files the suit without invoking the jurisdiction of the Rent Controller alleging denial of title he will be entitled to an order of eviction if the grounds mentioned in Sec.10(2) are available to him. Thus, the learned Judge held that the suit is maintainable and the decree of eviction is valid. This dictum has been well accepted by the Division Bench consisting of Venkataswamy and K.M.Natarajan, JJ. reported in 1990 T.N.L.J. 38.

Just after two months of the Division Bench case, came the decision of the Supreme Court in *East India Corporation v. Minakshi Mills Ltd.*, (1991)3 S.C.C. 230. There a piquant situation arose in which the landlord filed a suit on the denial of title by the tenant as non-residential premises whose rent was more than Rs.400 was exempt from the provisions of the Act. The landlord succeeded throughout and at the execution stage the exemption was struck down by the Supreme Court. The tenant contended that the landlord has to go to the Rent Controller to get a finding as to the *bona fides* of the denial and then come to civil court and hence the decree is *null and void* and became inexecutable. This was accepted to by the Supreme Court wherein Thomman, J., has held in Paras. 9 and 10 “the decision of the controller is solely with the *bona fides* and not the correctness or validity of the denial or claim, for these difficult questions of title are by the statute reserved for decision by the appropriate civil court which is a more competent forum for such matters”. After elaboration of this matter the learned judge concluded by stating in para 10 “the decision of the Rent Controller duly recorded by him as regards *bona fide* denial or claim by the tenant is a condition precedent to the invocation of power of the civil court. Any suit instituted by the landlord for eviction of tenant from a building dealing within the ambit of the act otherwise than as stipulated in the section is therefore incompetent for the lack of jurisdiction and any decree in such a suit is *null and void*”. This has been implicitly followed by Hadi, J., in *Nallathambi and others*, (1992)1 M.L.J. 289 and also by Bellie, J., in another case, in *Natesan Pillai v. Sethuman Ammal*, (1992)1 M.L.J. 9.

The gamut of judicial pronouncements referred to above has not changed the old order but by a fallacious reasoning has set the clock backwards and has dislodged the vested right of landlord without looking into the fact that the amendment is not retrospective in effect, Thomman, J., has gone to the extent of saying that the decree is *null and void* and have made the amendment retroactive. Such juristic approach makes the landlord whirl round and round and has made the landlord to oscillate between the Rent Controller and the civil court.

At this juncture I want to submit that an important matter cannot be overlooked is that the finding regarding the title of landlord and *bona fides* of the denial by the tenant, are so intertwined that one cannot be dissociated from the other and the Rent Controller has no other option but to find out *prima facie* title of landlord inspite of judicial dictum.

Therefore, I submit that the proviso to Sec.10(1) has to be deleted or amended so that civil courts can deal with the matters unfettered any of the provisions of the Rent Control Act and finality is given. Or else the landlord will be at his wit's end and in a state of uncertainty, so that as T.S.Eliot has put it “the end will be the beginning”.

**Critical note on
Benami Transactions (Prohibition) Act 45 of 1989.**

By

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The above Act received the assent of the President on 5.12.1988 and was published in the Gazette of India on 6.12.1988, Part II, S-1 Ext.P-1. Save Sections 3, 5 and 8 which came into force at once, the rest shall be deemed to have come into force on 19.5.1988, the date of the Ordinance. The Act followed an Ordinance on 19.5.1988. It is indeed a drastic piece of legislation making a 'benami' transaction an offence, punishable with imprisonment extending to three years or with fine or with both and is expropriatory in nature, arming the Government, under Sec.5, to acquire without paying compensation all such property which, by its investigating authority, was found to be held benami. It would appear that the Act *inter alia* was conceived only to make such property available to the Government in its socialistic plan to seize such property from the propertied class and distribute it to the 'have-nots'.

Whatever may be said of the necessity for the enactment, it cannot be said that the Government brought in the legislation to enforce morality in the transactions by its subjects. Ethical codes and moral conduct are quite different concepts as distinguished from crimes which are punishable as offences. Our courts are not strictly courts administering justice in the abstract sense, but only such justice as accords with law. Transactions which are unlawful, or offences at one time, may become lawful at another time, such as the Prohibition Law. Weaning society from its evils, which properly come within the purview of the social reformer, by enacting laws prohibiting them has often been found to be only a tardy remedy - as for instance, the Child Marriage Restraint Act, the Prohibition Act, Dowry Prohibition Act, Immoral Traffic Act, etc. - whether by the Parliament or State Legislatures. It is not, therefore, seen why a practice in vogue which in the opinion of the Privy Council in *A.I.R. 1915 P.C. 96: J.L.R. 37 All. 557 (P.C.)*, as early as 1915, was "unobjectionable" and has a curious resemblance to the doctrine of our English Law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our common law that where feoffment is made without consideration the use results to the feoffor". Yet again, the Privy Council has observed, *46 Cal. 566: A.I.R. 1918 P.C. 140 (P.C.)*, that "the system of acquiring and holding property and even carrying on business in the names of other than those of the real owner usually called "benami system" is and has become the common practice in the country. *There is nothing intrinsically wrong in it and it accords within its legitimate scope with the ideas and habits of people*". [*Italics mine*]

The Ordinance and the Act, following six months later, have come up for scrutiny in two recent judgments one by the Kerala High Court reported in *A.I.R. 1989 Ker. 12* and the other by the Supreme Court in *(1989) 2 S.C. 1247: (1989) 1 L.W. 430*, where the decisions were made from the point of view of their retrospective validity. The Kerala judgment has attempted to justify the ordinance and in my humble opinion, in considering the pros and not the cons, it failed to obtain the opposite view, notwithstanding the help sought for from an '*amicus curiae*'. The drastic nature of the enactment is further illustrated in a later decision of the Kerala High Court in *1989 Ker. 256(3)*, holding even application for execution for recovery of the property after reaching finality in the suit and appeal will not lie, interpreting the words '*claims and actions*' to execution petitions also. The earlier Kerala judgment referred to above has discussed the historic origin of the practice of benami transactions in

the despotic attempts of ruling princes after the fall of the Moghul empire, to clutch at properties in the hands of rich land owners who, therefore had to resort to putting their property in the names of others in trust for them from the peril of the despots. Apart from the above exigency of secrecy, it has been observed that the practice has been quite common among Muslims, known as 'furzee', and even among other communities, quite innocuously, with no fraudulent motives, but only to win regard and loyalty from the transferee and who considered it a privilege to be an 'alias'. So prevalent a practice as therefore gained legal validity by specific provisions to safeguard the title of the real owner under Secs.81, 82 and 94 of the Indian Trusts Act, has been unceremoniously repealed by the Act. Indeed, wherever the transaction was resorted to defraud creditors, and evade clean court sale procedure or taxation laws, statutory safeguards have been provided by relevant enactments.

Assuming that a time has come to put an end to the system, as evil and opposed to morals, the Act has failed to provide for equities when avoiding such transactions as unlawful, believed lawful for centuries by the parties thereto. Take two instances only of inequity, namely:

(i) The benamidar who respected the confidence reposed in him and allowed the real owner to be in actual possession of the property and even made admissions to that effect is suddenly emboldened to trespass on the property and dispossess the real owner. Neither the civil nor the criminal court will come to the rescue of the real owner.

(ii) The purchase at the time may be a property of trifling value - only a vacant housing site or waste land. During a course of years, a decade or two, the property has been improved by a superstructure at enormous cost or converted into arable land by improved methods of agriculture, irrigation facility etc. or discovering a mine of coal or other minerals, the benamidar remaining quiet all the time making the real owner believe in the truth of his title and not also having little means of his own to effect the changes envisaged above is now enabled to pounce on the property on his hidden title. Even assuming that the benamidar had provided the money for the purchase at the time, the improvements are not his. There is authority for the position that if a member of a joint family purchases the property in the name of the manager, but the family will not be entitled to share in the property, if it had been improved by the separate income of the purchasing member - *A.I.R. 1927 Mad. 676*, but only compensation for the value of the property at the time of the claim for partition. In fact Sec.51 of the Transfer of Property Act has provided for such a contingency and will the present Act permit the protection of the above section?

Moreover, the Act is quite vague as regards the personnel of the suitor or the defender. In a recent decision of the Orissa High Court - *A.I.R. 1991 Ori. 131*, it is held that the bar of suit will apply only to the real owner or any person on his behalf meaning an agent and the estoppel will not apply to any third party, which may include even a legal representative.

The Act is further quite vague as regards the means by which benami transactions will be unearthed and the rules by which they would be proved to be benami. Instance the Land Ceiling Acts. The real owner is not interested in disclosing the truth when he had already sworn disowning the truth when he had already sworn disowning his ownership at the time of his statement on affidavit submitted before the Land Ceiling Officer, nor the benamidar who will not get a single pie when it is recovered from him under the Act by the Government authority.

In any event, the Act has to be condemned in making it retrospective, if not by specific section but by implication. Both the two judgments referred to above have held categorically that the Act is retrospective. In the Supreme Court case, a transaction held to be valid by three courts and ended in a

decree in the suit of the plaintiff for recovery of the property from the benamidar, has been rendered invalid by the Supreme Court, after 15 years of the suit because the appeal is only a continuation of the suit, and Sec.4 says that, 'no suit..... shall lie.

In my opinion the retrospective interpretation can be availed by use of the words 'shall be instituted' instead of the words 'shall lie' in Sec.4(1).

The Act require drastic amendments having regard to the defects pointed out above. It is no doubts true Parliament has plenary powers to pass any law and courts of law have to abide by it. It cannot interpret its provisions by resort to objects and reasons for its promulgation or to any extraneous body like the Law Commission when the section is quite clear. Both the Kerala High Court and the Supreme Court have clearly found that the Act is retrospective in nature by implication and the reasoning therefor requires reconsideration. There their Lordships were called upon only to interpret the section and were not allowed to challenge the validity regarding its retrospective effect or the 'vires' of the Act itself.

Granted, therefore, that the Parliament of India or the legislature of a State has power to enact a law so as to have retrospective effect by express words or by necessary implication, courts are entitled, in certain cases, to strike down the provisions for retrospective effect. A provision taking away vested rights or imposing a new penalty or a new liability will not be construed retrospectively. A right to recover property by suit unlawfully held by a benamidar (the unlawfulness being only by the new law) is a vested right. The provisions in the new Act making the transfer an offence and punishable by imprisonment is a new liability. Authorities on the point in our coun try and English and American courts are numerous. The provisions giving retrospective effect requires to be struck down. The principle of '*stare decisis*' governing erroneous judgments continuously holding away over a long stretch of years must also govern practices regarding benami transactions as lawful and laid to rest and not disturbed raising dust as though by a hurricane.

I must conclude this critical article about the Act which poses two propositions:

- (i) The transaction being a criminal offence punishable with imprisonment the real owner may be prosecuted for effecting the benami transaction however remote in time it might have been.
- (ii) The transaction being an offence, cannot confer valid title to the benamidar. If so, where does the title vest?

The Year that was 1993

By

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Introduction: 'To Votaries of Law and History the event of each year are meaningful. To the common man each year follows another in much the same way. Art Buchwald humorist that he is would describe the process thus:

'Who is next? What is your name?
Nineteen ninety three
Reason for leaving the job?
I was replaced by a *New Year*'

In the light of the happenings and trends during the year we are prone to look upon each expiring year as good or bad, bountiful or calamitous, one to remember or one to abhor.

In India it was the year of calamitous. There were bomb blasts in number of places resulting in heavy damages to property and human life, there was a severe earthquake which resulted in the destruction of many villages, there were severe cyclone and floods. It can also be said that it is the year of political instability. But it can be claimed to be the year of productivity. So far as other countries are concerned they are in no better position. Be that it may be the total situation both at home and abroad as revealed by the occurrences during the year is not one to bring cheer to the average man.

National: It is not possible to list out all the events that happened in the year 1993. An attempt is made to give only some of the notable events omitting others.

Let us start with the auspicious events of presentation of *Awards*.

Awards: The prestigious Dr.C.V.Raman Award for the year 1993 was presented to Dr.S.Chandrasekar of the Indian Institute of Science, Bangalore. Dr.B.C.Roy National Awards were presented to eminent medical persons by the President Dr.Shankar Dayal Sharma.

"Bhagavad Geetha" in Sanskrit was adjudged the best feature film for 1992. Mithun Chakrabarty and Dimple Kapadia received the best Actor and Actress Award at the 40th National Film Festival.

The noted Producer-Director of Assam Bhopen Hassarika was awarded the Dadasaheb Phalke Award of 1992. The Ramon Magasaysay Award was given to Dr.Banoo Coyaji, Director of the King Memorial Hospital in Poona for public service. "Jamanlal Bajaj" Awards were presented to Mr.Vichitra Narayana Sarma, Mr.Dinakar Rao G.Pawar, Ms.Chandrakantha Bahen Shah, Mr.Harvilesh Shah and Johan Galtung.

Political: Mr.Kenneth Clark the British Home Secretary arrived in Delhi to review the issue of terrorism

in Kashmir and Punjab and the problems regarding immigration faced by the Asians. The Prime Minister Mr.P.V.Narasimha Rao called off his visit to Dhaka for the SAARC summit. India decided to reduce the strength of the Pakistan High Commission in New Delhi as Islamabad struck to its decision to prune the Indian consulate in Karachi to less than one-third. Mr.Sunil Dutt, Congress-I M.P. from Bombay North West constituency resigned as self-imposed punishment because the deteriorating law and order situation in the metropolis. The charred body of Sathasivam Krishnakumar *alias* 'Kittu' a top L.T.T.E., leader was recovered from the Vessel M.V.Ahat.

The Tamil Nadu Secretary of the Hindu Munnani M.Muniasamy was attacked by some unknown persons and he died subsequently. The British Prime Minister Mr.John Major held talks with the Prime Minister Mr.P.V.Narasimha Rao in New Delhi on economic co-operation. The Russian President Boris Yeltsin paid his first visit to India on 28th January, 1993. There was an agreement between India and Russia regarding the scheme for setting the rupee-rouble exchange rate for computing the quantum of past debt owed to Moscow. Russia announced full support to India on Kashmir and also ruled out any military or technical help to Pakistan.

The Spanish President Mr.Felipe Gonzatez was in India on a four day visit. The Sri Lankan Foreign Secretary Mr.Bernard Tilakaratne visited India for bilateral discussions. The Chancellor of West Germany Dr.Helmut Kohi was in New Delhi on a five day visit.

Maharashtra Chief Minister Mr.Sudhakar Rao Naik resigned. The Governor Mr.C.Subramaniam also resigned. Mr.P.C.Alexander was made the new Governor. Lok Sabha extended the President's Rule in Jammu and Kashmir for another six months. The Chief of Bhindranwala Tigers Force and Founders of the Banned Panthic Committee, Babu Gurbachan Singh Manochahal killed in an encounter in Amritsar district. The Defence Minister Mr.Sharad Pawar returned to Maharashtra as Chief Minister. The Tamil Nadu Chief Minister Miss Jayalalitha announced her withdrawal of support to Congress-I in Parliament.

Gen.K.V.Krishna Rao, former Chief of the Army Staff was appointed as the Governor of Jammu and Kashmir. Mr.Sanjay Dutt, son of Film Star Sunil Dutt, Congress-I M.P., was arrested under TADA on charges of possessing illicit arms. Mr.P.V.Narasimha Rao was named by the Stock Broker Harshad as the direct recipient of Rs.1 crores in cash from him. The Bombay Stock Exchange Broker Mr.Harshad Mehta placed before the Joint Parliamentary Committee (J.P.C.) the statement which contained that the Prime Minister's Office instructed the Finance Minister on his behalf to help him out the problem of stock exchange. Mr.A.S.Syali was appointed New Research and Analysis Wing in the place of Mr.J.S.Bedi. The Doordharshan introduced 5 new Sattelite Channels. New Governors were appointed in the States West Bengal, Bihar and Tirupura. Film Actress Vaijayathimala Bali was nominated for the Rajya Sabha. Mr.Pranab Mukherjee was reappointed Union Commerce Minister. The Reserve Bank of India announced change in lending rates of the Co-operative Banks. India and South Korea signed agreement for co-operation on tourism, culture, science and technology.

Prime Minister Mr.P.V.Narasimha Rao, visited China and had talks with Chinese Prime Minister Mr.Li Peng. India-China signed agreement on Maintenance of Peace and Tranquility along the line of Actual Control (LAC) at Beijing. Mr.P.V.Narasimha Rao made a three day visit to China. The Iris Prime Minister visited India and met the President and the Prime Minister. Ajit Singh and Chandra Shekhar group merged with the Janata Dal at a formal function at Ghaziabad. Union Government converted Election Commission into a multi-member body appointing two Election Commissioners Mr.G.S.Gill and G.V.G.Krishnamurthy besides the Chief Election Commissioner Mr.T.N.Seshan. Russia supported the Simla accord between India and Pakistan.

Miscellaneous: The ordinance providing for the setting up of a National Human Rights Commission to inquire into complaints of violence of human rights against public servants promulgated. More than 10,000 feared killed in an earth-quake in Kihari and Umerga towns in the Marathwada region of Maharashtra. Tremors rocked four other States. Eight killed and around 100 injured in tremors that rocked Karnataka. Centre formed crisis management group to tackle the situation. Relief operations streamlined in 73 quake-hit villages in Maharashtra. Prime Minister Mr.P.V.Narasimha Rao, made a whirlwind tour of the earth quake-hit areas of Maharashtra announced Rs.50 crores assistance to the State Government. Maharashtra Government put the toll in the earthquake as 9,454 dead, 12,500 injured. Special nine Judge Bench of the Supreme Court given primacy to the Chief Justice of India over the executive in the appointment of Judges to the Apex Court. Two newly appointed Election Commissioners Mr.M.S.Gill and Mr.G.V.G.Krishnamurthy, walked out of Election Commission headquarters to protest against the treatment meted out to them by the Chief Election Commissioner, Mr.T.N.Seshan.

Congress (I) President and Prime Minister Mr.P.V.Narasimha Rao negotiated for a concessional assistance of 3 millions from the World Bank for rehabilitation of quake victims. Mr.P.V.Narasimha Rao discussed economic issues and other related areas with the visiting Swedish King Karl Gustaf. Central Bureau of Investigation (CBI) saw no case against the Prime Minister Mr.P.V.Narasimha Rao in the Rs.1 crore bribery allegation levelled by the stock broker Mr.Harshad Mehta. India expelled four Pakistan diplomats stationed in New Delhi and Bombay for indulging in espionage activities. Vice President Mr.K.R.Narayanan underwent coronary artery bypass at Apollo Hospital in Madras. Union Finance Minister Mr.Manmohan Singh lead Indian delegation to the Commonwealth meet at Limassol. Dutch Prime Minister Mr.R.F.M.Lubbers in New Delhi has an hour long meeting with the Prime Minister Mr.P.V.Narasimha Rao on closer economic co-operation between the two countries. Mr.Jaspal Singh appointed Joint Director of C.B.I. High level official of the Clinton administration questioned Kashmir's status as part of India. Delhi conveyed its protest to the U.S. on its remarks on status of Kashmir.

Bombay C.B.I. named Dawood Ibrahim, Tiger Memon, Sanjay Dutt among 189 chargesheeted in March's serial blasts. In Madras D.M.K. expelled V.Gopalsami, M.P. for anti-party activities. Supreme Court upheld supremacy of CEC Mr.G.V.G.Krishnamurthy and Dr.M.S.Gill appointed Election Commissioners. The 32 day-old Hazratbal crisis ended with 62 including armed militants surrendering unconditionally. The Home Minister Mr.S.B.Chavan visited Hazratbal Shrine. Congress got two-thirds majority in H.P., Rajasthan got hung Assembly, B.J.P. largest party B.J.P. got two-thirds majority in Delhi.

Congress (I) get absolute majority in M.P. P.M. sacked Union Minister of State for Science and Technology Mr.P.R.Kumaramangalam for criticising Congress (I)'s poll performance. The President Dr.S.D.Sharma inaugurated Mahamastakhabhisheka of Lord Bahubali. Series of blasts in five prestigious trains killing on mark anniversary of Ayodhya demolition. The Prime Minister Mr.P.V.Narasimha Rao participated in the celebrations of Mahamastakhabhisheka at Shravanabelagola. JPC tabled report in Parliament, indicated the Health Minister Mr.B.Shankaranand, former Minister Mr.S.P.Malaviya.

The birth centenary of Sri Chandrasekara Saraswathi Senior Pontiff of Kanchi Mutt was celebrated at Kancheepuram on the occasion of the Paramacharyal entering his birth centenary year of the 8th May, 1993. Sri Satya Sai Baba of Puttaparthi survived an apparant attack on his life, when four persons said to be his disciples and whipped out daggers and clubs entering his private chambers. Two inmates were killed and two others were injured. On 27th May the devotees of Sri Chandrasekara Saraswathi performed Kanakabishekam to Paramacharyal-Mahasnam to mark his 100th Jayanthi. There were a

series of atleast 10 powerful bomb explosion in Bombay which claimed about 200 lives and injured 1,000 persons. About 40 per cent of the giant pandal erected in Peelamedu in Coimbatore in connection with the 7th State Conference of the D.M.K. Party was destroyed in fire.

Judiciary: The motion to impeach Mr. Justice V. Ramaswami of the Supreme Court for alleged finance irregularities during his tenure as Chief Justice of the Punjab and Haryana High Court was taken up for consideration of Lok Sabha and the Supreme Court Judge survived the impeachment since the Congress-I also joined from voting and the opposition motion was put to vote.

The Karnataka High Court Judge Mr. Justice Kudarikoti Annadanayya Swamy was appointed as Chief Justice of Madras High Court.

International: Some notable international events are mentioned below. Czechoslovakia was replaced by independent Czech and Slovak Republics. The Presidents of Russia and the U.S. Mr. Boris Yeltsin and Mr. George Bush signed in Moscow the II treaty that called for the elimination of about two-thirds of their strategic weapons by the year 2003. U.S. and allies launched air strike against Iraq. About 100 aircraft hit surface to surface missiles just north of the 32nd parallel in Iraq. Bangladesh Parliament strongly condemned the demolition of Babri Masjid in Ayodhya and the subsequent communal disturbances in India. The Bangladesh Parliament passed a resolution urging India to reconstruct the Babri Masjid. The former U.S. Secretary of State Mr. George Shultz accused the former Republican Presidents Mr. George Bush and Mr. Ronald Reagan of misrepresenting their role and knowledge in the arms for hostages deal with Iran.

A joint Russian "space mirror" flashed a shaft of reflected sunlight across Europe as part of an experiment to turn night into day. The French President Mr. Francois Mitterrand and the German Chancellor Mr. Helmut Kohl were jointly nominated for the 1993 Nobel peace prize. The British Foreign office rejected an Iranian leader's demand to hand over author, Mr. Salman Rushdie to face a death sentence in Iran over the book "Satanic Verses". A giant explosion, set off by terrorist in the underground parking lot of the twin towers of the World Trade Centre, New York's tallest building, killed seven persons and injured more than 600.

Israel sealed off the 7,50,000 Arabs of the occupied Gaza strip after a Gazan ran Amok in Tel Aviv, stabbing to death two Israeli and wounding eight. The British Prime Minister Mr. John Major was defeated in a Parliamentary vote over the Maastricht treaty on European union. President Suharto of Indonesia re-elected for the sixth-five year term. North Korea quit the nuclear non-proliferation Treaty (NPT). The Azerbaijan lost its western Kelbadzhar region to Armenia, a significant turn in the five year war between the two former Soviet Republics. The seventh SAARC Summit opened in Dhaka, Bangladesh. Black South African Community Party leader Mr. Chris Hani shot dead. In the SAARC Summit at Dhaka it was decided that India will host the next summit in 1994. All the charges against the former East German Communist leader Mr. Erich Honecker living in Chile was dropped. The former U.S. President Mr. George Bush received Kuwait's highest civilian medal for his leadership in the Gulf war. In Pakistan the Government headed by Prime Minister Nawaz Sharif was dismissed by the President Ghulam Ishaq Khan and the National Assembly was dissolved. A new Government headed by Mr. Balakh Sher Mazari as Prime Minister was sworn in. In Sri Lanka the Democratic United National Front (DUNF) leader Mr. Lalith Athulath Mudali was assassinated by a group of unidentified gunmen as he was addressing an election meeting in Kirilopone. A U.S. jury convicted a teenager of murder. The Howard county circuit court jury also convicted Bernard Miller of kidnapping Mrs. Pamela Basu's 22 month old daughter. Sri Lanka President, Mr. Ranasinghe Premadasa was assassinated by a suspected suicide bomber as he was leading the ruling United National Party's (UNP) May Day rally in Central

Colombo. Mr.D.B.Wijetunga was unanimously nominated by Sri Lanka's ruling United National Party as its candidate for new President. He was sworn as new President. Subsequently he was unanimously elected as the President. Bangladesh agreed to take back an estimated 60,000 Chakma refugees who fled to India from the troubled south eastern part of the country over a decade. In Sri Lanka United National Party (UNP) retained its hold on four of the seven Provincial councils. It emerged as the single largest party in two provinces. India's Prime Minister Mr.P.V.Narasimha Rao in Uzbekistan announced that India has agreed to provide a \$ 10 million soft term credit to Uzbekistan for purchase of Indian Equipment. Mr.Nawaz Sharif was restored by the Paksitan Supreme Court. Russian President Mr.Boris Yeltsin declared a virtual emergency and announced the holding of a nation wide vote of confidence in the President and on the principles of the new Constitution. The Russian President Mr.Boris Yeltsin survived impeachment bid. U.S. offered \$ 1.6 billion in short term aid to Russia. The U.S. President Mr.Bill Clinton and his Russian counter part Mr.Boris Yeltsin held their final round of summit talks at Vancouver.

Azerbnizan lost its Western Kelbadzhar as Prime Minister and his Government and the National Assembly was revived. He obtained a vote of confidence.

South Africa's appeal court set aside a six year jail term for Ms.Winnie Mandela estranged wife of the ANC leader Mr.Nelson Mandela on kidnapping and assault charges. More than 250 refugees were massacred at an abandoned rubber plantation near the Liberian Capital Monrovia, apparently by rebel forces. The former Bangladesh President Gen Hussain Mohammad Ershad was sentenced to seven years in jail for corruption and abuse of power. Crown Prince Naruhito, heir to the Chrysanthemum Throne married 29 year old Ms.Masako Owada in a day long ceremony in the Imperial Palace. United Nations and American forces striked the forces of Somalian Warlord Mohammed Farrah Aidid retaliating for the recent ambush that killed Pakistani troops and crippled relief efforts. The Supreme Court U.S. upheld a State Law that allowed harsher punishments for crimes motivated by racial, religious and such like bias. When Tansu Ciller is sworn the first Women Prime Minister of Turkey, history was made. A U.S. cruise missile struck on the Iraqi Intelligence headquarters in Baghdad killed six persons. Many western countries supported the U.S. President Mr.Bill Clinton's punitive action against Iraq. The non-alligned group of nations expressed themselves against terrorism of all types but also called for restraint by all notions.

Atleast all people drowned after a floating Pagoda packed with people sank during a religious ceremony in Bocaue, Philippines. The U.S. President Mr.Bill Clinton and Mr.Boris Yeltsin agreed to form a partnership and pledged more efforts to strengthen their ties. Seventy-five persons killed and more than 150 reported missing in Tokyo after an earthquake setting off tidal waves devastated Japan's Hokkaido prefecture leaving the whole island aflame. The Pakistan President Mr.Ishaq Khan and Prime Minister Mr.Nawaz Sharif resigned. The National Assembly dissolved and elections to be held.

NATO Ambassadors meeting in Brussels bowed to U.S. pressure and authorised air strikes to lift the siege of Sarajevo and other MY.U.N. designated areas in Bosina. A Palestinian leadership crisis ended with Mr.Yasser Arafat conceding too decision making positions in the PLO to peace to negotiators from the occupied West Bank Gaza strip. Bombs exploded at eight places in the Bangladesh capital as opposition parties plan rallies. U.S. Officials said there was "conclusive evidence" that China has shipped M-11 missile related technology to Pakistan. Isreal and PLO reached historic agreement to recognise each other after nearly three decades of hostility. The PLO Chairman, Mr.Yasser Arafat signed historic letter at Tunis addressed to Isareli Prime Minister recognising the existence of the State of Isreal and its right to live in peace and harmony.

The Russian President Mr. Boris Yeltsin in a televised interview promised not to use force against deputies of dissolved legislature barricaded in Parliament. LTTE cadres withdrew from Kilari and let Sri Lankan forces occupy the area. Sri Lankan security forces destroyed main boatyard of LTTE north of Kilali. China conducted nuclear test, first in a year. Pakistani People's Party emerged as the single largest party in the elections to Parliament. A powerful earthquake rocked Pacific territory of Papua New Guinea damaged buildings and leaving 10 persons missing. Mr. Nelson Mandela and South African President Mr. F. W. de Klerk were conferred the Nobel Peace Prize. Pope John Paul II completed 15 years in office. Ms. Benazir Bhutto back in saddle as Prime Minister of Pakistan. Canada's Liberal Party led by Mr. Jean Chretien won a landslide victory to the House of Commons.

Sports: South Africa won the test series against India. Tamil Nadu (men), Railways (women) won National Basket Ball titles. Jim Courier retained Australian Open crown. India beat England in the first test at Calcutta. India again beat England in the Test Cricket at Madras and also at Bombay. Alan Border crossed Sunil Gavaskar's land mark and became the highest test rungetter. England and India shared one day cricket series. India beat Zimbabwe in the cricket test at Delhi. India upset Switzerland in world group Davis Cup at Calcutta. Pravin Thipsay retained National Chess title. Steffi Graf regained French open title. Lindsay Hassett, former Australian Cricket captain passed away. Steffi Graf won 3rd straight Wimbledon crown. Australia retained ashes beating England in the fourth test at Leeds for 3-0 lead. India beat Sri Lanka in test cricket at Sri Lanka. Viswanathan Anand qualified for candidates round in world chess championship at Biel. Sri Lanka won one day series against India at Colombo. Steffi Graf won 3rd Grand Slam title of the year at the U.S. open. Australia thrashed India 5-0 in Davis Cup semifinal at Chandigarh. Geet Sethi won world professional billiards title at Bombay. Srikanth retired from test cricket. India beat West Indies and won Hero Cup one day cricket tournament at Calcutta. Ramesh Krishnan's Davis Cup career ended since he withdrew from team in protest. Nirupama Vaidyanathan retained women's tennis crown at New Delhi.

Notable deaths: Mr. Justice S. Swamikkannu (65) passed away. Sitting Judge of the High Court of Madras S. Govindaswami (58) passed away. Chellapandiyan, Former Speaker of the Madras Legislative Assembly passed away. Sunderlal Nahata (73) film producer and former Sheriff, President of the South Indian Film Chamber of Commerce passed away. Yashpal Kapoor (64) Congressman and Rajya Sabha member and a closely associated with Jawaharlal Nehru passed away. Anbil Dharmalingam (73) former D.M.K. Minister, founder-leader of the D.M.K. party passed away.

Srirangam Gopalaratnam notable vocalist passed away. Mrs. Lalitha Shastri, widow of the former Prime Minister Lal Bahadur Shastri died of heart attack. Kalyani Kumaramangalam passed away. Noble prize winner author Sir William Golding died in South-West England. A.N. Grover, former Judge of the Supreme Court passed away. Swami Chinmayananda died in Chicago. Kalyanisundari Sitaram Women's activist and educationist died at Bangalore. Swami Uddhavananda, Vice President, Ramakrishna Mission Ashrama, Madras died at Madras. Tamil scholar and spiritual leader Sri Kripanandavariar died while returning to Madras from London. Swami Vishnu Devananda one of the foremost exponents of Raja and Hatha Yoga and founder of International Sivanda Yoga Vedanta Centres in Manipal died. Top Industrialist Mr. J.R.D. Tata died on November, 29 in Geneva.

YE ARE THE SALT OF THE EARTH BUT IF THE SALT
HATH LOST HIS FLAVOUR WHERE WITH SHALL IT BE
SALTED.

(THE GOSPEL ACCORDING TO MATHEW 5-16)

By

S.Gopalaratnam, Senior Advocate, Madras.

Sec.213 of Government of India Act, 1935, provided as follows:

(1) If, at any time, it appears to the Governor-General that a question of law has arisen, or is likely to arise which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may in his discretion refer the question to that court for consideration, and the court may, after such hearing as they think fit, report to the Governor-General thereon.

(2) No report shall be made under this section save in accordance with an opinion delivered in open court with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.

The Act came into force in British India with effect from 1.4.1937.

To our knowledge the Governor-General of India had to make four references to the Federal Court of India during the period 1.4.1937 to 15.8.1947.

It is well known popular Ministries under leaders of the Indian National Congress took office in the major provinces sometime around August, 1937.

The first reference made by the Governor General to the Federal Court in Ref.No.1 of 1938, on the question of Constitutional validity of C.P.Act 14 of 1938, was answered by the Federal Court on 2.12.1938.

In those days even the Governor General had to go around the country only by a Special train pulled by steam locomotive.

The Princes' chamber, in which the Federal Court of India used to hold its sittings, was situated in New Delhi, and the Grand Trunk Express used to take nearly 50 hours or more, to take one from Madras to New Delhi.

Present at the hearing of the Special Reference before the Federal Court were, besides the Advocate General of India, Sir B.L.Mitter and Mr.Puranik the Advocate General of the Central Provinces. The Advocate General of Madras and Bengal, Sir Alladi Krishnasamy Ayyar and Sir A.K.Ray, were given leave to appear and argue in support of the case of the Government of Central Provinces as representing the general of Orissa also took part in the hearing.

It must have taken quite sometime to organise the presence of these eminent counsel of those days, demands on where time both from the Governments of their provinces, as also of the general litigant public of the country, should have been so pressing.

Next, there was reference No.3 of 1943, "In the matter of allocation of lands and buildings in a Chief Commissioner's province, which was answered by the Federal Court on 26.3.1943, after hearing the Advocate General of India, Sir B.L. Mitter, and the Advocate General of Punjab Mr. Saleem (1943 M.L.J. 137).

Yet the Federal Court was able to complete its task within quite a short period and express its answer to the questions referred to it. See: (1939)1 M.L.J. (Supp.) 1: A.I.R. 1939 F.C. 1.

Then, came Special reference 1 of 1941, touching the validity of the provinces of Hindu Women's Rights to Property Act, 1937 and the Federal Court answered the same, on 22.4.1941. See: A.I.R. 1941 F.C. 72. This was in the midst of World War II and counsel had to reach Delhi only by train from Madras and Lucknow.

The Governor General made yet another reference to the Federal Court. This was Special Reference 1 of 1944, on the question of competence of the legislature to levy Estate Duty. This was answered by the Federal Court on 25.8.1944. See: (1944)2 M.L.J. 234: A.I.R. 1944 F.C. 73. It may be noticed that this was during the thick of the second world war and at the height of the quit India movement!

Came the Constitution. 26.1.1950 and Art.143 therein provides:

(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that court for consultation and the court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in the Proviso to Art.131, refer a dispute of the kind mentioned in the (said Proviso) to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

Before noticing the first reference which the President of India made to the Supreme Court, we must note that the Supreme Court delivered its judgment on 19.5.1950, in *A.K. Gopalan's case*, upholding the validity of Act 4 of 1950 which had received the assent of the President only on 25.2.1950 vide: A.I.R. 1950 S.C. 27. Those were days of Dakota flights and New Delhi was still about 10 or so hours away in flight time from Madras.

Subject to correction we notice there have been as many as nine references by the President of India to the Supreme Court under Art.143:

They are:

(a) Special Reference 1 of 1951 *In re. Delhi Laws Act* decided on 23.5.1951 - vide: A.I.R. 1951 S.C. 332.

(b) Special Reference 1 of 1958 *In Kerala Education Act* decided on 22.5.1958 - vide: A.I.R. 1958 S.C. 956.

(c) N.B. The Kerala Legislature passed the bill on 2.9.1957 and the Governor of Kerala reserved the bill under Art.200 for the assent of the President.

(c) Special Reference 1 of 1959 *"The Berubari Enclaves Case"* decided on 14.3.1960 - vide: A.I.R. 1960 S.C. 845.

(d) Special Reference 1 of 1962 reference was made by the President on 19.4.1962 and decided on 10.5.1963. *In re. Sea Customs Act, 1878 - vide: A.I.R. 1963 S.C. 1760.*

(e) Special Reference 1 of 1964. Referred by President on 26.3.1964, *The Uttar Pradesh Assembly Breach of Privilege case* decided on 30.9.1964 - *vide: A.I.R. 1965 S.C. 745.*

(f) Special Reference 1 of 1974 decided on 5.6.1974 - *vide: A.I.R. 1974 S.C. 1682.*

(g) Then we had the famous reference by President Sanjeeva Reddy on the *Special Courts Bill*. Reference No.1 of 1978 made on 1.8.1978 and answered by the Supreme Court on 1.12.1978 - *vide: A.I.R. 1979 S.C. 478.*

(h) Next we had the *Cauvery Reference* No.1 of 1991, made by the President on 27.7.1991 and answered by the court on 22.11.1991. See: (1992)2 L.W. 51, See also, *A.I.R. 1992 S.C. 522.*

(i) On 7.1.1993, President Sharma has made Reference 1 of 1993 on the *Ayodhya Rama Janma Bhoomi case*. see: (1993)1 S.C.C. 642.

In Special Reference 1 of 1944, Sir M.Zafullah Khan, J., observed after noting Sir Edward Coke's characterising of consultation by the King of the Judges as, auricular taking of opinions" says, "It is a jurisdiction the exercise of which on all occasions must be a matter of delicacy and caution. This learned Judge says also, "Nor is it (an advisory opinion) binding upon the Governor-General" and at the end of his opinion, the learned Judge recorded, "For these reasons, I am compelled respectfully to decline to express an opinion on the question raised".

It may be noted that Varadachariar, J. who was a party to the answer in Special Reference 1 of 1941 dated 22.4.1941, has recorded, in his judgment dated 18.12.1944 in *Umayal Achi's case*, 58 of 1943 reported among others, in (1945)2 M.L.J. 108, "On the Governor General's reference this Court after due consideration of the above objections reported that the Act was valid and operative except to regulate succession to agricultural land in the Governor's provides. Having regard to the special character of that proceeding the parties to the present appeal claimed and were allowed liberty to deal with the whole question at length".

It may be noticed that excepting for Mr.T.R.Venkatarama Sastrigal, who did not appear before the Federal Court in Special Reference 1 of 1941, both Sir B.L.Mitter and Sir Alladi Krishnasamy Ayyar of counsel who appeared at the hearing of case No.58 of 1943, had appeared of the hearing of Special Reference 1 of 1941.

Chandrachud, C.J., while dealing with a preliminary objection to the reference itself, taken by, among others, Mr.A.K.Scen, Mr.Franle Antony, Mr.Shiv Shankar, Mr.Bobde and Mr.M.C.Bhandare, says at p.491 col.1 of *A.I.R. 1979 S.C. 478*:

"The bill may undergo charges in the future. But so may the Constitution itself including Art.143 under which the President has made the reference to this Court. The former possibility cannot make the reference speculative or hypothetical any more than the latter possibility can make it so!"

and in Col.2 of page 519 the learned Chief Justice has categorically expressed:

"We are inclined to the view that though it is always open to this Court to re-examine the question already decided by it and to overrule, if necessary, the view earlier taken by it, in so far as all other courts in the country are concerned they ought to be bound by the view expressed by this Court even

in the exercise of its advisory jurisdiction under Art.134(1) of the Constitution”.

We may record our appreciation of the learned Judges of the Supreme Court (and their Predecessors of the Federal Court) for their having displayed the necessary alertness whenever the Chief Executive of the land decided to take their counsel.

But one is pained to note that the same degree of alertness has not often been displayed in certain other instances.

That in the year 1994, C.A.No.990 of 1976 (16.2.1994), Crl.App. No.526 of 1978 (21.1.1994) were pending, till the dates shown within brackets, is a fact of life, though very difficult to stomach.

We find Justice A.M.Ahmadi, exclaiming at Ahmedabad on 18.12.1993 as follows:

“If the Supreme Court is also flooded with work of the nature of first appeals brought against tribunal orders it will also get diluted in importance and consequently our democratic polity will suffer”.

We may now turn to that aspect of the functioning of the Supreme Court, which prompted this piece. Art.315(1) of the Constitution provides subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.

Art.316(2): A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission or a Joint Commission, the age of (sixty-two years) whichever is earlier.

Provided that: xxx xxx xxx

Art.317(1): Subject to the provisions of Clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under Art.145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

Art.319(a): the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State.

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as

the Chairman of that or any other State Public Service Commission, but, not for any other employment either under the Government of India or under the Government of a State;

For most of us, the following extract, from report of Lee Commission of 1924 made by Mr. (later Justice) N.Rajagopala Ayyengar of our High Court and the Supreme Court at pages 276 and 277 of his commentary on the Government of India Act, 1935, serves as the baseline to start a study of the subject that it is well worth quoting below:

“Wherever democratic institution exist, experience has shown that to secure an efficient civil service it is essential to protect it so far as possible from political or personal influence and to give it that position of stability and security which is vital to its successful working as the impartial and efficient instrument by which Governments, of whatever political complexion, may give effect to their policies. In countries where this principle has been neglected, and where the ‘spoils system’ has taken its place, an inefficient and disorganised civil service has been the inevitable result and corruption has been rampant. In America a civil service Commission has been constituted to control recruitment of the services, but for the purposes of India, it is from the Dominions of the British Empire that more relevant and useful lessons can perhaps be drawn. Canada, Australia and South Africa now possess Public or Civil Services Acts, regulating the position and control of the Public Service Commission, to which the duty of administering the Acts is entrusted. It was this need which the framers of the Government of India Act had in mind when they made provision in Sec.96-C for the establishment of a Public Service Commission to discharge in regard to recruitment and control of the Public Services in India such functions as may be assigned thereto by rules made by the Secretary of State in Council”.

In *A.I.R. 1973 S.C. 2555*, a case dealing with the term of office of a Chairman of the Service Commission, of Mysore State, who was promoted to that post from that of a member, Justice V.R.Krishna Ayyar has quoted the same observations from Lee Commission as extracted by late Mr.B.Shiva Rao in his work, “The framing of India’s Constitution”.

Justice Bhagwati speaking for another Constitution Bench in his judgment dated 4.5.1979, (*1979*)3 S.C.C. 458, has extracted the same passage from Lee Commission report,

O.38 of Supreme Court Rules provide for the disposal of references made by the President of India under Art.317 of the Constitution.

The President had to make his first reference under Art.317 to the Supreme Court in the case of Shri Gopal Singh Saini, a member of the Punjab Public Service Commission regarding an incident which was alleged to have taken place on 24.11.1982. It was registered as Special Reference No.1 of 1983.

In his order made on 17.8.1983, on behalf of a Constitution Bench Chandrachud, C.J., observed among others:

“Not only is this reference the first of its kind, but the facts which have been referred to us for our consideration and report are shockingly, the first of their kind. We hope they will be the last of their kind”.

vide: (1983)4 S.C.C. 258 at 261.

The Court directed the District Judge, Delhi to nominate an Additional District Judge to record evidence commencing on 12.9.1983 to be concluded by 30.9.1983.

Regrettably the matter was listed before a Bench of 2 Judges (M.Sharma and P.B.Sawant) of the Supreme Court only sometime in 1990, and the final order of the Bench dated 23.8.1990 is reported in (1990)4 S.C.C. 262.

We may note that the Chief Minister of Punjab forwarded the complaint in the case to the Government of India on 25.11.1982.

And before the case was heard in 1990, the term of office of the member concerned Mr.Saini expired in May, 1986.

Now we have a more sad case.

It appears that the then Chief Minister of Manipur had despatched a complaint against one Mr.Megha Chandra Singh, who was functioning in the State as the Chairman of the Public Service Commission of that State in respect of certain examinations conducted by the Commission in September, 1981. We do not know the date of the communication of the Chief Minister. Suffice it to say that on 30.1.1985, President Zail Singh made his order of reference to the Supreme Court under Art.317 of the Constitution, which was registered as Special Reference No.1 of 1985.

It is shocking to find that despite the fact that the said Mr.Megha Chandra Singh came to demit his office of Chairman on 19.1.1987 and on 31.7.1991, the Governor of the State had even sanctioned the payment of pension admissible to the said Mr.Meghbochar Singh provisionally subject to the final pension and decision of the Supreme Court on the reference, no steps appear to have been taken by the Court on this reference until this year 1994.

We come to know that it was only on 18.2.1994, a Constitution Bench of the court made an order directing the Chief Justice of Guwhati to nominate a Judge of this High Court to record evidence in the matter.

The Constitution Bench of 1973, *A.I.R. 1973 S.C. 2555*, (V.R. Krishna Ayyar, J.) have pointed out that the post of Member and Chairman of Service Commission which have only a sort of short term existence, are high offices, where absolute rectitude is required of the incumbent. See also the later decision of a Constitution Bench reported in (1974)3 S.C.C. 458. And when a complaint made by a Chief Minister, the Central Government advises the President to make reference under Art.317 of the Constitution, are should expect the same degree of alertness on the part of the Supreme Court and its officials as while dealing with Presidential references under Art.143.

Justice Bhagwati and Koshal have declared in the first *Hussaina Khatun case*, "There can be therefore no doubt that speedy trial and by speedy trial we mean reasonably expeditious trial is an integral and essential part of the fundamental right to life and liberty enshrined in Art.21", (1980)1 S.C.C. 81 at 89; *A.I.R. 1979 S.C. 1360*.

Justice Bhagwati this time with Justice Eradi has declared, "Speedy trial is a fundamental right implicit in guarantee of life and personal liberty enshrined in Art.21 and any accused who is denied this right is entitled to approach the Supreme Court for the purpose of enforcing such right and the court in discharge of its constitutional obligation has power to give necessary direction to the State Government and other appropriate authorities for securing this right to the accused. (1983)2 S.C.C. 104 at 106; *A.I.R. 1982 S.C. 1167*.

Justice Sabyasachi Mukherji and Ranganath Mishra quashed proceedings which remained pending before a Magistrate for 9 1/2 years, saying, "quick justice is a *sine qua non* of Art.21 of the Constitution. Keeping a person in suspended animation for 9 1/2 years without any cause at all and none was indicated

before the learned Magistrate or before the High Court or before us cannot be with the spirit of the procedure established by law". (1988)4 S.C.C. 36 at 41-42; A.I.R. 1988 S.C. 1729.

As we began with a quotation from the new testament we may close with a quotation from Juvenal

"Quis Custodiet ipsos/Custodes".

ENVIRONMENT VIS-A-VIS CONSTITUTIONAL LAW

By

A.Venkatesan, Lecturer, The Central Law College, Salem.

"The earth provides for everyone's need but not for everyone's greed" - Mahatma Gandhi.

"Modern man must re-establish an unbroken link with nature and life. He must again learn to invoke energy for growing things and to recognise as did the ancients in India centuries ago, that one can take from the earth and the atmosphere only so much as one put back into them" (Smt.Indira Gandhi)

Earth is the only planet, so far known, to have an environment that can sustain life. Environment has in recent years become an issue for international negotiations and scholarly analysis.

Environmental protection is enshrined in our Constitution. Art.48-A of the Indian Constitution says:

"The State shall endeavour to protect and improve the environment and to safeguard forests and wildlife of the country".

Art.51-A(g) specifically deals with the fundamental duty regarding environment. This Article says:

"It shall be the duty of every citizen of India to protect and improve the natural environment, including forests, lakes, rivers and wildlife, and to have compassion for living creatures.

In *Taj Hotel's case*, A.I.R. 1987 S.C. 1109, the Supreme Court has held:

"Whenever a problem of ecology is brought before the court, the court is bound to bear in mind Art.48-A..... and Art.51-A(g).... when the court is called upon to effect Directive Principles and the Fundamental Duty, the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy making authority".

The judiciary in a series of cases expanded the horizon of Fundamental Rights enshrined in Part III of the Constitution. In this process, environmental protection was drawn within the expanding boundaries of the right to life and personal liberty guaranteed under Art.21.

The Supreme Court observed:

"The enjoyment of life and its attainment and fulfilment guaranteed by Art.21 of the Constitution embraces the protection and preservation of natural gift without which life cannot be enjoyed. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Art.21 of the Constitution".

P.Damodar Rao v. Special Officer, Municipal Corporation of Hyderabad, A.I.R. 1987 A.P. 71.

Art.47 states:

'the State shall regard the raising of the level of nutrition and standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health'.

The right to wholesome environment is included within the ambit of right to life under Art.21 of the Constitution.

Despite these legislative provisions and judicial interpretations pollution is rampant. Public participation and awareness is necessary for the protection of the environment and to preserve the health environment.

OPEN SESAME UNDER CONSUMER PROTECTION ACT. (CENTRAL ACT 68 of 1986)

By

P.G.Venkatachalam, Advocate and Notary, Tirunelveli.

The question for consideration is whether no court-fee need be paid by the complainant for the relief prayed for or on the quantum of relief under the Consumer Protection Act 68 of 1986 or the relief under that Act can be availed off "*Gratis*".

It will not be out of place to mention nowhere in that Act, either in the preamble or in the operative portion, it is stated, court fee need not be paid. OR

Rather, Section 3 of that Act states that "the provisions of this Act, shall be in addition to and not in derogation of the provision of any other law for the time being in force.

Now, in view of the section 3 of this Act 68 of 1986, it will have to be seen whether the Tamil Nadu Court-Fees Act XIV of 1955 is *not* applicable to proceedings under the Act 68 of 1986.

Sec.3(ii) Act XIV of 1955 says *inter alia* "Court means and includes Tribunal or other authority having jurisdiction under any special or local law to decide question affecting the right of parties."

A perusal of Sections 12 to 14 of Act 68 of 1986, shows that the District Forum decides the disputes affecting the right of parties before the Forum.

Accordingly the Forum comes within the definition of court under Sec.3(ii) of Act 14 of 1955.

Sec.4 of the Act XIV of 1955 stipulates *inter alia* "No documents..... unless in respect of such document, there be paid a fee of an amount not less than indicated as chargeable under this Act.

Sec.12(ii) of Act 14 of 1955 stipulates that the defendant can raise the question of correctness of the Court-fee paid.

Hence, it is felt that, the complaint before the District Forum must be stamped under the Tamil Nadu Court-Fees Act on the quantum of monetary relief claimed.

**JUSTICE T.G.J.CHOUTA AND JUSTICE C.J.BABU
JUDGES OF KARNATAKA HIGH COURT TRANSFERRED TO
MADRAS HIGH COURT.**

Mr.Justice *Chouta* belonging to Dakshina Karnataka hails from an agricultural family. His Lordships had his early education in Bantwat and obtained his degree in law from the Bangalore Law College. His Lordship was enrolled as an advocate in 1964. Mr.Justice *Chouta* built up a lucrative practice on the criminal side. His Lordship served as a Government Pleader in the Karnataka High Court and also as a State Public Prosecutor. Mr.Justice *T.G.J.Chouta* has a keen interest in sports.

Mr.Justice *Jaisimha Babu* hails from Mysore. His Lordship graduated from the Mysore University obtaining a distinction in English. Mr.Justice *Babu* took a post graduate degree in Political Science standing first in the University. His Lordship had his apprenticeship under his father who was having extensive work in civil, company and labour law. His Lordship was enrolled as an advocate in the year 1968. Mr.Justice *Babu* has appeared in other High Courts and Supreme Court as well and acted the counsel for public and private sector undertakings.

We are sure that the two Judges having excellent record will prove themselves to be good Judges. We extend our hearty welcome to both of them.

**AN APPRAISAL OF THE TWO JUDGMENTS ONE
BY JUSTICE ABDUL HADI IN
SUNDARARAJAN AND ANOTHER V. SUNDARAMOORTHY, (1993)1 L.W. 569
AND THE ANOTHER BY JUSTICE BELLIE IN
1992 T.L.N.J. 136.**

By

R.Govindarajan, B.A., B.L., Advocate, Madurai-625001.

Both the judgments lacks juristic lusture and reasoning. Because of that I have ventured to write this article not with a view to criticise the learned Judges, but to bring before the lawyer fraternity some of the mistakes and view taken in those judgments.

Facts of the 1st case: The landlord files a suit for possession after removal of superstructures by the tenant. From the judgment one has to understand that the lease is of a vacant site. The defendant pleaded a sale agreement with the landlord and also pleaded that he was a tenant under the previous owner. He has also not attorned to the plaintiff. In the suit the defendant has not pleaded and filed any application in the lower court that he is entitled to the benefits of the Madras City Tenants' Protection Act and that the application has to be filed within 30 days of the receipt of the suit. One finds that he has not complied with the duties imposed upon him by Statute. He failed in the lower court and he took the matter in appeal and in the appellate court he filed an additional written statement claiming the benefits of the Act and the same was received and the appeal was allowed without possession to the landlord declaring his title. Before the appeal in the High Court filed by the landlord the question was whether what the lower appellate court has done is correct.

In this stage one has to see and understand the provisions of the Madras City Tenants' Protection Act as amended. The tenant is entitled to compensation under Sec.3 and such a tenant must apply to the court by way of application within 30 days from the date of the receipt of the notice of the suit (not appeal) under Secs.9(1) and 9(2) the tenant is entitled to file an application to direct the landlord to sell the land to him as soon as he receives the notice of termination of the tenancy whether a suit is filed or not. It is an independent right given to the tenant reference may be made to (1980)1 M.L.J. 339. In (1993)2 L.W. 419, Justice Ratnam has held "the institution of a suit in ejectment is one of the conditions to be fulfilled before he can maintain an action under Sec.9 of the Act". Another important section is Sec.11 which postulates that the land can file a suit only after three months of notice given in writing to the tenant offering compensation for the building and also the amount thereof. "Sec.11 is mandatory and imposes an unqualified objection upon the court not to entertain suit in ejectment without compliance of the proviso to that section" (1942)2 M.L.J. 92; (1982)2 M.L.J. 70; 78 L.W. 739 and (1985)1 S.C.C. 270. The tenant and landlord has to exercise their right under the Act in the lowest court only where the suit in ejectment is filed.

All the provisions of the Act has been given a goby both by the lower appellate court and the High Court. The case seems to have proceeded on the basis of the sale agreement with the landlord and hence these questions did not arise for consideration. Having failed the tenant filed an additional written statement in the appellate court falling back upon the original contract of tenancy and without complying with the provisions of Act claimed its benefits, which is a *sine qua non* one.

The lower appellate court is wrong in receiving it and framing the issues and answering in favour of the tenant on the two issues and as the landlord failed to give notice under Sec. 11 and dismissed the suit without giving possession but simply declaring the title of the landlord under issue 3. The High Court has also affirmed that in second appeal.

The learned Judge has forgotten the fact that the mandatory provisions of Secs.9 and 11 can only be availed of in suit as stated supra and not in suits where the question of the validity of the sale agreement and not regarding the tenancy agreement. The High Court by a very curious reasoning taking para.4 of the written statement wherein he has stated that "in any event the suit is not maintainable for want of notice". I am unable to understand whether it refers the notice to quit or under the provisions of the Act. The decision referred to in 95 L.W. 412 (D.B.), is not all applicable to the facts of the case, the judge has said. Another reasoning in not applying (1990)1 L.W. 546 (D.B.), in para.3" in a way since the defendant has impliedly given up his original plea in the original written statement and admitted in his additional written statement that he is a tenant under the plaintiffs themselves. I think he cannot be denied the right to claim the benefits of the Act".

The plea of waiver has to be pleaded and proved as laid down in 95 L.W. 412 (D.B.). Not following that the learned Judge says, "there is a plea in the additional written statement that he is entitled to the benefits of the Act and to purchase at value as may be fixed by the court. However, despite this plea I have already laid there is no waiver by implication". The reasoning in paras.4 and 6 shows the conflicting and confusing mind of the judge.

The learned Judge has correctly followed what has been laid down in (1985)1 S.C.C. 270, which had laid down that amendment of a statute applies even to appeals and hence Sec.11 is applicable to appeals also though amended long after the filing of the suit.

Thus it will be seen that the judgment obliterates the effect of the enactment and emboldens the tenants to take his plea at any point of time and in any manner and at the same time the landlord is deprived of his rights under the statute. So this judgment of Justice Hadi requires reconsideration.

The judgment of Justice Bellie would not have evoked any comment but for the *obiter* he has made. As is well known that many times *obiter dicta* of the judges has caused embarrassment to the lawyers and that many of them have succeeded by harping upon the *obiter dicta* of the judges. The essential difference between a sale and a license is this: Lord Denning, M.R. in *1 Q.B. 424 at 432* has stated, "the word sale properly connotes the transfer of the absolute or general property in a thing for a price in money". The same view has been held in *A.I.R. 1965 S.C. 1655*, "to constitute a sale there must be an agreement express or implied relating to the sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold" where as in license there is no transfer of title and that it is revocable by the grantor. There are other important ingredients such as a licence is not assignable and is also determined when the grantor makes an assignment of the subject-matter, which are not found in sale. Thus both are diametrically opposite in concept. The learned Judge's *obiter* is "on a deeper consideration it is only a sale". This *obiter dicta* is quite unwarranted and uncalled for because the learned Judge is expected to lay down correct law since he has already correctly found that it is only licence.

This reminds us the words of an English Judge, "the words of a judge must be construed as empty vessels into which he can pour anything he will".

THE TWIN JUDGMENTS OF JUSTICE PRATAP SINGH REPORTED IN
VEERASAMI NAICKER V. MOHAMED SHERIFF AND ANOTHER, 1993 T.L.N.J. 284,
AND IN THE SAME VOLUME AT PAGE 325, THE OTHER ONE DEIVANAYAGI
DORAISAMI NADAR V. ABRAHAM AND ANOTHER AND OF JUSTICE HADI IN
SARASWATHI AMMAL V. SHANMUGAVADIVAMMAL AND OTHERS, REPORTED IN
(1993)2 M.L.J. 425.

By

R.Suryanarayanan, Advocate, Madurai.

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The facts in the three cases are the same. To be brief, the vendor of a property retains with the vendee a sum of money, which is payable by him as loan to a co-operative society. The loan was wiped out by an order of Government, either written off or remission granted. The question in the three cases arose whether the vendor is entitled to get back the money or the balance from the vendee. The argument advanced in these cases are one and same, but in a different way.

Before advertng to the case, I would submit that Sec.55(1)(b) and (g) and (2) does not envisage a situation like this. It only postulates the rights accrued to the seller and nothing more. But we have to go only to the precedents for a question that has arisen in these cases and it is only the judicial dictum that answers the above question.

In the first case, only two decisions seem to have been referred to, *31 All. 583* and *(1953)2 M.L.J. 504: A.I.R. 1954 Mad. 508*, and they have not been followed as not applicable to the facts of the case and hence, held that the vendor is not entitled to get back the money which the vendee has been benefited by a supervening act of State.

In the second case, the extracts from the sale deed has been extracted and that shows as in the first case that the vendee has retained a portion of the sale consideration towards the debts due to the

land mortgage bank. The vendee has also paid some portion of the same. The extracts from the sale deed has not been extracted in the first case and I take it that both are the same. Both the sales have been made free of encumbrances. In the second case, a ruling in *Subba Row v. Varadiah, A.I.R. 1943 Mad. 482 (D.B.)*, was cited in which the relevant extracts have been made by the learned Judge and he takes cue from that, there is a difference between the sale free from encumbrance in which the vendor clears the dues and another in which the vendor allows the vendee to retain money as he has bargained for a clear title by retaining out of that money to pay and discharge the encumbrances over the property. The learned Judges of the Division Bench were of the view that in the former the vendee is bound to pay all the interest and other after sale and in the latter the liability is shown on the vendee, the vendee however being given the right to retain a portion of the sale towards the same. They go to the further extent saying "*the vendee acts as the agent of the vendor as regards the disposal of the sum retained although the agency is one which cannot be revoked as vendee has himself an interest in the money applied in the manner indicated*". If this is the position as we apprehend where immovable property is sold free from encumbrances, it follows that the vendor is entitled to call upon the buyer to account to him for any portion of the purchase money, which it has been no longer necessary to apply in accordance with the stipulation in that behalf". In *31 All. 383*, which was not followed in the earlier case has been followed in this case, where the Privy Council has laid down the vendee purchases and "covenants with the vendor to pay off the encumbrances, it is still more than a contract of indemnity". Before the learned Judge, a case of Kerala High Court *1957 K.L.T. 592*, which held that the vendee is entitled to the benefit. That was not followed perhaps of the overwhelming authorities both by the Privy Council and our Division Bench. This anomaly would have not happened if the case was projected in the above manner in the earlier case decided on 18.8.1983 or atleast if it has been brought to the knowledge the learned Judge in the latter case dated 2.9.1993, I think he would have clarified and reconciled the different approach made by him.

I come across with another case by Justice Hadi reported in *(1993) 2 M.L.J. 424*, dated 25.1.1993 which was also not cited before Justice Pratap Singh in the earlier case. In this case also, the facts are the same as that of the two and all the judgments that were brought to the knowledge of the learned Judge, and in spite of that, the learned Judge approaches the question in quite a different way, inspite of the decisions cited before Justice Pratap Singh. The learned Judge points out in para.11 as follows:

"But I think that there is no necessity to do so in the present case in view of the decision. I propose to take in the next argument of the learned counsel for the plaintiff as indicated below".

He relies upon the observation of Division Bench in *(1983) 1 M.L.J. 273*, 'the said provisions of Sec.12(1) of Tamil Nadu Debt Relief Act exempting the debt representing the portion of the purchase money price of the property purchased by a debtor is intended to see that he does not make *unjust enrichment* by withholding the price of the property purchased by a debtor is not intended to take advantage of the provisions of the Act'. The learned Judge has followed the above Division Bench case, though the Sec.12(1) of the Debt Relief Act will not apply to the facts of the case. Anyhow, I find that there is keledoscopic view on a case with same facts. It has been seen in different angles by the same judge who decided the first two cases and another learned judge viewed the same in a different angle.

I would submit that in the second case, the vendee has been treated as an agent of the vendor, which concept is unknown to Transfer of Property Act, Sec.55. The principle of unjust enrichment may also not apply as against a statutory right. So, both the lawyers and the subordinate judiciary will be in a dilemma to decide such cases as they are placed in the cross roads of judicial dictum which is embarrassing. Therefore, the three judgments have to be reconciled by a Division Bench atleast.

TRANSFER OF THREE JUDGES TO MADRAS HIGH COURT

Three more Judges are transferred to *Madras High Court*. Mr.C.G.Gupta has been transferred from the Madhya Pradesh High Court's Jabalpur Branch, Mr.S.V.Patil and Mr.C.Shivappa has been transferred from the Karnataka High Court. With this the strength of the High Court has become 23 since Mr.Justice *Bakthavatsalam* is transferred to Karnataka High Court.

Mr.Justice *C.G.Gupta* hailing from Mahendra Nagar in Madhya Pradesh obtained his B.A. degree in Political Science and took his degree in Law (LLB) in 1956 winning all the three medals in the Law Faculty. He was enrolled as an advocate in 1959 and became Judge of the Madhya Pradesh High Court at Jabalpur in June, 1983. Mr.Justice *C.G.Gupta* specialised in Industrial Law.

Mr.Justice *Shivaraj V.Patil* born in Raichur District of Karnataka State took his degree in Law (LLB) in 1962. Mr.Justice *Shivaraj V.Patil* was enrolled as an advocate in July, 1962. He was practising both in Civil and Criminal side. He was also a lecturer and has served as Legal Adviser and Standing Counsel for various Government Departments. He was elevated as a Judge of the Karnataka High Court on March 29, 1990.

Mr.Justice *C.Shivappa* was born on December, 1938 at Chattamballs in Madya District. He obtained his M.A. degree and Law degree. He was enrolled as an advocate of the Karnataka High Court in August, 1963. He has served twice as an Advocate-General of Karnataka. He became a Judge of the Karnataka High Court in August, 1991.

We extend our hearty welcome to all the three new Judges.

"R.K." AGAIN AS ADVOCATE-GENERAL

Mr.*R.Krishnamurthy* senior advocate familiarly and affectionately known as "R.K." has been appointed as Advocate General since Mr.K.Subramanian has resigned. Mr.R.K. is not a stranger to us. He has already served as Advocate General from 1980-89. He has appeared on behalf of the Government in our High Court and also in the Supreme Court in a number of important cases. Soft spoken and having a smile always in his lips he is a gentleman in every respect.

We are happy that he has come back as Advocate-General.

We wish him a smooth tenure of office as Advocate-General.

BOOKS REVIEW

I. T.R.Desai's **CONTRACT ACT WITH SALE OF GOODS ACT AND PARTNERSHIP ACT**, Nineteenth Edition by Kanishka H.Kaji. Published by S.C.Sarkar, Calcutta. Price Rs.240/-.

Contract Act and other allied Acts are important branches of Law. There are a good number of books on Contract Act and each book is useful in its own way.

The book under notice deals first with Indian Contract Act, secondly with Sale of Goods Act and thirdly with Partnership Act. Indian Contract Act is divided into XI Chapters. First Chapter covering Sections 3-9 deals with communication, Acceptance and Revocation of proposals. The second chapter covering Secs.10-30 deals with contracts, voidable contracts and void agreements. Chapter III covers Sections 31-36 and is devoted to contingent contracts. Sections 37-67 are covered in Chapter IV and speaks of performance of Contracts. Chapter V is devoted to contracts implied in law and deals with Sections 68-78. Chapter VI speaks of breach of contract and covers Sections 73-75. Indemnity and Guarantee are found in Chapter VIII covering Sections 124-147. Chapter IX deals with bailment and covers Sections 148-181 and Chapter X is devoted to Agency and covers Sections 182-238.

The next Act is the Sale of Goods Act. This Act is covered under VII Chapters. Chapter I is preliminary, Chapter II speaks of Formation of Contract. Effects of Contracts are dealt with under Chapter III. Performance of Contract is found under Chapter IV. Chapter V deals with the rights of the unpaid seller against goods. Chapter VI speaks of suits for breach of Contract and Chapter VII is devoted to Miscellaneous.

The third Act is the Indian Partnership Act. There are VIII Chapters under this. As usual the First Chapter is Preliminary. Chapters II and III narrate the Nature of Partnership and relationship of partners to one another. Chapter IV states the relationship of partners to third parties. Chapter V speaks of incoming and outgoing partners. The Dissolution of the Firm is found under Chapter VI. Chapter VII is devoted to Registration of Firm. The heading given to Chapter VIII is Supplemental.

There is an Appendix which contains summary of Acts, Technical terms and explanation of maximums. There is an Subject Index and Table of Cases also.

The author of the book under notice has given his comments, on the sections with reference to other acts. The case law on the subject is upto dated. All cases of the Supreme Court and important decisions of the various High Courts are incorporated under relevant sections. This book though concise is a self-contained one.

The book under notice will be very useful to law students and to practising lawyers. This book must find a place in every library.

II. **MARX, LAW AND JUSTICE**, By Upendra Baxi, Published by Tripathi. Price Rs.200.

The name of the book is quite new and not much familiar. The author of the book has stated the Marxist theory with reference to law and justice. The author of this book has delivered a number of lectures in different Law Academies. It is stated that the genesis of this book is in the series of lectures delivered by Professor Baxi at the Kerala Law Academy in 1980. From a limited standpoint of jurisprudence which is the main stream Marxan Corpus has by and large been ignored. The present work endeavours to suggest the importance of retrieval of Marxist insight.

The book under notice contains eight chapters. The Chapters are divided into different headings. At the end of each Chapter the author has given references. The important cases are also introduced wherever necessary and discussed. In this book the author has endeavoured to suggest the importance of retrieval of Marxist insight. This book is different from other books. The author has adopted a different approach instead of following the traditional method. The book is based on the lectures given by the author on this subject. The subject that is taken is abstract and a difficult one and the author has dealt

with it in such a way so that it can be easily understood.

There is an Index of names at the end and a Thematic Index. An Errata is given at the beginning which suggests that there are mistakes in this book. Since the book runs to only 196 pages the mistakes could have been averted.

This book under notice may not be of much use to lawyers but will be very useful to students of law who pursue research work. This book has to find a place in every general library.

III. CRIMINAL PROCEDURE CODE, By Justice C.K. Thakker, Published by Tripathi. Price Rs.150.

The author of this book Mr. Justice Thakker is a sitting Judge of Gujarat High Court. He has written number of other books as well which are popular in the legal field.

The author of the book under notice has taken particular care to deal with important topics such as anticipatory bail, arrest of judicial officers, search and seizure, etc.

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be seen whether the judgment-debtor is actually 'liable to be arrested'. The first such situation is indicated in the proviso to O.21, Rule 37(1), Civil Procedure Code that is where the court is satisfied by affidavit or otherwise that with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court. In such a case, without issuing the notice under O.21, Rule 37(1), Civil Procedure Code, straightaway the court can order arrest. The second situation is provided in O.21, Rule 37(2) as indicated above, that is, where appearance of the judgment-debtor is not made in obedience to the notice of the court under O.21, Rule 37(1), Civil Procedure Code and the decree-holder requires issuance of a warrant for the arrest. The third situation is under O.21, Rule 40(3), Civil Procedure Code, that is after the conclusion of the enquiry under O.21, Rule 40(1), Civil Procedure Code for detention in prison and subject to Sec.51, Civil Procedure Code an order for detention is passed. In such an event, the court can also pass an order of arrest if the judgment-debtor is not already under arrest. The fourth situation is mentioned in O.21, Rule 40(1), Civil Procedure Code which says that a judgment-debtor released under Rule 40 may be re-arrested. Even in the abovesaid four cases, before arrest order could be passed the court should find that any one of the reasons mentioned in the proviso to Sec.51, Civil Procedure Code exists, in the light of the construction placed by the Supreme Court in *Jolly George Varghese v. Bank of Cochin*, (1980) 2 S.C.C. 360 on Sec.51, Civil Procedure Code. No doubt in such a case, the said proof need not necessarily be in an enquiry as contemplated under O.21, Rule 40, Civil Procedure Code that is by taking evidence as may be produced by the decree-holder etc. That is so because, O.21, Rule 37(2) does not provide for any particular mode of enquiry. In other words, even by affidavit evidence, the execution court could come to the conclusion that the necessary proof is there for ordering arrest of the judgment-debtor.

While considering the provisions of Sec.115, C.P.C., the Single Judge of the High Court has held in *Jayalakshmi Ammal v. K.Lakshmi Iyengar represented by Power Agent M.Jayaramiyar*, (1993) 1 M.L.J. 95, that strictly speaking it is not the function of High Court to appreciate evidence. The court

is sitting in revision and it should only see whether the order of the court below is vitiated by illegality or material irregularity and whether there is any error of jurisdiction.

In *V.Subramani v. Arumugham*, (1993) 1 M.L.J. 451, the court has held that it shall be noted that the disposal of the said application did not involve adjudication of any right or obligation of the parties in controversy and that hence the order cannot be treated as 'case decided' within the meaning of that term in Sec.115, C.P.C. Therefore, the civil revision petition is not maintainable.

As per Sec.115, C.P.C., as amended in 1976 if a revision is filed against an interim order, unless irreparable injury or failure of justice is shown, the revision is not maintainable.

Sec.115 and O.14, Rule 2 petitioner raising question of pecuniary jurisdiction of court on ground that suit is not properly valued-praying that issue be decided as a preliminary issue-application, if maintainable. As per O.14, Rule 2, C.P.C., only when 'the case or any part thereof may be disposed of on an issue of law, the court may try that issue first. But what is contained in the affidavit in support of I.A.No.1263 of 1992 is only that the court has no pecuniary jurisdiction and that hence that question should be decided first. As per the written statement, the said contention is based on the fact that the suit is not properly valued. If that is so when a proper valuation is made and it is found that the court below has no jurisdiction, then the plaint may have only to be returned for presentation to the proper court. In such a situation, the said return, of the plaint cannot be considered as 'disposal' of the case or part spoken to in O.14, Rule 2, C.P.C.

As per O.14, Rule 2, C.P.C., only a question of law, if at all, can be taken up as a preliminary issue. Issue No.5 in the present case relating to jurisdiction involve question of law and fact since, the question raised is that the suit has not been properly valued. The Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues.

In *M.Krishnappa Chetty and another v. P.E.Chandrasekaran alias Chandra*, (1993) 1 M.L.J. 18, the Court has held that the proper procedure to be adopted in all cases where caveat has been filed is for the plaintiff/petitioner to serve copies

of the plaint and application on the caveator's counsel or the caveator or his counsel as the case may be the date on which he will move the application before court. He must also file acknowledgements of the receipt of copies obtained from the caveator counsel or the caveator as the case may be in court along with the application. On receiving such papers the office of the court shall, while fixing the date for the first hearing of the application prepare a note and bring it to the notice of the Presiding Officer concerned that caveat has been entered and the caveator's counsel or the caveator application. The Presiding Officer shall direct the office of the court to issue notice to the caveators counsel or the caveator as the case may be specifying the date on which the matter will be heard in the first instance. The court shall inform the petitioner's counsel also of the said date and on that date both sides shall be heard before any interim order is passed. This procedure shall strictly be followed by all the subordinate courts. There shall be no lapse in following this procedure. There is no necessity for the caveator's counsel to file a separate vakalat in the suit or the application once again. The vakalat filed in the caveat will hold good for the main suit as well as the application filed therein unless the caveat has expired before the filing of the suit and application.

It is said that sometimes the caveator's counsel evades service deliberately with a view to delay the matter. Such conduct on the part of counsel will amount to grave dereliction of duty and wilful obstruction in the administration of justice. It is hoped that no lawyer will adopt such dilatory tactics. In such cases the court can record a finding as to such wilful evasion and proceed to pass interim order in the application and direct notice to the party himself. In all such cases, such counsel shall file fresh vakalat in the main proceedings if they want to appear therein.

The Bench while considering the scope and applicability of O.39, Rule 2-A, C.P.C. in *Sri-la-Sri Sivasubramanyananda Swami v. Sri-la-Sri Arunachalasamy Chidambaram and another*, (1993)1 M.L.J. 274, that Sec.151 of the Civil Procedure Code confers power to make such orders as may be necessary for the ends of justice or to prevent abuse of process of court. Every court is constituted for the purpose of doing justice according to law and must be deemed to possess as a necessary

corollary and as inherent in its very constitution, all such power as may be necessary to do the right and to undo the wrong in the course of the administration of justice.

There is no provision in the Code providing for the implementation of the order of temporary injunction or decree for perpetual injunction granted by the courts. Therefore, when a party has obtained an order of temporary injunction from a court under O.39, Rule 1 of the Code and the other party against whom the order of injunction is passed disobeys the same, the aggrieved party can certainly approach the court invoking the police aid for the enforcement of the order of temporary injunction.

In *Pe.Ramasamy Thevar v. Perumal Thevar and others*, (1993)1 M.L.J. 423, it is held that a reading of the abovesaid provisions would make it clear that in the absence of any plea in the written statement on the misjoinder of parties and misjoinder of cause of action the trial court was not within its limits in framing issues on this aspect of its own accord and non suiting the plaintiffs on the ground of misjoinder of parties. On the failure of the appellant to raise any objection regarding misjoinder of parties and cause of action before settlement of issues, the objection must be deemed to have been waived.

The Bench has held in *Corporation Bank v. M/s.E.W.Stevensors, No.22, Jawaharlal Nehru Road, Calcutta and others*, (1993)1 M.L.J. 446, that it has to depend upon the facts of each case whether to set aside the decree only insofar as the case of the defendant who applied for setting aside the decree is concerned or even in case of other defendant as well and in that the court shall mainly be guided by the principles of equity and good conscience. In the present case, the money decree revealed that the first defendant is the principal debtor and the second and third defendants are the sureties. The effect of setting aside the decree against the first defendant alone will mean that a decree made effective against all the defendants jointly will stand annulled in so far as the principal debtor is concerned but shall bind the sureties and the creditor-decree holder thus shall satisfy the decree. On the facts as above even if the decree has to be set aside at the instance of only one of the defendants it must be set aside against all of them. The Bench has held in *Soopi Haji and others v. R.M.Ramanathan Chettiar*, (1993)1 M.L.J. 644,

that the clear words "if the parties are or any of them is absent proceed under Rule 2" in Rule 3 of O.17, leave no manner of doubt that in all cases of the absence of the party the order has to be passed under Rule 2 and not under Rule 3. The words in Rule 2 make such order as it thinks fit do not mean that the court may proceed to dispose of the suit in the absence of the party under Rule 3. Rule 3 is not attracted at all in the case of the absence of a party and thus 'or make such other order as it think fit' must mean an order other than to proceed to dispose of the suit in one of the modes directed in that behalf by O.9 of the Code, but surely not to dispose of the suit on merits. "Such other order" may be a further adjournment to enable the party which is absent to appear or to regulate the proceedings in some other manner. It is also relevant to take notice of the language in the explanation that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear that is, if a party's evidence is already on the record or substantial portion of the evidence of that party has already been taken and only a negligible part to appear the court may proceed with the case as if that party were present. If evidence of a party has taken but substantial portion of the evidence of that party is yet to be taken and that party is absent, the explanation shall not enable the court to proceed with the case in the absence of that party but to proceed to dispose of the suit in one of the modes directed in that behalf by O.9 or to make such other order that is to say adjourn again for another date or take such steps as would ensure the appearance of the parties and their evidence. The court has held in *A. Mani v. A. Chandranath*, (1993) 1 M.L.J. 597, that it must be noticed that O.21, Rule 37(1) will apply as per the very words used therein, only where the application is for the execution of a money decree by arrest and detention of a judgment-debtor who is liable to be arrested in pursuance of the application. So notice under O.21, Rule 37(1), Civil Procedure Code cannot be issued to the judgment-debtor if he is not 'liable to be arrested'. While dealing with execution of money decrees by arrest and detention four situations are expressly and specifically mentioned in the Civil Procedure Code, where the execution court could order arrest and even in those situations, it has to be seen whether the judgment-debtor is actually liable to be arrested".

The first such situation is indicated in the proviso to O.21, Rule 37(1), Civil Procedure Code that is where the court is satisfied by affidavit or otherwise that with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court. In such a case without issuing the notice under O.21, Rule 37(1), Civil Procedure Code, straightaway the court can order arrest. The second situation is provided in O.21, Rule 37(2) as indicated above, that is, where appearance of the judgment-debtor is not made in obedience to the notice of the court under O.21, Rule 37(1), Civil Procedure Code and the decree-holder requires issuance of warrant for the arrest. The third situation is under O.21, Rule 40(3), Civil Procedure Code that is after the conclusion of the enquiry under O.21, Rule 40(1), Civil Procedure Code for detention in prison and subject to Sec.51, Civil Procedure Code an order for detention is passed. In such an event the court can also pass an order of arrest if the judgment-debtor is not already under arrest. The fourth situation is mentioned in O.21, Rule 40(1), Civil Procedure Code which says that a judgment-debtor released under Rule 40 may be re-arrested. Even in the abovesaid four cases, before arrest order could be passed, the court should find that any one of the reasons mentioned in the Proviso to Sec.51, Civil Procedure Code exists, in the light of the construction placed by the Supreme Court in *Jolly George Varghese v. Bank of Cochín*, (1980) 2 S.C.C. 360, on Sec.51, Civil Procedure Code. No doubt in such a case, the said proof need not necessarily be in an enquiry as contemplated under O.21, Rule 40, Civil Procedure Code that is, by taking evidence as may be produced by the decree-holder, etc. That is so because O.21, Rule 37(2) does not provide for any particular mode of enquiry. In other words, even by affidavit evidence, the execution court could come to the conclusion that the necessary proof is there for ordering arrest of the judgment-debtor.

It has held in *Subba Navithan v. Veluchami Gounder*, (1993) 1 M.L.J. 476, that the decree-holder is trying to bring 4 acres and 48 cents of property belonging to the judgment-debtor to sale. Even according to the decree-holder, the value of the said property would be Rs.67,200. But according to the judgment-debtor the value of the said property would be about Rs.1,00,000. The decree amount

is stated to be Rs.6,020. In view of the decision of the Supreme Court rendered in *Ambatti Narasayya v. M.Subba Rao*, A.I.R. 1990 S.C. 119, the execution court is directed to consider whether the division of property and sale of a portion of the property would be advantageous to the judgment-debtor. If that is so the property may be divided and a portion of the property can be brought to sale.

In *V.Muthukumaran and another v. State of Tamil Nadu and others*, (1993)1 M.L.J. 631, the court has held that from a careful perusal of O.33, Rule 11, Civil Procedure Code as amended in Madras, it is rather crystal clear that where the plaintiff fails in the suit in the sense of the suit meriting dismissal, the court shall order the plaintiff or any other person added as co-plaintiff to the suit to pay the court-fees. In the instant case, the petitioner had been added as co-plaintiff in the suit consequent on the death of their father as his legal representatives. In such a situation, to contend that the petitioners are not liable to pay the court fees either personally or from out of their properties and if at all they are liable only to the extent of the estate of the deceased available in their hands as contended by learned counsel for the petitioner cannot at all be countenanced.

From O.33, Rule 14, Civil Procedure Code, it is clear that the court fees payable is recoverable as if it is an arrear of land revenue without prejudice to any other mode of recovery under Art.136 of the Limitation Act the period prescribed for exemption of any decree other than a decree granting a mandatory injunction or order of any civil court is 12 years when the order or decree becomes enforceable. The suit in C.S.No.114 of 1960 on the file of this Court was dismissed by judgment dated 6.3.1963 requiring the plaintiffs in the suit to pay the court fees due to the Government. Twelve years calculated from the said date of dismissal of the suit, the exemption proceedings ought to have been taken on or before 5.3.1975. Of course, no proceedings for exemption of the decree been taken before the civil court. But what has been done in this case is to recover the court-fees dues payable by the institution of the proceedings. Under the Revenue Recovery Act, as already stated Rule 14, O.33, Civil Procedure Code, makes it abundantly clear that recovery of court fees is permissible by resorting to the provisions of the said Act without prejudice to any other mode of recovery.

At this juncture it has to be borne in mind that under the said Act, there is no provision at all prescribing any period of limitation for the recovery of monies to be realised as if such recovery is an arrear of land revenue. The fact that there is no period of limitation prescribed under the said Act does not mean the authorities can sleep over the matter for any length of time as in the instant case, for about more than two decades in seeking to recovery such dues. In such circumstances, the recovery attempts made therefor by the authorities concerned has to face dismissal failure purely on the ground of laches on their part.

The Bench has held in *Amsath Ansari Jawahar and another v. S.Sikkandar Batcha and others*, (1993)1 M.L.J. 370, that Rule 22, O.41, C.P.C., has clearly envisaged a cross-objection not only when a respondent in the appeal can take by way of appeal a matter to the court where a part of the decree has gone against him, but also in a case where the decree is entirely in his favour but a certain finding is, according to him, erroneous or has gone against him. A cross-objection, is treated at par with the appeal and heard along with the appeal if the appeal is not dismissed for any reason of default or withdrawn by the appellant. When however, the appeal is withdrawn or dismissed for default, the objection so filed is treated as an appeal by the respondent and heard independently. The provision in Rule 22, O.41, however, has given a right to the respondent to approach the court for adjudication of any issue that has been decided against him or any part of period one month from the date of service on him or his pleader of notice of the day fixed for appellate court may see fit to allow. It has not affected the court's power to enter into any issue that has been decided against the respondent and in favour of the appellant or to interfere with that part of the decree which has been in favour of the appellant and has gone against the respondent. The period of limitation for cross-objection is different as found in Rule 22, O.41, C.P.C., from the period of limitation for appeal against a decree. It starts running from the day of the service of notice on the day fixed for hearing the appeal. The period of 30 days under Rule 22 is not a fixed period in the sense that unless sufficient cause is shown in terms of Sec.5 of the Limitation Act, the court cannot accept a cross objection beyond 30 days of the service of notice of the day fixed for

[To be continued]

hearing the appeal. The words 'or within such further time as the appellate court may see fit to allow in Sub-rule (1) of Rule 22, O.41 of the Code are indicative of the discretion of the court in appropriate cases to give further time to a respondent than the period of one month from the date of service of notice of appeal for filing the cross objection. As to when and how the appellate court can think fit to allow further time, however, is a question that can be answered only by saying that it shall be decision taken on the facts of each case. In *S.Kuppurathunam and others v. A.R.Munirathinam*, (1993)1 M.L.J. 507, the court has held that it is true that the provisions of O.41, Rule 27, C.P.C., should be strictly complied with by the lower appellate court. However, it cannot be gainsaid that only by inadvertence, the documents available in court were omitted to be marked during trial by the present respondent. At the most, it can reflect only on the carelessness of the counsel concerned in conducting the case. It is the unfortunate that even in the lower appellate court the advocate appearing for the present respondent had not cared to file an application seeking permission to let in additional evidence. However, the party need not be penalised for the mistake of the counsel. Under O.13, Rule 2, C.P.C., additional evidence could be received at any subsequent stage of the proceedings if good cause is shown to the satisfaction of the court for the non-production thereof. While so interest of justice as contemplated under O.41, Rule 23 requires that the respondent herein is given an opportunity to mark the documents already available in court as additional evidence and have a decision on consideration of the entire materials on record in respect of his liability to render accounts in case he has functioned as an agent under the present appellants.

There cannot be any remand merely for the purpose of affording an opportunity to a party to let in additional evidence. The expression 'interest of justice' occurring in O.41, Rule 23 does not widen the powers of the appellate court to remand a suit in the sense that irrespective of the fact whether it come to the conclusion that the judgment and decree of the trial court are liable to be reversed or set aside or not, if the appellate court is of the opinion that the interests of justice require that there should be a fresh trial, it can remand the suit for fresh disposal. There is no principle or

authority to support such a contention. It is clear from the scheme of the rules that generally speaking only where it is not possible to apply O.41, Rules 24 to 27, C.P.C., a remand should be resorted to under O.41, Rule 23, C.P.C.

The court has held in *Abdul Salam v. T.R.Vinobkumar and another*, (1993)2 M.L.J. 15, that when a party had obtained an order of interim injunction and the other party insisted that the application may be heard a party in whose favour there is an injunction should be ready to argue the case particularly when the other side has already filed counter and was ready. It is seen from the petition that counter was filed on 24.4.1992 and the Sub Judge, had adjourned it to 28th April, 1992 for arguments, though initially the learned Judge insisted the counsel for the petitioner to argue the matter. Simply because the Judge was anxious to dispose of the matter quickly, nothing can be imparted against him. On that score, a transfer cannot be made.

In *Kamakshi v. Minor Ramalingam alias Munusami and another*, (1993)2 M.L.J. 17, it has been held that the lower appellate court has not specifically gone into the question of factum of marriage though it held that the marriage was void in view of the subsistence of the 1st defendant's earlier marriage. In the above context, in view of Sec.103, C.P.C., the court itself could go into the question of factum of marriage.

The Bench has held in *M.James and another v. S.Issac Banerjee and others*, (1993)2 M.L.J. 35, that after amendment of Sec.92, C.P.C., under Act 104 of 1976 leave of the court has to be obtained instead of written consent of Advocate General. The discretion of the court to grant leave or not to grant leave under Sec.92, C.P.C., has to be exercised according to know principles of law. It is clear that there are sufficient averments in the plaint to the effect that the church is a religious trust and the affairs of the religious trust have not been administered in accordance with the provisions stipulated and there is also a prayer for framing a scheme. The averments made in the plaint *prima facie* satisfied the requirement of the suit filed under Sec.92, C.P.C. The merits of the issue will not arise at the stage of granting leave or refusal to grant leave under Sec.92, C.P.C.

In *Abdul Salam Rowther v. State Bank of India, represented by its Manager, Villupuram*, (1993)2 M.L.J. 124, the court has held that the O.5, Rule 17, C.P.C., states that where the serving officer after due and reasonable diligence, cannot find the defendant who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides and shall then return the original to the court with a report endorsed thereon stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person by whom the house was identified and in whose presence the copy was affixed.

It is held in *Paul Samuel alias Paulraj Samuel and another v. Koil Pichai Anandhadurai*, (1993)2 M.L.J. 109, that in the instant case, the respondent wanted to examine two witnesses on commission because they were sick and infirm. So, it is incumbent on the part of the court to find out whether the witnesses sought to be examined on commission were unable to attend the court because of sickness and infirmity and then only appointment of an advocate-commissioner to examine them on commission would arise. But the court below has stated in its order that it is not possible to decide as to whether the witnesses are keeping good health or whether they are sick, as if it is not necessary. But it is *sine qua non* before passing an order of appointment of an advocate-Commissioner to examine whether the witnesses are keeping good health or not. But the court below without deciding the main issue and when that aspect has not been decided, ordered appointment of a Commissioner and such an order cannot be sustained and has to be necessarily set aside. Such a case would fall under Clause (b) of the Proviso to Sec.115 of the C.P.C., and a revision petition against the order would be maintainable.

The court has held in *Subramania Odyar and others v. Govindammal and another*, (1993)2 M.L.J.

129, that the appointment of a receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the person seeking the appointment of a receiver is exposed to manifest peril. Therefore, this exceedingly, delicate and responsible duty has to be discharged by the court with the utmost caution and only when the five requirements embodied in the words 'just and convenient' in O.40, Rule 1, C.P.C., are fulfilled by the facts of the case under consideration. See *Krishnaswami v. Thangavelu*, A.I.R. 1955 Mad. 430. The appointment of a receiver is made to preserve the property pending litigation to decide the rights of the parties or to prevent the scramble among those entitled. It is necessary to allege and prove some peril to the property. The court by taking possession of the property at the instance of the plaintiff may be doing irreparable wrong to the defendant. If the plaintiff should eventually fall in establishing his right against the defendant, the court may by its interim interference cause mischief to the defendant for which the subsequent restoration of the property may offer no adequate compensation. It is true that the court has got absolute discretion in the matter of appointment of receiver. But the discretion cannot be exercised in an arbitrary and in an unreasonable manner. It has to be exercised cautiously, judicially and according to well established legal principles. In the instant case, it is evident that the order of the trial court appointing a receiver is unsustainable.

In *T. Doraiswami v. Lakshmi and another*, (1993)2 M.L.J. 169, it has been held that as per O.21, Rule 66(2)(f) every other thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property can be given. The valuation of the property given by the court officer/amin would be a material for a purchaser to note in order to judge the nature and value of the property. One thing is that there is no bar or prohibition to note the valuation of a court officer/amin of the property. The second thing is that such a note or valuation of the court officer/amin regarding value of the property would come within the ambit of O.21, Rule 66(2)(f). So, it is clear that mentioning of the value given by the court officer/amin would not at all make the sale

proclamation defective in the eye of law.

None of the provisions in the Civil Procedure Code and particularly O.21, oblige the court officer to inform the court at every stage when the property could not be sold at the valuation given by the judgment-debtor and then get directions and then further proceed with the auction proceedings.

It is held in *Devagiri Plantations Ltd., Nagercoil and another v. State of Tamil Nadu*, (1993) 2 M.L.J. 193, that no doubt the powers of remand under Rule 23 of O.41, Civil Procedure Code are wide enough to take in not only the cases where the trial court had decided the cases on the preliminary point but also the case where the trial court had decided all the issues after considering the entire evidence on record and when the appellate court in the interest of justice feels that remand was just and proper. But the conditions prescribed for the exercise of the power of remand under O.41, Rule 23, Civil Procedure Code are mandatory and not mere formality. To arrive at a finding on the material on record that the judgment of the trial court is erroneous and is liable to be reversed or set aside is a condition precedent for the appellate court to pass an order of remand under O.41, Rule 23, Civil Procedure Code. It is settled law that where a suit has been disposed of by a trial court on an issue, the appellate court cannot make an order of remand for fresh disposal of the suit unless it reverses the decree of the trial court. In other words, the appellate court should come to the conclusion that the judgment and decree of the trial court cannot be sustained before it can think of remanding the suit for fresh disposal. The question whether it is in the interests of justice to remand the case would arise only after the appellate court comes to the conclusion that the judgment and decree of the trial court are not sustainable and the appellate court reverses the same.

In *S. Mani v. N.G. Mani and others*, (1993) 2 M.L.J. 368, the court has held that apart from the fact that Sec.10, Civil Procedure Code will apply only in the case when the two proceedings in question are suits, Sec.10 only contemplates stay of trial of a suit in which the matter in issue is directly and substantially in issue in previously instituted suit, but here the T.R.A. proceeding is not a previously

instituted proceeding, but a subsequently instituted one. Therefore, it is clear that Sec.10 will not apply looking at from any angle.

It has been held in *S. Janakardas, Prop. M/s. Vijayan Saw Mills and Wood Works, Palliyadi v. C.M. Raj Mohan*, (1993) 2 M.L.J. 371, that the provisions of Rule 11 of O.38 of the Code of Civil Procedure provide that where a property is under attachment, by virtue of attachment having been made before judgment under the said order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a reattachment of the property. If that be the position and if, in such a case, there need not be in any request for an attachment once over again at the time of filing an execution petition, it cannot be contended that a second execution petition cannot be entertained or proceeded with unless a reattachment is sought for. There is nothing in the provisions contained in Rule 11 of O.38 to confine its application to the first execution petition or to exclude its operation and application to any subsequent execution petition filed after the termination of the first execution petition *de hors* the manner or cause for which the first execution petition came to be terminated.

On the very face of the language employed in Rule 57 of O.21, Civil Procedure Code, it has relevance and concern with a case where any property has been attached in execution of decree and the court for any reason passes an order dismissing the application for the execution of the decree and Sub-rule (2) of Rule 57 is part and parcel of Sub-rule (1) though it indicates the consequences of a failure on the part of the executing court in passing either way an order on the fare of an earlier attachment effected in execution proceedings initiated for the execution of a decree. Consequently, the provisions contained in Sub-rule (2) of Rule 57 of O.21, Civil Procedure Code cannot be allowed to supersede a specific stipulation contained in Rule 11 of O.38, nor could the said provision be dovetailed into O.38, Rule 11, Civil Procedure Code.

In *S. Govindasamy Naidu and others v. Poorna Valli and others*, (1993) 2 M.L.J. 390, the court has held that it is now well-settled law that worshippers in the temple can maintain suit for the

purpose of preserving the properties endowed to the temple or otherwise.

It is held in *Thirugnam v. M.Kulasekaran*, (1993)2 M.L.J. 380, that it is well known that O.9, Rule 9, Civil Procedure Code read with Sec.141, Civil Procedure Code provides for setting aside the dismissal of the suit or the petition as the case may be, where the suit or the petition as the case may be, where the suit or petition is wholly or partly dismissed under Rule 8 of O.9. What the said Rule 8 provides is that where the defendant (or respondent appears and the plaintiff (or petitioner) does not appear when the suit (or petition) is called on for hearing, the court shall make an order that the suit (or the petition) be dismissed. So, O.9, Rule 9, Civil Procedure Code will come into play when there is default in the appearance of the plaintiff or the applicant, as the case may be and not when there is default in the payment of the amount directed to be paid by the court as condition for restoration of the suit or the petition as the case may be.

In *M/s.Espee Agencies and others v. State Bank of India, Tiruchirapalli*, (1993)2 M.L.J. 377, the court has held that Rule 10(c) of O.26 of the Civil Procedure Code contemplates the sale of movable property even before the passing of a decree and pending the determination of the suit. In this case, the goods cannot be conveniently preserved till the end of the suit as the value will go down considerable if the goods are kept idle. The defendants having expressed their inability to sell the goods and giving the value of the plaintiff have surrendered the goods already to the plaintiff. Hence, there is no difficulty in holding that this is a fit case in which the goods should be directed to be sold even before the determination of the suit.

The court has held in *The Union of India represented by the Steel Authority of India Ltd., Salem Steel Plant, Salem v. Kuppayammal and another*, (1993)2 M.L.J. 415, that when there is a change of law, decisions rendered prior to the change of law cannot be pressed into service for putting forth a plea of *res judicata*.

In *Kuppan v. S.A.Kuppammal*, (1993)2 M.L.J. 441, it has been held that it is apparent that for the purpose of Sec.24 of the Civil Procedure Code

'proceeding' is one which was already taken on file and pending before a court for trial or disposal. Trial or disposal of a suit, appeal or a proceeding would pre-suppose that the suit, appeal or proceeding was already taken on file. In this view of the matter, a petition under Sec.24 of C.P.C., would not be maintainable with regard to matters, before they were taken on file.

It has been held that in *K.A.Kunjalu v. V.V.Jose*, (1993)2 M.L.J. 454, it is well known that with reference to interest *pendente lite*, that is from the date of the suit till the date of the decree, it is left to the discretion of the court to come to a decision as to what is the reasonable rate of interest and then grant it. So with reference to interest *pendente lite* the court in its judgment, must have said, in the present case, what is the reasonable rate of interest to be allowed for the abovesaid period. But in the present case, there is absolutely nothing in the judgment as to how the abovesaid discretion has been exercised by the court below. In fact, the judgment even according to the counsel for respondent is totally silent about this aspect. When there is such an omission on the part of the court below with reference to the grant of interest *pendente lite*, it is the judgment, if at all which has to be corrected either under Sec.152 of the Civil Procedure Code or O.47, Rule 1, Civil Procedure Code or by filing a regular appeal which ever course is in accordance with law. Without doing that the respondent has filed the present petition to amend the decree. The decree can only be drafted in accordance with the judgment. The judgment only grants 6% interest. It does not speak of 24% interest anywhere. The impugned order allowing amendment of the decree is set aside.

In *N.Anandan v. Ayyanna Gounder Memorial Trust represented by its Trustee C.B.Nanjappan and others*, (1993)2 M.L.J. 493, the court has held that the permission referred in Clause 2 of Rule 8 of O.1, Civil Procedure Code is the permission of the court under Clause 1 of the said Rule which may be sought for by a plaintiff. So only after permission spoken to under Clause 1 is given the court gives notice of the institution of the suit to all persons inferred. So when the court gives such notice it can be inferred that the abovesaid permission has been granted by implication.

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An order for appointment of receiver to protect and preserve the suit trust properties could be made by a court even pending disposal of the application for leave under Sec.92, Civil Procedure Code. No doubt in contract it may also be noted that the language of O.39, Rule 1, Civil Procedure Code indicates that the temporary injunction thereof can be granted.

The Bench has held in *M.Anandan v. Ayyanna Gounder Memorial Trust represented by its Trustees, C.B.Nanjappan and others*, (1993)2 M.L.J. 533, that the object of the provisions contained in Sec.92, Civil Procedure Code is to ensure that the allegations in the plaint are not *prima facie* baseless or frivolous or reckless with a view to safeguard the interest of the public trust and the trustees. Therefore, necessarily the court in which the application seeking leave if filed has to look into the plaint. Consequently, the plaint has to be filed along with the application seeking leave. Therefore, filing of the plaint along with the application seeking leave cannot be considered to be irregular. The court has to *prima facie* see and satisfy itself as whether the allegations made in the plaint are not frivolous or reckless and they raise a triable issue that the persons who have applied for leave having regard to their antecedent only intend to harass the trust. For this purpose, it is not always necessary for the court to issue notice to the defendants. Leave to institute the suit can be granted without notice to the defendant. As observed by the Supreme Court, granting of leave without notice is not invalid. Normally, the trial court should give notice to the defendant before granting leave to file the suit under Sec.92, Civil Procedure Code. However, in appropriate and urgent cases where the circumstances of the case warrant the issue of interim orders for the grant of which the pendency of a suit is a condition precedents as in the case of grant of order of *ad interim* injunction under O.39, Rule 1, Civil Procedure Code the court can grant leave to file to the suit under Sec.92, Civil Procedure Code, even without notice to the defendant provided the court is satisfied, *prima facie*, that the suit is not frivolous and it is not intended to harass the trust, that it raises issues. In such cases, where leave is granted to file the suit without notice to defendant, liberty must be reserved to the defendant to file an application for revocation of the leave already granted.

There is no dispute that once the court holds that grant of leave is necessary for instituting the suit under Sec.92, Code of Civil Procedure the court cannot without granting leave proceed to pass an interim order for the passing of which there must be a validly instituted suit. But in the light of the finding recorded by this Court that have taken place subsequent to the order dated 6th August, 1982 cannot be held to be *non est*, because it has been held that the leave must be deemed to have been granted from that date.

In *T.R.Sriram v. K.M.Duraibabu and others*, (1993)2 M.L.J. 574, the Bench has held that the injunction is sought for against the Bank and the prayer is to restrain the bank from acting upon the election. How can a Bank be restrained unless the election is declared to be invalid? If the Directors who are elected had been impleaded as parties and if an injunction has been sought for against them restraining them from functioning that would have been a different matter. But without impleading them an injunction cannot be obtained against the Bank not to act upon the election. The application for injunction is not maintainable.

It is rightly pointed out by the learned counsel for the Bank and the Directors that unless the balance of convenience is shown to be in favour of the grant of injunction, the court should not grant the relief in an interlocutory application even if strong *prima facie* case is made out.

It has held that in *Veerappan v. Kolanda Gounder*, (1993)2 M.L.J. 672, in every suit for injunction, there may necessarily be an application for interim injunction as the plaintiff will be in need of some interim relief. Such interim relief has to be granted only on the basis of *prima facie* case made out by the plaintiff. In the present case, in spite of several opportunities having been given and the petitioner having taken a long time for filing counter, the petitioner did not choose to file a counter affidavit. Hence, the court thought it fit to grant an interim injunction. In particular it has to be seen that the injunction is one to protect the effecting of repairs to the tiled roof and the rainy season having approached, the respondent's interest should necessarily be protected so that he will not suffer by a leaking roof. It is only in those circumstances, the interim order has been passed. Hence, there is

no merit in the contention that the main relief in the suit has been granted before the trial.

Constitution of India: In *A.M.Jain College by Honorary Secretary, Madras v. Government of Tamil Nadu and another*, (1993)1 M.L.J. 140, the court has held that any preference given to the religious minority candidate in their own institution cannot be a discrimination falling under Art.29(2) of the Constitution of India. The institution in answer is established for the transit of the Jain community and if they are prevented from admitting their own community candidate, the very purpose of establishing the institution would be defeated. Minority institutions are entitled to admit their candidates by preference or by reservation. They are also entitled to admit them to the exclusion of all others and that right flows from the right to establish and administer the educational institutions guaranteed under Art.30(1) of the Constitution of India. The State can lay down reasonable conditions for obtaining and for admission of students in their institutions, but the State has no right to compel the minority institutions to give up their right under Art.30(1) of the Constitution of India.

The Court has held in *R.Parthasarathy v. The Union of India*, (1993)1 M.L.J. 257, that the public interest litigation does not mean that any one can institute proceedings anywhere and that too a writ petition for any cause or purpose irrespective of the fact whether he has any semblance of interest either in his personal or representative capacity in the subject matter concerned or involved in the case. Courts have been encouraging public interest litigation deviating from the normal rule of *locus standi* and the principle of personal grievance or personal injury only in respect of matters where it involved denial of fundamental rights to innocent citizens who cannot protect themselves or where it is espouse the cause of some helpless individual or representative group who have no vigilance or where withal or the required stamina to have recourse to courts and to fight to secure relief for themselves. Except in such extraordinary situations entertaining of writ petitions on any and every issue at the instance of anyone from the public irrespective of such matter is not to be countenanced. Otherwise, it will lead to serious repercussions and encourage all types of unethical litigation which is to be otherwise severely repelled by Courts of Justice.

In *Mina Parikh v. Pondicherry Planning Authority, Annanagar, Pondicherry represented by its Member-Secretary and others*, (1993)1 M.L.J. 550, it has held that just because the Rules provide an appeal against an order, the petitioner cannot be prevented from invoking the jurisdiction of this Court under Art.226 of the Constitution of India. The existence of an alternative remedy could only be availed for the purpose of exercising discretion of this Court and it is not a bar to the filing of the petition.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorarified mandamus*.

The court has held in *R.Sarojini v. Superintending Engineer, World Bank Circle, Tamil Nadu Housing Board and another*, (1993)1 M.L.J. 659, that in the present case inasmuch as the petitioner not only suppressed material facts, furnished misleading statements to the authorities, but also in a dexterous fashion executed such a fear before this Court also in the affidavit filed in support of the application, in order to put forward a case of violation of principles of natural justice and obtained successfully interim relief with the oblique motive of squatting over the property all along that is to say for ten years from 7.10.1982, the date on which the impugned order was passed. Since the petitioner revelled in suppression of material facts and furnishing misleading statements merits whatever she may have cannot at all be looked into especially when the discretionary jurisdiction of this Court under Art.226 of the Constitution of India is based on justice equity and good conscience. It was held in *Tvl.Pattukkottai Azhagiri Transport Corporation Ltd., Rangapuram, Vellore v. Tvl.V.K.Velayutham and Sons, Imperial Motor Service, Vellore and others*, (1993)1 M.L.J. 240, that it has been repeatedly held that for maintaining a writ petition, the petitioner should be a person aggrieved and even in cases of statutory violations, a writ cannot be entertained at the instance of a person who is not aggrieved. Mere violation of the provision of law is not sufficient to enable the third party who is not aggrieved to challenge the order in question. The *sine qua non* is a public injury.

In *D.S.Ravindradoss v. The Government of Tamil Nadu represented by its Secretary to Government, Health, Indian Medicine Homeopathy and Family Welfare Department and others*, (1993)1 M.L.J. 179, the court has held that it is well settled that principles of natural justice cannot be put into straight jacket formula and principle is flexible. It varies from case to case and depends upon the facts and circumstances of each case, nature of right which may be affected.

To entertain a petition as a 'public interest litigation', there should be a breach of public duty or violation of some provisions of the Constitution. The weapon of 'public interest litigation' as a safeguard must be utilised and invoked by the court with great deal of circumspection and caution. While it is the duty of this Court to enforce fundamental rights it is also the duty of this Court to ensure that the weapon under Art.226 of the Constitution should not be misused or permitted to be misused. This Court has to protect the society from the so-called 'protectors'.

The court has held in *V.Tamil Selvan v. The State of Tamil Nadu represented by its Secretary, Industries Department, Madras and others*, (1993)1 M.L.J. 26, that the remedy under Art.226 of the Constitution is an extraordinary and discretionary remedy. The High Court would be fully justified in refusing to exercise its discretion in favour of a person who has abused the process of court and suppressed material and relevant factors and obtained orders from the High Court. It is on the strength of such orders the petitioner is now claiming relief in the present writ petitions. The court should not be a party and extend its helping hand to a person who has played a fraud on court.

The petitioner has not come to court with clean hands and failed to disclose material facts. If all the relevant facts and mentioned in the present writ petitions, the court would not have even entertained the writ petitions. The petitioner has been misleading the court and obtained favourable orders and is trying to mislead the court further. Hence, this Court should decline to grant any relief to the writ petitioner in the exercise of its jurisdiction under Art.226 of the Constitution of India.

The Bench has held in *M.Shakur Chathik (Minor) represented by his father and natural guardian A.Mohammed Abdul Habeeb v. Association of Private Schools affiliated to the Central Board of Secondary Education represented by its President v. Venkatachalam and others*, (1993)1 M.L.J. 125, that a judgment of the court is final to appeal and if there is any mistake or error therein is found, it is corrected by the appellate court or by way of review in accordance with the procedure prescribed therefor and constructively recognised by the courts in India and accordingly applied to the writ proceedings. The decision of the court in the case of *Mayavaram Financial Corporation Limited, Mayiladuthurai v. The Registrar of Chits, Pondicherry*, 1991 Writ L.R. 519, completely rules out any collateral review and interference thus in the order or directions issued by a Bench of the court. The collateral proceedings unless are in the nature of review petitions are incompetent and no court can make any order of any kind in such proceedings whether a single judge or a larger Bench. A judge sitting in a collateral proceeding can go into the question of any *obiter dicta* or the judgment being *per incuriam* only for the purpose whether he would be bound by one or the other judgment as the rule of *obiter dicta* and *per incuriam* are the rules attached to the *ratio decidendi* of the judgment and thus for deciding whether one or the other judgment is a binding precedent and not for the purpose of review of any of the two judgments on the plea that one is wrong and the other is right.

In *V.Sudhakaran and another v. The Corporation of Madras and another*, (1993)1 M.L.J. 153, it has held that it is well-settled that any violation of any non-statutory direction cannot be made a cause of action to approach the High Court under Art.226 of the Constitution unless the provisions of the Constitution are violated especially Arts.14 and 16 of the Constitution.

The Bench has held in *L.Lakshmikantham v. The Tindivanam Co-operative Urban Bank Ltd.*, (1993)1 M.L.J. 380, that it is the settled position of law that where the disciplinary authority and the enquiring authority are different authorities and when the enquiry officer sends a report of the enquiry proceedings to the disciplinary authority, the delinquent is entitled to a copy of the report of the enquiry officer and the failure on the part of the

disciplinary authority to send a copy of the report of the enquiry officer to the delinquent along with the second show cause notice proposing the punishment would amount to violation of the principles of natural justice and will render the final order illegal.

In *Babian and another v. Lt.Col. Offg. Col. Q.Branch H.G., Tamil Nadu and Kerala Sub Area, Madras*, (1993)2 M.L.J. 265, it has held that it is seen from the Regulations for the Army and the standing operating procedure that the petitioners herein (Staff of T.N. and Kerala Sub Area C.S.D. Canteen), are not Government servants and that they are not entitled to the protection under Art.311 of the Constitution of India. So they have to approach the Central Administrative Tribunal. It cannot be said that they are part of the defence personnel. C.S.D. canteen is a shop almost run by persons controlled by commanding officers and the petitioners are employed under their control. Justice because the appointment order is being made by Headquarters office, it cannot be said that the petitioners are Government servants or belong to Military service.

A power is vested in the court to issue a writ against a private body or even an individual. If the facts of the case are looked at, there can be no hesitation to hold that the termination orders against persons who put in a service of several years which are impugned in the cases have got to be set aside as the monstrosity of the situation and other exceptional circumstances necessitate the issuance of writ in these cases.

The court has held in *V.Kasturi and others v. The Managing Director, State Bank of India, Central Office, Bombay and others*, (1993)2 M.L.J. 473, that it may be true that the State Bank of India is a State coming under Art.142 of the Constitution of India. But surely, it is not a Government of India institution. The employees of the State Bank of India cannot be said to be employees of Government of India. If the question is put whether Art.311 will be applicable, the answer will be that it will not apply to the case on hand. That means that the petitioners are not Government employees. As such there is no justification for the petitioners claiming parity with the employees of the Government.

The Bench has held in *C.Stephenson Roobasingh, Manager and Correspondent, Ebenezer Teachers Training Institute for Women, Poonagram, Tuticorin v. State of Tamil Nadu represented by Secretary to Government, Department of Education, Science and Technology, Madras and others*, (1993)2 M.L.J. 311, that on an analysis of the rulings of the Supreme Court, the following principles can be culled out: (1) The fundamental right declared by Art.30(1) of the Constitution is absolute in terms, but subject to regulatory measures; (2) There is no fundamental right under Art.19(1)(g) of the Constitution to establish or administer an educational institution if recognition is sought therefor; (3) The institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms; (4) There is no fundamental right to recognition and any institution seeking recognition should abide by the regulations prescribed by the State as conditions therefor; (5) The minority institutions must be fully equipped with educational excellence to keep in step with other institutions in the State; (6) The regulations framed by the State cannot abridge the fundamental right of the minorities and they should be in the interests of the minority institutions themselves and not based on State necessity or general societal necessities; (7) The regulations should be with a view to promoting excellence of educational standards and ensuring security of the services of teachers and other employees of the institutions and in the true interests of efficiency of institutions discipline, health sanitation, morality, public order and the like; (8) even unaided institutions are not immune from the operations of general laws of the land such as contract law, tax measure, economic laws, social welfare legislations, labour and industrial laws and similar other laws which are intended to meet the needs of the Society.

It is a fallacious to compare a teacher training institution with other educational institutions. Teachers training institutions form a class by themselves. The qualifications required for the persons who handle the trainees in such institutions with a view to make them fit to become teachers should be necessarily higher than the qualifications fixed for the teachers in the other institutions. As a matter of policy, the Government has fixed higher qualification for meeting

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the standards of teacher training institutions. The action of the Government is well within the parameters of Art.30(1) of the Constitution.

In *The Tamil Nadu Freedom Fighters' Association (Regd.) v. The Government of Tamil Nadu by its Chief Secretary*, (1993)2 M.L.J. 254, it has held that the free bus travel concession in the buses of the State Transport undertakings in terms of the existing Government Orders would ensure to all the recipients of the pension irrespective of the facts whether such recipient was himself the person who actually participated in the freedom struggle or in receipt of the pension as the eligible dependant of such participant.

Whatever may be the motivating factor in passing the Government order dated 9.2.1992 the increased payment ordered is not made subject to any condition depending upon the future increase for the rate of Central Government pension nor the rate is to be inter-dependent or in any manner linked with the subsequent increase or decrease of the quantum or rate of Central pension. There is, therefore, no room for claiming any *pro tanto* reduction with the increase in the scale of central pension. Consequently as the orders stand there is no room for any doubt or scope for any clarification in implementing the orders dated 9.8.1992 which in the court's view, is specific and clear in its terms and effects.

The Bench has held in *Tamil Nadu Minority Educational Institution Protective Council v. The State of Tamil Nadu represented by its Secretary, Education Department and others*, (1993)2 M.L.J. 309, that this writ petition is not maintainable as it is really one for interim relief pending final disposal of case before the Supreme Court of India. If the petitioner wants any interim direction pending a case before the Supreme Court it should move only the Supreme Court and not file a Writ petition in this Court.

When the institutions themselves have filed the writ petitions and failed to obtain an interim order in this Court, it is not possible for their agent or representative to file a subsequent writ petition for the very same relief seeking an order from this Court.

In *V. Gunasekaran and others v. The Registrar of Co-operative Societies and others*, (1993)2 M.L.J. 525, the court has held that the decision of the recent Full Bench of our High Court has held that no writ petition is maintainable against a co-operative society. It cannot be gainsaid that the 3rd respondent is a co-operative bank registered under the Tamil Nadu Co-operative Societies Act. Applying the ratio laid down in the decision of the Full Bench it has to be held that this writ petition is not maintainable and this same is liable to be dismissed.

The court has held in *Prof. C.R. Srinivas, Social Worker and Public Interest Litigant, Madras-35 v. The Chief Secretary, Government of Tamil Nadu, Fort St. George, Madras-9*, (1993)2 M.L.J. 100, that under sub-clause (2) of Art.1 of the Constitution of India, the States and the territories thereof shall be as specified in the first schedule. In the First schedule Item 7 is shown as 'Tamil Nadu'. Originally it was called 'Madras'. The name of 'Madras' has been changed to Tamil Nadu by the Madras State (Alteration of Names) Act (LIII of 1968). In the fourth schedule also, read with term 'Tamil Nadu' appears. As such, it is seen that even in the Constitution of India itself for the term spelling in 'Tamil Nadu' alone is used. When the Constitution itself used the word 'Tamil Nadu', the court does not think the petitioner can ask for a direction to issue to the respondent as asked for a change in the spelling the term 'Tamil Nadu' as 'Tamil Nadu'. If any of such thing has to be done, it has to be done only by Parliament and not by anybody else, more so, by the respondent before this Court. The effect of articles of the Constitution and Act LIII of 1968 cannot be changed as asked for by the petitioner, by an administrative order. If the spelling of the term has to be changed stated it cannot be done by issuing a writ of *mandamus*. The writ petition cannot be entertained as a public interest litigation. The court is also of the view that the issue raised in this writ petition is not justiciable. The jurisdiction under Art.226 of the Constitution being discretionary, the discretion cannot be exercised in favour of the petitioner on the facts and circumstances of this case.

Evidence Act: The Bench has held in *R. Anandavalli v. Alagammal*, (1993) 1 M.L.J. 15, that admission is the best form of evidence and the plaintiff can certainly rely on it. In that case, no attempt whatsoever has been made by the defendants to show that the said admission was wrong. When the defendants themselves have not given any explanation, the court cannot on some presumption think that the admission may not be true. It is held in *A. Sankaralingam v. Anunachala Reddiar*, (1993) 1 M.L.J. 472, that the objection regarding the mode of proof of a document has to be taken at the time when it is being exhibited and not at a later stage. Where a piece of evidence even assuming not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of litigation. The Bench has held in *Chidambaram Pillai v. Muthanmal*, (1993) 1 M.L.J. 535, that a rule of *non est factum* which in full reads *non est factum, scriptum, predictum non est factum* rule has existed as a rule of law in England as well as in India and there has been a good deal of improvement in this behalf, while applying the rule of burden of proof in evidence to women in India. A section of womenfolk in view of the social conditions of the times are presumed to have imperfect knowledge of the world. It is thus imperfection of the knowledge of the world that the law throws round such women, a special check of protection which demands that the burden of proof shall, in such a case, rest not with those who attack but with those who found upon the deed and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by but was explained to and was really understood by the grantor. In such case it must also of course be established that the deed was not signed under duress but arose from the free and independent will of the grantor. A pardanashin may not be illiterate but she still may be ignorant in the sense that she has an imperfect knowledge of the world and she is practically excluded from social intercourse and communication with the outside world. If it is so for this reason that they are taken at persons suffering from disabilities which make them dependent upon or subject to the influence of others, the illiterate women who for the reason of social compulsion are required to move out the work in the field and elsewhere for livelihood cannot be said to be less disabled and deprived.

The court finds itself in complete agreement with the view that the special cloak of protection applied to pardanashin women has to be applied to illiterate women as well. The distinction as to the law of burden of proof in the case of pardanashin and illiterate women or the case where the rule of *non est factum* is applied and a case otherwise falling in the category of cases of undue influence and fraud in which initial burden has to be discharged by the person making the allegations before the *onus probandi* is applied has to be kept. In the former case, there is no burden of proof upon a woman who alleged that she was ignorant of the character and contents of the documents for the reason of illiteracy or she being a pardanashin women. It has to be presumed in such a case that she could have transferred her rights to the other only for the reason of fraud or undue influence. In the latter case, the burden shall be upon the person alleging undue influence and fraud. The onus will shift only when there is a clear pleading in this behalf with necessary particulars and the initial onus is discharged.

It is held by the Bench in *K. Varadhan v. Pattammal*, (1993) 1 M.L.J. 259, that the courts in India have, on the rule of evidence enshrined in Secs. 101 and 102 in Chapter VII of the Evidence Act, particularly in cases of woman in India who in some parts and some communities are pardanashin and in most parts of the country illiterate for the reason that they transact their business generally through malefolk only men always dominated women, and women lived a life dominated by men, this being the curse that always surrounded womenfolk even though law recognised their independent right, they failed invariably in exercising such rights, accepted that onus lies upon the defendant to show that there has been no fraud, undue influence or coercion in the transaction. In *Indirani Ammal v. E. Chandra*, (1993) 1 M.L.J. 339, the court has held that a combined effect of Secs. 107 and 108 of the Evidence Act would show that it is only upon proof that a person concerned has not been heard of for seven years by those who would have naturally heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms that he is alive. Again the learned single Judge has held in *Shailesh N. Shah v. The Regional Commissioner, Employees Provident Fund, Tamil Nadu and Pondicherry State*, (1993) 1

M.L.J., 328, has held that a careful analysis and consideration of Secs. 107 and 108 of the Evidence Act would go to show that if a person was shown to be alive within 30 years factum of death is to be proved and the burden lies upon the person who claims that such a person was dead. Likewise, when it is proved that a person has not been heard of for several years by those who would naturally have heard of him if he had been alive, the burden of proving that such a person is alive is on the person who affirms it.

In *Jayalakshmi Ammal v. K. Lakshmana Iyengar represented by Power Agent M. Jayaramiyar*, (1993) 1 *M.L.J.* 95, it is held that the court is not entitled to make surmises and assume anything contrary to the document. The court is bound to apply the presumption under Sec. 114 of the Evidence Act and hold that the will was presented for registration by the executant and registered properly in accordance with law.

The court has held in *Rizwan International represented by M. Moosa, Managing Partner v. The Union of India represented by its Secretary, Department of Commerce, New Delhi and another*, (1993) 1 *M.L.J.* 561, that the uniform view taken by all the High Courts and the Supreme Court is that the doctrine of promissory estoppel will be available as against Government action, though the said action has been taken in exercise of statutory power. There is also no doubt that the principle of estoppel is available against the subordinate legislature and delegated legislations which cannot be placed on the same pedestal as an enactment passed by the legislature in exercise of the plenary powers.

It has been held in *Kamakshi v. Minor Ramalingam alias Minusami and another*, (1993) 2 *M.L.J.* 17, that the birth extract of the plaintiff cannot be relied on to prove the parentage of the plaintiff, in other words, to prove the factum of marriage between the parties.

In *Alagiriswamy Naidu v. Dharmaraj Naidu*, (1993) 2 *M.L.J.* 462, it has held that when the certificate was not authorised by any provision of act, the proof of the contents of the same can be only by examination of the authority of the certificate or otherwise it cannot be looked into.

The court has held in *Varadara Reddiar and others v. The District Revenue Officer, Madurai and others*, (1993) 2 *M.L.J.* 662, that for such a statement occurring in the said order to be relied upon as a piece of evidence the primary requisite is that the order in which such statement or figure appears must be one admissible under the salient provisions adumbrated in any one of the Secs. 40 to 44 of the Indian Evidence Act. In the light of those sections, it goes without saying that the appellate order modifying the imposition of punishment on the delinquent karnam in the disciplinary proceedings instituted against him for tampering with the adangals cannot be stated to be an order falling either under anyone of Secs. 40 to 42 in the sense of the same not being *inter parties* nor an order *in rem* and not relatable to matters of public nature relating to the enquiry. If at all, it may fall under Sec. 43 and if it does fall it is conclusive evidence for or against all persons who are parties, privies and strangers of his own existence and legal effect as distinguished from the accuracy of the decision rendered. That is to say, all statements of facts referred to therein cannot be used as evidence in the case on hand being a subsequent one to decide the point relatable to the tenancy arising therein.

The Bench has held in *G. Amarendran and others v. State Bank of India*, (1993) 2 *M.L.J.* 500, that in the present case besides oral evidence, quite a few documents marked without objection are on the record and the plaintiff intends to rely upon the contents of such documents. In *P. C. Puroshotham v. S. Perumal*, A.I.R. 1972 S.C. 608, the Supreme Court has said that when a particular document is admitted in evidence without objection by the opposite party, the contents of such document are also admitted in evidence. Courts in India have not hesitated in taking contents of such documents into consideration, but two exceptions have always been noticed, namely, when genuineness of the contents or correctness of the contents is controverted, proof of contents, as required by Sec. 67 of the Evidence Act is insisted upon and such evidence is never taken as conclusive evidence. It is used for the purpose of corroboration or contradiction only.

In *S. K. Samiyappan v. The Idol of Sri Sellandi Amman at Sri Sellandi Amman Temple by its Executive*

Officer, Sri Kalyana Pasupatheeswarar Temple, Karur Taluk, Karur, (1993) 2 M.L.J. 469, the bench has held that the suit is based only on the promissory note. The promissory note does not fall in any of the clauses of Sec.23 of the Contract Act. Even if it is assumed that there was an ulterior transaction which is illegal and that resulted in the suit promissory note, the enforcement of the promissory note cannot be resisted as ground of illegality. The suit is filed *de hors* illegality and therefore it is maintainable. Whatever might have been the illegality in the agreement arrived at in the village panchayat, that does not vitiate the promissory note as such. Moreover nothing has been placed before the court to show that the agreement arrived at by the village panchayat is illegal or opposed to any provision of law.

The court has held in *Selvaraj and another v. Madheswaran and others*, (1993) 2 M.L.J. 385, that long cohabitation for over three decades and begetting as many as four children itself would show that they lived as husband and wife and as such no special evidence in this regard is called for.

The Bench has held in *C.Abdul Jabbar Sahib (died) and others v. C.Abdul Hafiz Sahib and others*, (1993) 2 M.L.J. 283, that under Secs.107 and 108 of the Evidence Act when the question is whether a man is alive or dead and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him, the burden of proving that he is alive is shifted to the person who affirms it. Sec.107 deals with the presumption of continuation of life whereas Sec.108 deals with the presumption of death. Both the presumptions under Secs.107 and 108 come into play after a suit is instituted. While initially the presumption of death extends over the whole period when the person is unheard of. There is no warrant on the language of Sec.108 for the view that if the exact date of death is not proved, the earliest date on which the death could be presumed is the date on which the suit is filed. The exact time of death is not a matter of presumption but is a matter of evidence the onus of proof being cast not under Sec.108, but under the

general principle of burden of proof.

Hindu Law: Hindu Adoptions and Maintenance Act: The Bench has held in *R.Ashok and another v. Bhagavathi Ammal (deceased) and another*, (1993) 1 M.L.J. 492, that there is a strong reason for accepting the right of a widow to adopt a son or daughter for herself even though there may be a child to her co-widow through her husband for the reason of the concept of full blood, half-blood and utrine blood relationship that have been one of the voted postulates of the rule of inheritance when two persons stand together to inherit certain property. A son of the co-widow is the step-son to a Hindu widow and it is different in the case of inheritance of the properties exclusively going to the step-son in the same society as he is equal to her son when the devolution as contemplated under Sec.15 of the Hindu Succession Act is confined to the sons and daughters including the children of predeceased son or daughter and the husband and consequently upon the heirs of the husband. Chapter II of the Hindu Adoptions and Maintenance Act, 1956 which regulates Hindu Adoptions by a male or female Hindu does not in any way inhibit a Hindu female who is not married and if married whose marriage has been dissolved or whose husband is dead or has completely renounced the world or has ceased to be a Hindu or has been so declared by a court of competent jurisdiction from adopting a child either male or female of her husband has left a child through another wife. If such an inhibition is to be found, then the courts will have to read in Sec.8 of the Hindu Adoptions and Maintenance Act, 1956 additional words and that only such female Hindu whose husband is dead and has not left a child through another wife can adopt. That will be a violation of the provisions of in Secs.8 and 9 of the Act. The conditions in Sec.11 leaves no room to doubt that in the case of the adoptive father, he should not have a son, son's son or son's son's son (whether by legitimate blood relationship or by adoption living at the time of adoption and in the case of adoptive mother she should not have son or son's or son's son or son's son's son whether by legitimate blood relationship or by adoption) the right given to the adoptive mother is independent of the right given to the adoptive father. This right she can exercise not on the basis of the existence of a son to her husband but a son to herself. A son to a co-widow

may be a step-son to her but can be accepted as a son for the purpose of adoption. As a result of the adoption the child will not only become entitled to inherit the properties exclusively belonging to his/her father but also get all such rights that would accrue to a son to the adoptive mother because such a son enters into the coparcenary as found by the Supreme Court in the case of a joint family as also otherwise entitled to intestate succession to the estate of her mother's husband who becomes the fictional or legal heirs *Marriage*. The court has held in *V.G.Shamsundar Sahib Sah v. Sumitra Bai*, (1993)1 M.L.J. 622, that under Sec.11 of the Hindu Marriage Act, 1955 any violation of Sec.5(iii) is not included as a void marriage. While so, there is no point in saying that there is no lacuna in the Hindu Marriage Act and the courts have to decide the aspect of that the marriage is void or voidable. It is the function of the legislature courts are always anxious to keep the marriage intact while so when the statute does not provide for nullity of marriage or voidability of marriage on such a ground, courts will not go to the extent of holding the marriage void on this ground. The Bench has held in *Radhika Konel Parekh v. Konel Parekh*, (1993)1 M.L.J. 163, that a mere glance at the provisions show that in a suit seeking divorce, the court can make provisions in the decree itself with respect to the custody of the child and may after the decree upon application by petition filed for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree. In most of the cases custody orders have to be made for limited purpose. No minor can always be ordered to be in the custody of another, the limit being the statutory age of majority. Once however the question of custody of a minor child is an issue on fact and law in the proceedings before a Family Court, if the same issue is brought between the same parties in another court, the judgment of one court delivered earlier has to operate as *res judicata* in the other. In *Seetharaman v. Vaduvambal*, (1993)1 M.L.J. 175, a single Judge has held that in view of Sec.28(1) of the Hindu Marriage Act, it can be stated that the decree passed by the trial court for dissolution of marriage under Sec.3 is a decree which is appealable but it cannot be so in the case of the order passed by the trial court under Sec.27 of the Hindu Marriage Act. The said

order is only an order passed in an interim application and not a decree. A combined reading of Sec.28(1)(2) makes it abundantly clear that appeals can be only from orders of personal nature under Secs.25 and 26. Since the order passed for return of jewels is an order passed in an interim order and not of a personal nature as contemplated under Sec.28 it can be said that it is not appealable. Hindu Minority and Guardianship Act (XXXII of 1956). In *Karuppannan v. Sudhamathi*, (1993)2 M.L.J. 293, the court has held a combined reading of the provisions in both the Acts (The Hindu Minority and Guardianship Act, 1956 and Guardians and Wards Act, 1890 would indicate that the custody of an infant who has not completed the age of five years shall, ordinarily, be with the mother. And the paramount consideration in deciding the custody of the earlier Act which are inconsistent with the later enactment shall be deemed to have been repealed. And it is significant to note that Act XXXII of 1956 nowhere mentions that the custody of the boy who has not completed the age of five years should necessarily be with the mother. So, considering the welfare of the child, the court must use its discretion and arrive at the conclusion. It is pertinent to note that there is a distinction between guardianship and custody based on the provisions of Sec.6 of the Hindu Minority and Guardianship Act, 1956. The abovesaid Section which purports to specify who the natural guardians of Hindu minor with reference to his person or property makes a distinction between guardianship and custody. The father of a minor is first declared to be the natural guardian in case of a boy or an unmarried girl only thereafter the claim of the mother is provided for. This is with reference to guardianship which in its ordinary connotation would take in custody and case of minor which would be equated to guardianship of minor girl custody by and control of the property which is really guardianships with reference to the property of the minor. The proviso to the section casts a special right to custody in favour of a mother in cases where the infant child has not completed the age of five years. In such a case, preferential claim for custody is conferred statutorily on the mother that would mean that father though he would still be the natural guardian of an infant child under Sec.6 would not be as of right entitled to the custody of the infant child if the child has not

completed the age of five years. It is thus seen from Sec.6(a) and the proviso thereunder that the statute contemplates the father being the natural guardian of an infant who has not completed the age of five years while the mother is entitled, ordinarily to have the custody of such a minor obviously, in such a case, the father would still be, for all practical purposes, the natural guardian as defined in Sec.4(c) of the Hindu Minority and Guardianship Act. The difference made even in the statute in Sec.(6)(a) makes it clear that it is not necessary in every case where the boy has completed five years, his custody must pass on to his father. So the provisions of the Act are no bar to entrust the custody of a five years old minor with the mother. The expression welfare of minor though has not been defined, yet undoubtedly has to be given a very wide meaning. It ought not to be measured by the money only or by physical comfort alone. It has many facets such as financial, educational, physical, moral and religious welfare. Hindu Succession Act (XXX of 1956). In *Ayyampertumal Chettiar (died) and others v. Manivel Chettiar and others*, (1993)1 M.L.J. 421, it is held that for Sec.14 to operate the Hindu woman concerned should have been legally possessed of the property in question on the date when Hindu Succession Act came into force. Again the Bench has held in *E.S.R.Packirisamy Pillai v. Vijayalakshmi and another*, (1993)1 M.L.J. 105, that such recognition of the pre-existing vertige of title under law and the nature of possession of property she had made, must be allowed to be enlarged under Sec.14(1) of the Act as it was not a ground coming to her under the testament with that there being any pre-existing right in her to succeed to the estate of her husband on his demise having a life estate. In *Sundara Bai v. Ponmani Town Panchayat Kanyakumari District and others*, (1993)2 M.L.J. 349, the language of Sec.29-A of the Hindu Succession Act is clear that it is manifest that the share of a daughter cannot be on a better footing than that of a son in co-parcenary property. It has been clearly and without any ambiguity stated in the section itself that the daughter shall have the same rights in the co-parcenary property as a son, while so when even a share of a son is liable for any debt which is not for immoral and illegal purpose, the share of a daughter is liable for such debt. In *Shanmuga Udayar v. Sivanandar and others*, (1993)2 M.L.J. 617, the Bench has held that when a specific

property is allotted to a widow in lieu of her claim for maintenance under an instrument which prescribes the restricted estate, the acquisition of property by her is only by virtue of a pre-existing right. Such an acquisition would not be within the ambit of Sub-sec.(2) even if the instrument allotting the property prescribing a restricted estate in the property. Sub-sec.(2) must be read only as a proviso or exception to Sub-sec.(1) of Sec.14 and its operation must be confined to cases where property is acquired for the first time as a grant without any pre-existing right under instrument, the terms of which prescribe a restricted estate in the property. The opening words of Sec.29-A(1) of the Act, no doubt indicate that there should be a joint Hindu family governed by Mitakshara Law in existence on 25.3.1989 in order that a daughter of a coparcener shall become a coparcener. If the family had ceased to be a joint family and got divided in status by reason of a preliminary decree or by a method known to Hindu Law the section will not apply.

Land Acquisition Act: In *C.Padma and others v. The Deputy Secretary to the Government (Ex-officio), Department of Labour and Co-operation, Government of Tamil Nadu and others*, (1993)1 M.L.J. 628, it is held that under the provisions of the Land Acquisition Act, once the land is taken possession, it vests with Government free of all encumbrances. It is seen from the averments made in the affidavit and from the letters written by Amalgamation Company that the lands were given to the company and that the said company was taken over by another company later. As such the lands which were handed over to the company originally were resumed and were leased out to another company. Nobody can prevent that. From the records before this Court, it is seen that the lands were with the Government as Government lands even under the common law, the lands are vested with the Government nearly 28 years ago. It is settled law under S.O.90 of 32 that no land shall be disposed of to any person which is no longer required for the public purpose for which it was acquired and if the land relinquished are likely to be again required for public purposes, it should be merely leased out for such term as may be considered desirable in each case.

The court has held in *Muthuswamy and others v.*

The State of Tamil Nadu represented by Secretary to Government Adi-Dravidar and Tribal Welfare Department, Madras and another, (1993) 1 M.L.J. 217, that it is beyond comprehension as to how the responsible authorities discharging statutory functions under the Act were very much indifferent in making due enquiries to ascertain about the heirs of the deceased owner and were so gullible to readily accept a claim by someone that the lands have been given to him by mutual and oral understanding. The person who made such a claim claimed to be the son-in-law of the erstwhile owner. Such contentions coming from responsible statutory functionaries cannot be either justified or sustained in a Court of Law. The authorities have miserably failed to verify properly about the heirs of the deceased pattadar and the fact that such heirs have not themselves come on record cannot be a valid plea in a case of nature involving the death of the only owner of the land or justify the issue of a notification or a declaration in the name of a dead person.

In *Saroja Sethu v. State of Tamil Nadu represented by its Secretary to Government, Revenue, Irrigation Department and others, (1993) 1 M.L.J. 440*, it has been held that the court has no hesitation in holding that there cannot be any acquisition for a public purpose when the land is being used for another public purpose. Once it is found that the co-operative society could be regarded as constituted for the benefit of the public and that in general building schemes were to be considered advantageous to the public and that even though the direct and immediate beneficiaries under the scheme might be individuals, it was public purpose or in benefit of the public generally any interference in the scheme of housing society by another acquisition will constitute interference in a public purpose there can be no public purpose which shall interfere with another public purpose and if there are two public purposes in conflict one which has proceeded ahead must be allowed to proceed further.

The court has held in *Jayarama Naidu and others v. The State of Tamil Nadu and another, (1993) 1 M.L.J. 634*, that it has been settled by now that there is no ambiguity of any kind in the principle that publication of primary Notification under Sec.4(1) of the Land Acquisition Act is mandatory

and not only the publication in the official gazette, but publication of the substance of such notification at convenient places in the locality is also mandatory.

In case where there is some defect in the notice of a sort that a court may think that the mandatory requirement of the publication of the substance of the notification under Sec.4(1) has not been complied with, the court shall not for the reason of non-compliance of this requirement alone nullify any acquisition proceedings unless it is shown that the petitioners have suffered for want of notice in the sense that they lost the opportunity to participate in the enquiry under Sec.5(1) of the Act for the reason of want of notice or could not make any representation in the case of urgency acquisition to the proper authorities to show that it was not a case for the acquisition of their lands. No remedy is extended unless it is required to redress an injury. Unless such injury is sustained, no remedy is required. The court may not for the reason of a mere non-compliance with the requirement of a mandatory provision like to interfere with a concluded proceeding unless the petitioners without such interference have suffered any legal injury.

The Bench has held in *S. Balasubramanian v. Special Tahsildar (LA) III, Maraimalai Nagar Scheme, Kattangulathur, Chingleput District and another, (1993) 1 M.L.J. 55*, that it is found that Sub-sec.(1-A) of Sec.23 contemplates the award of an amount calculated at the rate of 12% per annum on the market value for the period commencing on and from the date of the publication of the notification under Sec.4(1) in respect of such land to the date of the award or the date of taking possession of the land whichever is earlier. Prior to the Amendment Act, case law was replete even at the level of the highest court in the land striking down acquisition proceedings on the ground of prejudice caused by delay. The Amendment Act has brought in redeeming provisions and they, to a very great extent, ameliorate grievances with regard to delay. They provide adequate answers to this ground. The grievance expressed by the learned counsel for the petitioner to strike at Sec.11-A of the Act cannot be appreciated and sustained.

[To be continued]

In *Neyveli Lignite Corporation Ltd., represented by the Secretary Neyveli-I v. P.R. Govindarajulu and others*, (1993) 2 M.L.J. 523, the court has held that Sec.20(d) of the Land Acquisition Act provides that the court shall cause a notice specifying the day on which the court will proceed to determine the objection and directing their appearance before the court on that day to be served on the persons viz., the appellant and all persons interested in the objection and if the acquisition is not made for the Government the person or authority for whom it is made. It is not disputed that the acquisition in the instant case is not made for the Government and that the same is made only for and on behalf of the writ petitioner. The non-compliance of the statutory provision provided under Sec.20(d) of the Land Acquisition Act is fatal to the case. Hence the awards passed by the 3rd respondent without affording an opportunity to the interested person cannot be allowed to stand.

It has been held in *The Union of India represented by the Steel Authority of India Ltd., Salem Steel Plant, Salem v. Kuppayammal and another*, (1993) 2 M.L.J. 415, that Secs.18, 19 and 20 of the Land Acquisition Act occur in Part III of the Act which is under the heading 'Reference to Court and Procedure thereon'. Sec.18 provides for reference to court'. Sec.19 provides for 'collector' statement to the court. Thereafter Sec.20 comes in and provides for service of notice to the parties mentioned thereunder, specifying the day on which the court will proceed to determine the objection and directing their appearance before the court on that day. It clearly implies that the said notice was intended for bearing the objection of the parties mentioned thereunder before fixing enhanced compensation. At that stage notice was intended to the parties mentioned in Sec.20 of the Act. That stage has passed, an enquiry was held and enhanced compensation has been fixed. In view of the above, there is force in the submission that Sec.20 would come into play only prior to the fixation of the enhanced compensation. In this regard it is submitted by the learned counsel for the petitioner that in the statement of objects and reasons it is stated that this amendment Sec.20(d) is applicable to pending proceedings and so in an execution proceeding, the petitioner can claim impadment. While considering this sentence in

the statement of objects and reasons, the sentence prior thereto is also relevant and it reads as "As a result, such person or authority could not participate directly in the proceedings of the court and effectively assist the court in fixing the compensation reasonably..." It would clearly indicate that this amendment was made in Sec.20 so as to enable that party also to help the court in fixing the compensation reasonably. Taking that view of the matter, the court is clear that the words occurring in the sentence relied upon by the learned counsel for the petitioner viz., 'proceedings pending before any court' would only relate to proceedings pending for the fixation of the enhanced compensation and not thereafter. In this case, Sec.4(1) notification was made as early as in 1964. The parties affected by the notification would be left in a nebulous stage right from that date. If by virtue of this amendment made in the Act in 1990 the entire thing is unsettled that would lead definitely to injustice. In the opinion of the court, that was why in the statement of objects and reasons given in the Land Acquisition (Tamil Nadu Amendment) Act, 1989, it has been so stated' that this amendment was made so as to enable that party for whom acquisition was made to take part and assist the court in fixing the compensation reasonably. It cannot come at a later stage and putting forth contentions and unsettling the matter. It is also worthwhile to note that this amendment was not given any retrospective effect. That is also a factor which impels the court to come to a conclusion that this Sec.20(d) is not applicable at a stage subsequent to fixing of enhanced compensation. *Tenancy Laws: Tamil Nadu Agriculturists Relief Act (IV of 1938)*: It is held in *G.Kaliaperumal v. V.Annamalai Mudaliar*, (1993) 1 M.L.J. 306, that a reading of Sec.20 of the Act clearly discloses that the study under the said section is a must. The word used in the section is 'shall'. Hence, when an application is made by a judgment-debtor that he is an agriculturist coming under the definition of the Act and that a decree has been passed against him in respect of a debt which arose prior to 1.3.1972 and that the said decree is not in accordance with law as it has not taken note of the fact that the judgment-debtor is an agriculturist debtor entitled to the benefits of scaling down under the Act, then the only thing that can be done by a court which passed the decree is to stay the decree. It has nothing more to do or probe into the truth of what

the judgment-debtor says. That has to be done only when a judgment-debtor files a petition under Sec.19 of the Act before the court which is to execute the decree. Sec.20 of the Act also-enjoins that within 60 days of obtaining the order for stay, the judgment-debtor shall apply to the executing court under Sec.19 at the risk of the stay being vacated. Act IV of 1938 is a self-contained enactment providing for appeals being laid under the orders passed under the Act. There is no need for invoking any statutory provision under the Code of Civil Procedure, namely O.43, because Sec.25-A of Act IV of 1938 as amended by Act VIII of 1973 itself provides for appeal. It is, therefore, idle to discover any provision under O.43, C.P.C. for an appeal being laid, as no such provisions can possibly be found in that Act when already there is a provision in the Act itself for appeals. The Bench has held in *Ramaswamy and others v. C.S.Venkatasubramani Iyer*, (1993)1 M.L.J. 585, that there is absolutely nothing to suggest that the mortgage deed Ex.A-1 contains terms that constitute a contract to the contrary so as to exclude the charge under Sec.55(4)(b) of the Transfer of Property Act. The court is clearly of the view that the money due under the mortgage must be considered as unpaid purchase money and therefore it is subject to a charge under Sec.55(4)(b) of the Transfer of Property Act and hence in view of Sec.10(2)(ii) of Act IV of 1938 the mortgage amount is not liable scaled under Sec.8 of Act.

Houses and Rents: It is held in *S.Manimudi v. State of Tamil Nadu and others*, (1993)1 M.L.J. 651, that as per the preamble to the Act, it is one to amend and consolidate the law relating to the regulation of the letting of residential and non-residential buildings and the control of rents of such buildings and the prevention of unreasonable eviction of tenants therefrom in the State of Tamil Nadu. It is seen from the preamble itself that the Act is not merely confined to prevention of unreasonable eviction of tenants. It is also intended to consolidate the law relating to the letting of buildings and control of rents. Even the expression 'unreasonable eviction' is significant. The Act does not prevent 'reasonable eviction'. It cannot be said that the Act is intended to protect only the tenants. The Legislature has taken care to protect the interests of the landlord also. It cannot be said that provisions of the Act should protect only the

tenants and no benefits shall be conferred on the landlord is, to say the least, preposterous. The Legislature has, in its wisdom, balanced between the rights of the landlord and rights of the tenants and brought about the present measure to hold the scales even. Sec.11 of the Act is enacted with a view to prevent defaulters from continuing the possession of the property taking advantage of the pendency of an application for eviction without performing their own part of the obligations. It should be noted that Sec.10(2)(i) of the Act recognises the duty on the part of the tenant to pay or tender the rent due by him within a particular time. Under that sub-section, it shall be paid or tendered within fifteen days after the expiry of the time fixed in the argument of tenancy or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable. The Act has not absolved the tenant from the liability to pay the rent within the prescribed time. If the tenant chooses to commit default wilfully, that itself will give a cause of action to the landlord to file an application for eviction. Even after the filing of the petition for eviction, the tenant is duty bound to fulfil his obligation to pay the rent regularly within the prescribed time. The tenant should not fail to pay the rent and take advantage of the pendency of the proceedings, nor should he indulge in delaying tactics in order to protect the proceeding. The section is intended only to prevent the tenant from failing to fulfil his obligations and protracting the proceedings for eviction. The order in Sec.11 has nothing to do with the order in the main proceedings. If during the pendency of the proceeding, the tenant fails to comply with the order passed under Sec.11 of the Act, he is liable to be evicted immediately and there is no question of the tenant claiming the benefit of the Proviso to Sec.10(2)(i) of the Act in such cases. Hence, there is no inconsistency between the two provisions. The language of the section is very clear and there is no necessity for any further guidelines. It is for the courts to understand the section and act accordingly. There is not a case of any delegated legislation to warrant prescription of guidelines by the legislature itself. There is no substance in the contention that because the section enables collection of rent, the recovery of which, under the general law is barred by limitation, the section is unconstitutional. Art.38 of the Constitution has no application. Art.31 has

been deleted with effect from 20.6.1979. Hence, there is no question of Sec.11 of the Act violating the provisions of Art.31(2) or Art.38 of the Constitution of India. Sec.11(4) of the Act is valid and not violative of any of the provisions of the Constitution of India. In *P.Premchand Bandhia v. Mrs.Yashbala R.Prohit*, (1993)1 M.L.J. 4, the court has held that it is seen Secs.2(5) and 10(8) of the Act as well as the Rules, that a general power of attorney agent, as in this case, duly empowered to initiate proceedings in eviction, can also sign and present application for and on behalf of the principal and such an application cannot be said to be not maintainable for the reason that it has not been signed by the landlady herself. The signing of the application as well as the verification therein, by the general power of attorney, as in this case, cannot be regarded as a defect, which affects the jurisdiction of the controller to entertain the application. In other words, a general power of attorney agent, as in this case, when he signs the application for eviction, under Rule 11(3) of the Rules, it shall be as good as having been signed by the applicant herself. The Bench has laid down in *The State of Tamil Nadu represented by the Collector of Madras (Accommodation Wing), Madras v. M.Kazim Khaleeli and others*, (1993)1 M.L.J. 681, that the fair rent fixed for the building taken over by the Government operates retrospectively from the date of tenancy subject to the law of limitation. In *Chekka Ramaniah and another v. S.Mariappan and others*, (1993)1 M.L.J. 406, it held that the proviso (d) to Sec.10(3)(a)(iii) of the Act prohibits filing a petition for eviction under this subsection before the expiry of the lease period if such lease agreement is in existence between the landlord and the tenant. Sec.11(4) is intended to prevent defaulters from continuing in possession of the property taking advantage of the pendency of an application without at the same time performing their own part of the obligations. The disability imposed by the section attaches only to the tenant. Proceeding under Sec.11(4) of the Act is intended to accelerate the long drawn proceedings under the Act. Therefore, if the landlord chooses to file another petition for eviction on the ground of wilful default in payment of rent, for the subsequent period when an earlier petition on the same ground is pending, he can do so and there is no impediment for the same. There is no express prohibition in the Act preventing the landlord

from filing a second petition for eviction on the ground of wilful default in payment of rent while the earlier petition on the ground is pending. It is held in *V.K.Veeraraghava Reddiar v. Urdu Madarasa (Arabic School) by Secretary and another*, (1993)1 M.L.J. 296, that when a tenant took the petitioner premises was let out for a partnership business and after the dissolution of the partnership, if the business is allotted to an erstwhile partner, then also there is no subletting. If on a stoppage of business, one of the partners has handed-over the entire business premises in which he carries on his business, thereafter, it is not a case of subletting. It is held, in *R.Krishnaswamy v. N.Arumugam*, (1993)1 M.L.J. 122, that in a petition for eviction filed under Sec.10(3)(c) of the Act, the landlord should clearly state that the required petition premises by way of additional accommodation. But according to the proviso, the controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord. In order to decide this question of hardship, there must be proper pleadings in the petition. If the hardship is not pleaded in the petition, that is fatal to the petition.

In *A.J.Doss v. Saroja*, (1993)2 M.L.J. 365, the court has held that when the stay granted by the High Court was in force, the courts below cannot pass any order whatsoever even if it be a consequential order. While the order of stay of this Court was in force if a subordinate court had passed an order adverse to the revision-petitioner, he would be certainly, prejudiced by that order and is entitled to get redressal by invoking the revisional jurisdiction of this Court.

It has been held in *M/s.Sultan Hardware Corporation and others v. C.T.Meiyammai Achi and others*, (1993)2 M.L.J. 442, that the judicial opinion throughout appears to have been consistent for more than two decades in holding that so long as the basis or ground on which the additional accommodation was sought subsisted and continued even after the death of a landlord/landlady who initially filed the application for eviction of a tenant and recovery of possession under Sec.10(3)(c) the legal representatives are entitled to continue the proceedings for their benefit also and the same do not come to an end with the death of the landlord who

initially filed it. This view appears to have gained ground with courts on the peculiar nature of the right secured to the owner of the property under the Act and also on account of such right and claim being an adjunct to the rights in the property as such and also fortified by the *bona fides* in the requirement for additional accommodation when as in the present case the owner has filed the application seeking recovery of possession as additional accommodation for the business that was being carried on in the same premises and it is also shown that notwithstanding the death of the erstwhile owner, the legal representatives who stepped into the shoes of the landlord have also succeeded to the business and successfully continuing the same. There will be no rhyme or reason or logic in stating that the application for eviction should be also held to have suffered a natural death with the person who filed it. In that respect there does not also appear to be any difference in the position depending upon the application being either one under Sec.10(3)(a)(iii) or Sec.10(3)(c) of the Act.

In *Nazimuddin Ahmed represented by his wife and P.A.A.Naseema Ahmed v. K.Narasimha Rao*, (1993)2 M.L.J. 39, the court has held that Sec.7(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 makes it very clear that any amount paid by the tenant in excess of the agreed rent and one month advance if stipulated by the landlord shall be refunded by the landlord to the tenant. Thus there is mandate of law to the landlord to refund that amount even though the tenant has not asked for that. But an option is given to the tenant to tell the landlord to adjust that amount towards rent and that the landlord shall do. The question is when the landlord has not refunded the said excess amount as enjoined on him by law even though the tenant has not asked him to adjust that amount towards the arrears of rent, can it be said that the tenant has committed wilful default in payment of rent. Obviously not, when the tenant's amount is with the landlord which the landlord ought to have refunded and he failed to do so, and the amount is more than the alleged arrears of rent, it does not lie in the mouth of the landlord to say that the tenant committed default much less wilful default in payment of rent because rent amount payable by the tenant and even more is already with the landlord.

City Tenants Act: In *Sundara Rajan and another v. Sundaramoorthy*, (1993)1 M.L.J. 640, the court has held that in more than one decision that filing of application under Sec.9 of the Act would amount to such a waiver of notice under Sec.11 of the Act. It has also been held that even the written statement which claims right under Sec.9 could be treated as such an application. In the present case, it is found that even in the original written statement filed by the defendant, the following plea was raised in paragraph 4 "In any event, the suit is not maintainable for want of valid notice". It cannot be held that there is a waiver of notice under Sec.11 by implication. Sec.11 notice is necessary even in the present case.

The court has held in *Jagadambal and another v. T.E.Varadhan and others*, (1993)2 M.L.J. 446, that a tenant who is not in possession but has sublet the property will not be entitled to claim benefits under Sec.9 of the Tamil Nadu City Tenants Protection Act. A reading of this decision would show that to claim benefits under Sec.9 the tenant must be in possession of both the land and the superstructure. Therefore even if the first defendant tenant is not in possession of only the superstructure, even then he will not be entitled to the benefits under Sec.9 of the Act. In this view of the matter, the first defendant cannot contend that he is entitled to purchase the land for a value to be fixed by the court.

Cultivating Tenants Act: In *Muniappan v. Hazra-thunnissa*, (1993)1 M.L.J. 605, the court has held that according to Sec.3(4)(b) of the Tamil Nadu Cultivating Tenants Protection Act, 1955 after ascertaining the arrears of rent a duty is cast upon the Revenue Court to grant time to the tenant to deposit the rent. This was not done by the Revenue Court in this case. Therefore the order passed by the Revenue Court is hit by Sec.3(4)(b) of the Act. The order of eviction is set aside on this ground.

Transfer of Property Act: In *Indirani Ammal v. E.Chandra and another*, (1993)1 M.L.J. 339, the court has held that Sec.35 of the Transfer of Property Act contemplates 'same transaction' and not 'same instrument'. To be the same transactions, the transaction need not necessarily be under one document only.

The court has held in *K.Raju v. M.Raju and another*, (1993)1 M.L.J. 518, that can it be said that though there is unlawful dispossession of the plaintiff from the demised property, the plaintiff cannot seek redelivery since there is lawful termination of the tenancy? The answer to this question should only be in the negative. In other words even in such a situation the plaintiff can seek redelivery.

The bench has held in *V.A.Padmanabhan and others v. M.A.Narasimhan and others*, (1993)1 M.L.J. 576, that the possession in part performance of a contract is a right falling under Sec.53-A of the Transfer of Property Act and the transferee in possession of the property in part performance of the contract can defend his possession in case there is any attempt by the transferor or any person claiming through him to dispossess him. That the transferee can do either as a plaintiff or a defendant. Ordinarily the issue as to possession or any other right under Sec.53-A of the Act shall be consequential or a dependant issue upon the issue of the existence of the contract itself and with the decree for the enforcement of the contract, there can be an order for maintaining the possession of the agreement holder transferee. In considering however, whether injunction should be granted on the plea of possession and allegation of threat to dispossession to a person holding the agreement for sale the rule will be as one reiterated almost in every case that to a plaintiff claiming only an equitable right, the court would not ordinarily grant temporary injunction pending the suit on the basis of Sec.53-A of the Act as mere possession of the plaintiff of the suit property on the date of the suit cannot be taken to enable him to obtain injunction from the court. The passive equity as provided under Sec.53-A of the Act shall be available as a shield against any interference by the defendant who is either the transferor himself or any other person claiming through the transferor but would not become active equity without there being something more.

In *M.Manickam Pillai v. Kuppalakshmi and others*, (1993)2 M.L.J. 252, the court has held that the law is that when there is an unpaid balance of the purchase money that is to say to the charge which the unpaid vendor is given by Sec.55(4-B) of the Transfer of Property Act but that the property having passed by conveyance from the

judgment-debtor cannot be sold in execution of the decree against the judgment-debtor. Attachment of the suit property as such and its subsequent sale thereafter are not valid.

Contract Act: In *M.Chettyappan and others v. State Bank of India, Nungambakkam Branch, Madras-34* (1993)2 M.L.J. 74, the Bench has held that it is not in the language of Sec.140 or Sec.141 of the Indian Contract Act that the court will always endeavour to find out whether the creditor was in actual custody of the security or not and that it was only on account of the negligence of the creditor that the security was lost. The provision in Sec.140 invests the surety with the same rights which the creditor had against the principal debtor and thus puts him in the same position as the creditor realises his debt from the principal debtor including in all such rights which the creditor had in the properties that are offered as securities. Unless such transfer of security is also read in Sec.140 of the Contract Act there shall be always a chance of a creditor suing the surety and in the meanwhile the principal debtor appropriating or removing every security so that in the event of the surety paying or performing all that he is liable for he is denied the benefits of the right of the creditor that is conferred upon him by virtue of a statute. Sec.141 read in the context as the Supreme Court has read in *State of Madhya Pradesh v. Kaluram* (1967)2 S.C.J. 823; (1967)1 S.C.R. 226; 1967 Lab.L.J. 55; A.I.R. 1967 S.C. 1105, thus entitled the surety to the benefit of every security which the creditor has against the principal debtor at the time when the contract for suretyship is entered into. The qualifying words 'whether the surety known of the existence of such security or not' keep the surety in inevitable position in relation to the creditor as all rights of the creditor as per Sec.140 would vest in him upon payment or performance of all that he is liable for. The other co-ordinating part of Sec.141 reads and if the creditor loses or without the consent of the surety parts with the security the surety is discharged to the extent of the value of the security. The loss that can be discharged by the surety to the extent of the value of the security has also been illustrated. The illustration has some similarity with the case in hand. It is found in Exs.P-2, P-3, P-4 and P-5 that the cash credit loan was sanctioned on the security of the goods, produce and merchandise and the stock of canned

shrimps was required to be stored in such place and in such manner as the Bank may from time to time approve. The first defendant-company held in trust solely for the plaintiff-Bank the goods pledged and the documents of title thereto in their absolute control, possession and disposition free of any charge lies or other encumbrance and to keep the goods fully insured against loss or damage by fire, riot, civil commotion therefor, pilferage, etc. This shows that the security against loss even on account of theft, pilferage etc., must be found in the hands of the creditor. The creditor cannot escape liability by saying that he has not ensured that the first defendant company had kept all the goods insured against loss or damage by fire, riot, civil commotion theft, pilferage, etc. It will be for the creditor, thus to say how the security was lost and in case of loss the amount of insurance that must be found to accrue to the surety and the surety must accordingly be found to have been discharged to the extent of the insurance. If there is no insurance it is obvious, it is on account of the negligence of the creditor-Bank. If there is insurance, there is security and the surety must be deemed to have been discharged to that extent. Negligence need not always be inferred from a positive act. It can be inferred also from omission. If the creditor has omitted to do something which he had to do, to keep the security for the surety in the event of the creditor claiming the debt from the surety, the creditor has to account for the loss. The burden is obviously on the creditor to satisfy the court that it has no liability under Sec. 141 of the Act or under Sec. 140 thereof to the loss of the security if can still claim the debt from the surety.

The Bench has held in *Chidambaram Pillai and others v. Muthuammal and others*, (1993) 1 M.L.J. 535, that a rule of *non est factum* which in full reads *non est factum, scriptum, predictum, non est factum* rule has existed as a rule of law in England as well as in India and there has been a good deal of improvement in this behalf while applying the rule of burden of proof in evidence to women in India. A section of womenfolk in view of the social conditions of the time are presumed to have imperfect knowledge of the world. It is thus imperfection of the knowledge of the world that the law throws round such women a special cloak of protection which demands that the burden of proof shall, in such a case, rest not with those who attack

but with those who found upon the deed and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by but was explained to and was really understood by the grantor. In such case, it must also of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. A paradanashin may not be illiterate but she still may be ignorant in the sense that she has an imperfect knowledge of the world and she is practically excluded from social intercourse and communion with the outside world. If it is so for this reason that they are taken at persons suffering from disabilities which make them dependent upon or subject to the influence of others, the illiterate women who, for the reason of social compulsion are required to move out the work in the field and elsewhere for livelihood cannot be said to be less and deprived. The court finds itself in complete agreement with the view that the special cloak of protection applied to paradanashin women has to be applied to illiterate women or the case where the rule of *non est factum* is applied and a case otherwise falling in the category of cases of undue influence and fraud in which initial burden has to be discharged by the person making the allegations before the *onus probandi* is applied has to be kept. In the former case there is no burden of proof upon a woman who alleges that she was ignorant of character and contents of the documents for the reason of illiteracy or she being a paradanashin women. It has to be presumed in such a case that she could have transferred her rights to the other only for the reason of fraud or undue influence. In the latter case, the burden shall be upon the person alleging undue influence and fraud. The onus will shift only when there is a clear pleading in this behalf with necessary particulars and the initial onus is discharged. Adverting to the facts of the case, it is a case of an illiterate woman thus seeking the protection of law as she executed the document without knowing its true character and contents. Learned single judge has fallen in error seeking any further pleadings and or proof of undue influence fraud from her. The burden in this behalf is upon the defendants.

Pleadings, Practice and Procedure: The court has held in *Saroja Sethu v. State of Tamil Nadu represented by its Secretary to Government, Revenue,*

Irrigation Department and others, (1993)1 M.L.J. 440, that when pleadings are inadequate and material facts are absent, it is proper for any court not to permit a point either of fact or law to be raised in any proceedings when however the material facts are available and on such facts that are not in dispute when law is supplied a consequence has to follow. It will be in the opinion of the court unjust in denying to a party availability of such a ground.

In *Enriappa Mudaliar and another v. T. Subramanian, (1993)1 M.L.J. 333*, it has been held that it is well settled that in the absence of any pleadings, the parties are not permitted to put forth any case other than those which have been raised in the pleadings.

The court has held in *A. Sankaralingam v. Anunchala Reddiar and others, (1993)1 M.L.J. 472*, that the fundamental principle is that no amount of evidence can be looked into on a plea which was never put forward.

In *R.P. Ramaswamy v. Karupiah Thevar, (1993)2 M.L.J. 449*, it has been held that even where the prayer is framed in that fashion as either the first or the second one the courts have held that if the trial court has granted second of such alternative prayer, the plaintiff could yet prefer appeal seeking to obtain the first prayer itself.

The court has held in *Thirumuruga Kirippananda Variyar Thavathiru Sundaraswamikal Medicial Educational and Charitable Trust v. Tamil Nadu Dr. M.G.R. Medical University and another, (1993)1 M.L.J. 307*, that when the responsible law officer of the High Court who represents the Government, makes a statement before the court, the same cannot be brushed aside so lightly by the court. It is true that the same counsel represented both the Dr. M.G.R. Medical University and the government in the above mentioned case. If the Government had really felt that at that point of time the law officer of the court had accepted an order without getting the instructions of the Government, it should have preferred an appeal against the said order. The Government Pleader in the High Court cannot be equated to a Government Pleader of a mofussil court. The Government Pleader in the High Court has certainly got more responsibility than a Government Pleader

in Mofussil Court.

The court has held in *Palaniappan and others v. The Regional Transport Authority, Madras, (1993)1 M.L.J. 623*, that when a learned Judge of this Court has laid down a principle in law it is applicable to cases of similar nature under the Motor Vehicles Act. Hence the respondent has to take up the applications or file and dispose them of on merits and according to law. It is very unfortunate that the Regional Transport Authority is ignorant of the implication of court's order wherein the learned single Judge of this Court has laid down a proposition on a question of law in explicit terms as to who is the proper authority in granting permits. As a public authority the respondent is expected to have understood the provision of law and in implication of the order of the learned single Judge. If he has any doubt he should have asked the Law Officers of the State.

Specific Relief Act: The Bench has held in *Nallaya Gounder and another v. P. Ramaswami Gounder (died) and others, (1993)1 M.L.J. 686*, that in the present action the court has no hesitation in negating specific performance for the reason that the plaintiffs have not come forward with clean hands in asking for the equitable relief.

In *Indian Bank represented by its Chairman and Managing Director, Head Office, Madras v. K. Usha and others, (1993)2 M.L.J. 186*, the Bench has held that it is now well settled law that there are three exceptions to the general rule that contract of service cannot be enforced viz., (1) cases falling under Art. 311 of the Constitution of India, (2) cases covered by the Industrial Law, and (3) cases in which a statutory body acts in breach of violation of the mandatory provisions of a statute. The case on hand will fall under categories (II) & (III) as the matter is covered by the Industrial Law and the appellant-Bank is a statutory authority. Hence clause (III) of the memorandum of settlement referred to earlier is enforceable against the appellant.

The Bench has held in *Nanjanimal (died) and another v. Palaniappan, (1993)2 M.L.J. 7*, that the court is unable to accept the contention of the defendant that the plaintiff is not entitled to specific performance of contract in view of the provision for repayment of damages in the event of breach by the defendant. There is no question of

any option having been given by the agreement to the plaintiff to make an election. Hence it is only a normal term of the contract fixing the liquidated sum of damage. That does not prevent the plaintiff from enforcing the contract.

In *Kumaraswamy and others v. S.K. John (died) and others*, (1993) 2 M.L.J. 144, the Bench has held that the doctrine of mutuality means that the contract should be mutually enforceable by each party against the other and not that right for right there must be corresponding clause. A contract may contain a series of clauses and covenants which form the total bargain each of which is a consideration for the other. Mutuality does not mean equality and exact arithmetical correspondence. It means that each party must have the freedom to enforce rights under the contract against the other. The Specific Relief Act does not anywhere repudiate the doctrine of mutuality. So mutuality means that each party must have the freedom to enforce the rights under the contract against the other. But under Sec. 204 of the Specific Relief Act the court shall not refuse to grant specific performance of the contract merely on the ground that the contract is not enforceable at the instance of the other party.

The court has held in *R.P. Ramaswamy v. M. Karupiah Thevar*, (1993) 2 M.L.J. 449, that Sec. 28(2) of the Specific Relief Act only states *inter alia* that where a contract is rescinded under Sub-sec. (1) of Sec. 28 the court shall direct the purchaser to restore possession to the vendor. The earlier Sub-sec. (1) only says that on the application by the vendor to have the contract rescinded 'the court may by order rescind the contract.... as the justice of the case may require'. So Sec. 28(2) will come into operation only when contract is rescinded by the order of the court contemplated under Sec. 28(1) of the Act. Admittedly in the present case no such order has been made so far. That apart Sec. 28(1) of the Act itself speaks of only a suit for specific performance of a contract for sale but in the present case, the suit is not merely for specific performance of the abovesaid sale agreement but plaintiff also prays as a part of the same composite relief that if the purchaser fails to pay the balance with interest and obtain the sale deed within the time fixed by the court, the plaintiff shall get back possession of the suit property from the defendant. In such a case, Sec. 28 of

the Act will have no application at all.

The Bench has held in *Viswanathan and others v. R. Lakshmi Ammal (died) and others*, (1993) 2 M.L.J. 560, that Sec. 16(c) of the Specific Relief Act, 1963 provides that the specific performance of a contract cannot be enforced in favour of a person who fails to over and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. O. 6, Rule 3 of the Civil Procedure Code provides that the Form in Appendix A when applicable shall be used for all pleadings. Form No. 47 Appendix A relates to a suit for specific performance.

The inordinate delay on the part of the plaintiffs is not paying the amounts agreed to and filing the suit naturally leads to the inference that the plaintiffs have abandoned the contract. It is not a case of mere delay. This is a case of wanton delay and deliberate inaction on the part of the plaintiff particularly in view of the fact that the possession was with the fifth plaintiff.

The plaintiffs have come forward with a false case not only in the pleadings but also in the evidence. Hence the court holds that the plaintiffs are not entitled to the relief of specific performance.

Succession Act: The court has held in *Jayalakshmi Ammal v. K. Lakshmi Iyengar represented by Power Agent M. Jayaramiyar*, (1993) 1 M.L.J. 95, that Sec. 68 of the Evidence Act requires that in order to prove a document required by law to be attested at least one attesting witness should be called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence. The proviso contains an exception and excludes a document not being a will which has been registered in accordance with the provisions of the Indian Registration Act unless its execution is specifically denied. A will even if registered, falls under the main section, as it is excluded from the purview of the proviso. Sec. 69 of the Evidence Act provides that if no attesting witness can be found it must be proved that the attestation of at least one attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. Thus, Sec. 69 of the Evidence Act requires proof of (1)

the signature of atleast one witness, and (2) the signature of the person executing the document. It is not necessary however, for the purpose of Sec.69 of the Evidence Act that the same witness must prove the signature of the attesting witness and also the signature of the executant. The two requirements can be satisfied by two independent witnesses.

In *S.Nagarathinam v. S.Balakathiresan and others*, (1993) 1 M.L.J. 678, the bench has held that Sec.180 of Succession Act, 1989 corresponds to Sec.35(1) of the Transfer of Property Act which deals with the doctrine of election. The main principle is that there is an obligation on the legatee who takes a benefit under a Will or other instrument to give full effect to that instrument and if he finds that instrument purports to deal with something which it is beyond the power of the donor to dispose of but to which effect can be given by the concurrence

of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect. He must elect either to retain his own property or to relinquish his own and take in its place property given to him by the Will. The doctrine of election rests on the principle that he who accepts a benefit under an instrument must accept the whole of it confirming with all its provisions and renouncing every right inconsistent with them. Election under Sec.180 arises wherever the legatee derived some benefit from the will to which he would not be entitled except for the Will. In such a case, he has to elect whether to confirm the Will or dissect from it. He cannot accept and reject the same instrument. This is the foundation of the law of election. Election once made is irrevocable.

away the funds belonging to the partnership firm. The entire dispute is in relation to what happened at Mandsaur. Secondly, it must also be remembered that even according to the plaintiff, after his father returned to Mandsaur, there was some talk of settlement of the dispute and consequently an agreement was executed on 26th November, 1992 at Bhilai by which the partnership was dissolved and it was agreed that the liabilities would be settled within one month. Now this agreement was executed outside the territorial jurisdiction of the Chandigarh Court unless this agreement is set aside, there is no question of the Chandigarh Court entertaining a suit for dissolution of the partnership and rendition of accounts. The plaintiff cannot wish away the agreement by merely stating that it is a void document. He cannot rest content by alleging that the document has no efficacy in law and must, therefore, be ignored. If it is the case of the plaintiff that the document was obtained by fraud or misrepresentation by suppression of material facts or for any other like reason he must have the agreement set aside through Court and unless he does that, he cannot go behind the agreement, ignore it as a void document and proceed to sue for dissolution of the partnership and rendition of accounts. It is not a matter of the volition of the plaintiff to disregard the document as void and proceed to ignore it altogether without having it declared void by a competent court. It, therefore, appears clear that to part of the cause of action arose within the territorial jurisdiction of the Chandigarh Court. The averment does not say that any of the defendants was involved in carrying on business at Chandigarh. The plaintiff is quite vague as to the type of business activity he was carrying on. He also does not say whether it was with the consent of the other partners or on his own. There is no averment that the intimation of the opening of the branch at Chandigarh was given to the Registrar of Firms as required by section 61 of the Partnership Act. Printing of stationery is neither here nor there. It is not the plaintiff's say that accounts were maintained in respect of business at Chandigarh. Mere bald allegation that he was having a branch office of the firm at Chandigarh will not confer jurisdiction unless it is shown that a part of the cause of action arose within the territorial jurisdiction of that Court. None of the defendants was ever residing in Chandigarh or did any business

whatsoever in Chandigarh and, therefore, the court thinks that the learned Single Judge was right in the view that the Court at Chandigarh could not be invested with jurisdiction since no part of the cause of action had arisen within its jurisdiction.

[*Paras. 3 and 4*].

The Judgment of the Court was delivered by *Ahmadi, J.*: The petitioner is the original plaintiff. He filed a suit in the court of the learned Senior Judge, Chandigarh, for dissolution of the firm carrying on business in the name and style of M/s. Rajaram & Brothers of which he claimed to be a partner along with his father, brothers and one K.K. Jindal. Each partner had 20% share in the profits and losses of the firm and the partnership was one at will. The head office of the firm was situated at Bombay where it was registered with the Registrar of Firms. Its factory was situated at Mandsaur where the father Rajaram Gupta lived with his sons and attended to the partnership business. The plaintiff also was residing at Mandsaur till 1974 when he shifted to Chandigarh. After he shifted to Chandigarh he visited Mandsaur off and on in connection with the business of the firm. His case is that after he shifted to Chandigarh he used to call for and receive statements of accounts of the business carried on at Mandsaur and he also received and booked orders for the firm at Chandigarh which he forwarded to Mandsaur for execution. According to him, the branch office of the firm was at Chandigarh as is evident from the stationery of the firm. According to him, his father shifted from Mandsaur to Rajnandgaon sometime in the year 1980 and thereafter his brothers Shrikant Gupta and Suryakant Gupta were virtually in charge of the business at Mandsaur. Certain disputes arose as regards the management of the partnership business and consequently the correctness of the accounts maintained by Shrikant Gupta and Suryakant Gupta at Mandsaur became suspect. The plaintiff further contended that he had sent his representative to Mandsaur to check the accounts but his two brothers did not permit him to do so. He also personally went to Mandsaur and it appears from the averment in the plaint that his brothers were not cooperative and in fact some criminal complaints came to be lodged in regard to certain incidents which happened at Mandsaur while he was there. In the end the father Rajaram Gupta went to Mandsaur and later a meeting took place at Bhilai on 26th November, 1992. At the

said meeting an agreement was drawn up for the dissolution of the partnership firm and for distribution of its assets amongst the partners. It was mentioned in the agreement that it will enure for one month meaning thereby that the accounts of the partnership would be settled within that time. The plaintiff now contends that the said agreement is void since material facts were suppressed by his two brothers and in any case the accounts were not settled within the period of one month. He also contends that certain assets owned by the firm were not included in the agreement and that also rendered the agreement void and unenforceable in law. He, therefore, contended that the agreement had to be ignored and the firm was required to be dissolved and accounts to be settled by the appointment of a Commissioner. He also claimed certain other incidental reliefs.

2. The first defendant Shrikant Gupta entered an appearance and raised a preliminary contention that on the averments in the plaint the Court at Chandigarh had no jurisdiction to entertain and decide the suit. He contended that from the averments in the plaint it is manifest that the head office of the firm was situated at Bombay, that none of the defendants was residing or carrying on business within the territorial jurisdiction of the Chandigarh Court and that no part of the cause of action had arisen therein. The learned trial Judge dismissed the application holding that a part of the cause of action had arisen within the territorial limits of the Chandigarh Court. However, on revision, a learned Single Judge of the High Court after carefully analysing the averments in the plaint came to the conclusion that on the mere allegation that the firm had a branch office at Chandigarh the Court at Chandigarh could not be invested with jurisdiction since no part of the cause of action had arisen within its jurisdiction. The learned Judge in the High Court observes:

"With regard to the allegation made by the plaintiff that the firm has its branch office at Chandigarh, suffice it to say that apart from the bald allegation made in the plaint, there is nothing on record to prove that the firm has any regular branch office at Chandigarh. Moreover, the fact that the firm has a branch office at Chandigarh is also not sufficient enough to confer jurisdiction on a Court at Chandigarh unless it is established that cause of action, on the basis of which relief is being claimed,

has arisen within the territorial jurisdiction of that court. In the present case, apart from other, the factory of the firm as well as the assets of the firm are also situated outside the territorial jurisdiction of court at Chandigarh. The relief sought in the suit is the dissolution of the firm and rendition of accounts of a firm which has its factory at Mandsaur and Head Office at Bombay. In this view of the matter, I am of the considered view that the court at Chandigarh has no jurisdiction to entertain the suit."

On this line of reasoning, the learned Judge in the High Court set aside the order of the trial Court and directed that the plaint be returned to the plaintiff for presentation in a competent court. It is this order of the learned Single Judge which is assailed before us.

3. Secs.15 to 20 of the Code of Civil Procedure indicate the place where a suit can be instituted. Sec.15 states that every suit shall be instituted in the court of the lowest grade competent to try it. Sec.16 then proceeds to state that the suit shall be instituted where the subject-matter is situate. Then comes Sec.20 which is relevant for our purposes. It reads as under:

"20. Other suits to be instituted where defendants reside or cause of action arises: Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises. *Explanation:* A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

It will thus be seen that clauses (a) and (b) are not attracted in the facts of this case. None of defendants at the time of the commencement of the suit actually and voluntarily resided or carried on business or personally worked for gain within the territorial jurisdiction of the Chandigarh Court. Clause (b) can apply only if atleast one of the defendants actually and voluntarily resided or carried on business or personally worked for gain while the others did not. But that is not the case here. The case must, therefore, be governed by clause (c) which requires that the whole or part of the cause of action must be shown to have arisen within the territorial limits of the Chandigarh Court. Now as is evident from the averments in the plaint no part of the cause of action arose within the territorial jurisdiction of the Chandigarh Court. On the averments in the plaint taken at their face value the case set up by the plaintiff is that after his father left Mandsaur his two brothers joined hands, manipulated the accounts and siphoned away the funds belonging to the partnership firm. The entire dispute is in relation to what happened at Mandsaur. Secondly, it must also be remembered that even according to the plaintiff after his father returned to Mandsaur there was some talk of settlement of the dispute and consequently an agreement was executed on 26th November, 1992 at Bhilai by which the partnership was dissolved and it was agreed that the liabilities would be settled within one month. Now this agreement was executed outside the territorial jurisdiction of the Chandigarh Court. Unless this agreement is set aside there is no question of the Chandigarh Court entertaining a suit for dissolution of the partnership and rendition of accounts. The plaintiff cannot wish away the agreement by merely stating that it is a void document. He cannot rest content by alleging that the document has no efficacy in law and must, therefore, be ignored. If it is the case of the plaintiff that this document was obtained by fraud or misrepresentation by suppression of material facts or for any other like reason he must have the agreement set aside through court and unless he does that he cannot go behind the agreement, ignore it as a void document and proceed to sue for dissolution of the partnership and rendition of accounts. It is not a matter of the volition of the plaintiff to disregard the document as void and proceed to ignore it altogether without having it declared void by a competent court. It,

therefore, appears clear to us that no part of the cause of action arose within the territorial jurisdiction of the Chandigarh Court.

4. The next question is whether the averment in paragraph 7 of the plaint without anything more can confer jurisdiction on the Chandigarh Court? Paragraph 7 reads as under:

"7. That the plaintiff himself was doing business of the firm from Chandigarh and in that connection had been engaged in all operations necessary for conduct of business. In fact, the Head Office of the firm was at Bombay where the firm was registered. The factory/plant was located at Mandsaur. Chandigarh was one of the Branch Offices of the firm M/s. Rajaram and Brothers. Not only this, the stationery printed by the firm also showed that Chandigarh is the Branch Office of the firm. The stationery has been in continuous use since the year 1974."

The averment does not say that any of the defendants were involved in carrying on business at Chandigarh. The plaintiff is quite vague as to the type of business activity he was carrying on. He also does not say whether it was with the consent of the other partners or on his own. There is no averment that intimation of the opening of the branch at Chandigarh was given to the Registrar of Firms as required by Sec. 61 of the Partnership Act. Printing of stationery is neither here nor there. It is not the plaintiffs say that accounts were maintained in respect of business at Chandigarh. Mere bald allegation that he was having a branch office of the firm at Chandigarh will not confer jurisdiction unless it is shown that a part of the cause of action arose within the territorial jurisdiction of that court. None of the defendants was ever residing in Chandigarh or did any business whatsoever in Chandigarh and, therefore, we think that the learned Single Judge was right in the view that he took.

5. In the result, we see no merit in this petition and dismiss the same with costs. Costs quantified at Rs. 10,000 to be paid in one set.

B.S.

Petition dismissed.

IN THE SUPREME COURT OF INDIA.

Present:- *M.N.Venkatachaliah, A.M.Ahmadi and P.B.Sawant, JJ.*

Review Petition No.249 of 1992 in W.P.No.1022 of 1989, etc. *24th August, 1993.*

All India Judges' Association and others

... Petitioners.

v.

Union of India and others

.... Respondents.

(A) Civil services - Distinction between judicial service and other services - Members of other services - If can be placed on par with members of the judiciary.

When it is said that in a democracy such as ours the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State and entrusted to the three organs of the State and each one of them, in turn, represents the authority of the State. However, those who exercise the State-power are the ministers, the legislators and the judges and not the members of their staff who implement or assist in implementing their decisions. The Counsel of Ministers or the political executive is different from the Secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the legislators and the Judges and not between the Judges and the administrative executive. The judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services cannot be placed on par with the members of the judiciary either constitutionally or functionally.

[Para. 7]

(B) Constitution of India (1950), Art.309 - Service conditions of judiciary - Prescription of - Judiciary - Whether has any say in matter.

The mere fact that Art.309 of the Constitution gives power to the executive and the legislature to prescribe the service conditions of the judiciary does not mean that the judiciary should have no say in the matter. It would be against the spirit of

the Constitution to deny any role to the judiciary in that behalf, for theoretically, it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary. *[Para. 10]*

Cases referred to:-

S.L.Sachdev and others v. Union of India and others, A.I.R 1981 S.C. 411; 1980 Lab.I.C.1321; (1980)4 S.C.C. 562; 1981 Serv.L.J.115; (1980)3 Serv.L.R. (S.C.) 503; (1981)1 Lab.L.N. 579. [Para. 1] Synthetics and Chemicals Limited etc. v. State of U.P. and others.

A.I.R. 1990 S.C. 1927; (1989)4 J.T. 267. [Para. 1] D.R.Choudhary v. Ashok Kumar Yadav and others, (1985)4 S.C.C. 417 [Para. 20]

The Judgment was delivered by

Sawant, J. These review petitions have been filed by the Union of India and various States raising general objections as well as objections to the specific directions given by this Court vide our judgment dated 13th November, 1991 to improve the service conditions of the members of the subordinate judiciary in the country. The general objections which are common in all the petitions may be summarised as follows:

(a) As per Arts.233 and 234 of the Constitution, the appointment to the posts of District Judges as well as to the posts other than those of the District Judges under the Judicial Service of the State are made by the Governor of the State. The power to regulate their conditions of service belongs to the executive subject to the legislative control. It is entirely in the purview of the respective State legislature/ Government to determine the conditions of service and as such this power given to the State legislature and the State Government is whittled down or curtailed by issuance of the specific directions in this regard by this Court. (b) In *S.L.Sachdev & Ors. v. Union of India & Ors. A.I.R. 1981 S.C. 411; 1980 Lab.I.C.1321; (1980)4 S.C.C. 562; 1981 Serv.L.J.115; (1980)3 Serv.L.R. (S.C.) 503; (1981)1 Lab.L.N. 579* para 13, this Court has laid down that the Court cannot interfere with or change the administrative policy of the Government unless it violates some provisions of the Constitution such as Art.14 which requires that

even an administrative authority must act fairly and treat its employees equally. No such ground was raised in the writ petition.

(c) The respective State Subordinate Judicial Services have service conditions that have been gradually developed and evolved over long years along with the service conditions of other Government services in the States / Union Territories. Any change in the service conditions of the Subordinate Judiciary in isolation, is bound to generate some demands from other services and it may be difficult for the State to resist such demands.

(d) The question of uniformity in service conditions is a question of policy pertaining to the respective State Governments which alone are competent to decide on the said issue and such decisions on the issue have various implications and ramifications which have to be determined by the respective State Governments by taking into account its financial limitations.

(e) The directions given by this Court involve a very heavy financial outlay and the State Governments with varying degrees of resources cannot implement the directions without considering and taking into account their own financial resources. Hence it is not possible to bring about uniformity in service conditions as envisaged in the directions given by this Court.

(f) The State Governments have constituted from time to time, State Pay Commissions for examining and making appropriate recommendations for revision in pay-scales based on certain criteria, and the basic wage structure varies from State to State. As such it may not be possible to have a uniform basis for pay-scales to the members of the Subordinate Judicial Service in view of the variations in conditions from place to place and from State to State both qualitatively and quantitatively. Hence the feasibility of referring the question of appropriate pay-scales of judicial officers to the State Pay Commissions deserves careful consideration. It may be possible to strive towards uniformity of pay-scales over a period of time with the cooperation of all the States.

(g) A mandatory direction enjoining upon the State to allocate resources to a specific activity would greatly impair the competence of the executive and the legislature to decide relative priorities in respect of the allocation of

available resources on developmental and non-developmental activities. Any direction by the Government which involves spending sums out of the Consolidated Fund of the State/ Union Territory, would amount to a direction to the State legislature/ Parliament for carrying out necessary legislation for relevant appropriation. Such a direction cannot be given by the judiciary to the legislature.

(h) In terms of Art. 309 of the Constitution, matters concerning appointment, promotion, terms of conditions of service of the Subordinate Judiciary are to be decided by the State Government/ Union Territory Administration subject to such laws as may be passed by the legislature/ Parliament. The implementation of the directions given by this Court, is likely to result in an impingement on the constitutional functions and powers of the executive and the legislature.

(i) In the interest of adhering to the constitutional scheme of the division of powers, directions given by the court may be converted to recommendations prompting State legislature/ governments and the Parliament/ Union Government to study them carefully and to introduce the requisite changes on their own in gradual steps.

(j) The function of the higher judiciary is limited to examining whether the means adopted by the State legislature/ Government are constitutionally valid: *Synthetics & Chemicals Ltd. etc. v. State of U.P. & Ors. A.I.R. 1990 S.C. 1927.*

2. To the specific directions given by this Court, the objections are as follows:

(a) To the direction for increasing the retirement age upto 60 years, the objection is that the late entry in the service is not peculiar to judicial service. There are a number of services like medical, engineering, teaching where entry into Government service is made at a late stage and hence any deviation on the ground of late entry may have implications for other services also. It is contended that in the services where entry is at a late stage the interests of the Government servants are protected by allowing a specified number of years to be added to the qualifying service for the purposes of determining the pension.

b. It is contended that the judiciary alone is not doing the sedentary work. There are services

like Central Secretariat Service which also perform the sedentary work and, therefore, the sedentary nature of work may not be a valid consideration for laying down a longer retirement age. It is argued that in arriving at the retirement age, the Government takes into account various factors like the optimum utilisation of the experience and the need to provide employment to the younger generation. If the age of retirement of the members of the judiciary is changed on the ground of the late entry and the sedentary nature of the work, the other civil services may also move the Court for such a direction.

If the age of retirement is increased there would be an increase in indirect cost as well, since the pension and the gratuity of the officer would also go up and the amount involved by way of emoluments etc., would also be higher.

c. The direction to provide residential accommodation, the vehicle and the transport facility, the library facility at the residence, the uniformity in designations and the setting up of the training facilities would call for a substantial investment in the infrastructure. It is difficult to quantify the financial outlay. By the early 1989, there were nearly 10000 judicial officers all over the country. The accommodation is not available to many of them at present, and at least more than 5000 residential houses may have to be constructed all over the country involving a large capital investment in the region of Rs. 150 - 250 crores. So is the case, with providing training facilities at the Central and the State/ Regional levels which will require considerable financial outlay.

3. To put it shortly, the thrust of the general objections is that the power to prescribe service conditions is vested in the executive and the legislature. The service conditions are a matter of policy and have to be prescribed by taking into consideration the comparative utility of the service, the nature and the quality of the work, the overall availability of the resources, the priorities for allocation of funds etc., It is thus an exclusive function of the executive and the legislature, and the scheme of the devolution of the power envisaged by the Constitution has been deviated from to the extent this Court has by the directions in question prescribed the conditions of service. It has thus impinged upon the field exclusively assigned by the Constitution to the executive and the

legislature. There is further nothing distinguishable about the judicial work, and if the directions given by this Court are followed, the other services may demand similar service conditions. That would place a very heavy financial burden on the public exchequer. It is also contended that the financial resources of all the States are not equal and some of the States would be unable to bear the financial burden that is bound to result from the implementation of the directions. What is more, the conditions of work and of employment of the judicial officers differ from State to State. Hence, uniform conditions of service and particularly of pay-scales and of the retirement age are not warranted.

4. As regards the specific directions, the increase in the retirement age is opposed on the ground that there are different conditions of general employment in different States. It will have repercussions on the other services and also the finances. The implementation of the other directions is resisted mainly on the ground of the financial burden that would be imposed by their implementation.

5. At the outset, it is necessary to note that at the time of the hearing of the Writ Petition, positive representation was given to the Union of India and all the States and the Union Territories by issuing notices to them. They were represented through their counsel. Some of them, viz., the States of Orissa, Madhya Pradesh, Rajasthan, Bihar, Haryana, Arunachal Pradesh, Gujarat, Himachal Pradesh, Jammu & Kashmir, Mizoram, Tripura and Goa did not file their counters and took the stand that they would abide by whatever is ultimately decided by the Court. The Union of India filed a counter stating that the issues involved fell within the dominion of the States. Some of those which filed counters, viz., the States of Andhra Pradesh, Maharashtra, Uttar Pradesh, West Bengal, Punjab, Karnataka, Assam, Manipur, Meghalaya, Nagaland and Sikkim placed their point of view while others objected to any directions being given. The objection to the enhancement of the superannuation age was mainly on the ground that the superannuation age of the judges fixed in their States was on par with that fixed for the members of the other services. Similarly, the Judges' demand for rent-free accommodation was objected to also on the ground that the rent-free accommodation was not given to the members of the other services and that the house rent

allowance given was sufficient to meet the needs of the Judges. The demand for conveyance to the District Judges was, however, not seriously objected to by any of the States.

6. It is after considering the counters filed and after hearing the learned counsel for all the parties, that this Court had pronounced its judgment and given the directions in question. The very same contentions which are made the grounds of the present Review Petition were advanced at that time and have been dealt with in the judgment under review. Hence the Review Petition *Stricto sensu* is not maintainable and is liable to be dismissed summarily.

7. It is not necessary to repeat here what has been stated in the judgment under review while dealing with the same contentions raised there. We cannot, however, help observing that the failure to realize the distinction between the judicial service and the other services is at the bottom of the hostility displayed by the review petitioners to the directions given in the judgment. The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the Council of Ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the state-power are the Ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions. The Council of Ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the legislators and the Judges and not between the Judges and the administrative executive. In some democracies like the U.S.A., members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The Judges, at

whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally.

8. This distinction between the Judges and the members of the other services has to be constantly kept in mind for yet another important reason. Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary, and no price is too heavy to secure it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties, is to impair and whittle away justice itself.

9. So much for the contention of the review petitioners that the directions given by this Court would lead to the demand from the members of the other services for similar service conditions. It is high time that all concerned appreciated that for the reasons pointed out above there cannot be any link between the service conditions of the judges and those of the members of the other services. It is true that under Art.309 of the Constitution, the recruitment and conditions of service of the members of the subordinate judiciary are to be regulated by the Acts of the appropriate legislature and pending such legislation, the President and the Governor or their nominees, as the case may be, are empowered to make rules regulating their recruitment and the conditions of service. It is also true that after the Council of States makes the necessary declaration under Art.312, it is the Parliament which is empowered to create an All India Judicial Service which will include posts not inferior to the post of District Judge as defined under Art.236. However, this does not mean that while determining the service conditions of the members of the judiciary, a distinction should not be made between them and the members of the other services or that the service conditions of the members of all the services should be the same. As it is, even among the other services, a distinction is drawn in the matter of their service conditions. This Court has in the judgment under review, pointed out that the linkage between the service conditions of the

judiciary and that of the administrative executive was an historical accident. The erstwhile rulers constituted, only one service, viz., the Indian Civil Service for recruiting candidates for the judicial as well as the Administrative service and it is from among the successful candidates in the examination held for such recruitment, that some were sent to the administrative side while others to the judicial side. Initially, there was also no clear demarcation between the judicial and executive services and the same officers used to perform judicial and executive functions. Since the then Government had failed to make the distinction between the two services right from the stage of the recruitment, its logical consequences in terms of the service conditions could not be avoided. With the inauguration of the Constitution and the separation of the State power distributed among the three branches, the continuation of the linkage has become anachronistic and is inconsistent with the constitutional provisions. As pointed out earlier, the parity in status is no longer between the judiciary and the administrative executive but between the judiciary and the political executive. Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged. The failure to grasp this simple truth is responsible for the contention that the service conditions of the judiciary must be comparable to those of the administrative executive and any amelioration in the service conditions of the former must necessarily lead to the comparable improvement in the service conditions of the latter.

10. This leaves us with the contention of the review petitioners that by the directions in question, this Court has encroached upon the powers of the executive and the legislature under Art.309 to prescribe the service conditions for the members of the Judicial Service. In view of the separation of the powers under the Constitution, and the need to maintain the independence of the judiciary to protect and promote democracy and the rule of law, it would have been ideal if the most dominant power of the executive and the legislature over the judiciary, viz., that of determining its service conditions had been subjected to some desirable checks and balances. This is so even if ultimately, the service conditions of the judiciary have to be incorporated in and declared by the legislative

enactments. But the mere fact that Art.309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary, does not mean that the judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary.

11. It is for this reason again that the present practice of entrusting the work of recommending the service conditions of the members of the subordinate judiciary to the same Pay Commissions which recommend the service conditions of the other services requires reconsideration. The service conditions of the judicial officers should be laid down and reviewed from time to time by an independent Commission exclusively constituted for the purpose, and the composition of such commission should reflect adequate representation on behalf of the judiciary.

12. However, it cannot be contended that pending such essential reforms, the overdue demands of the judiciary can be overlooked. As early as in 1958, the Law Commission of India in its 14th report on the System of Judicial Administration in this country made certain recommendations to improve the system. The Commission lamented that "though we have been pouring money into a number of activities, the administration of justice has not seemed to be of enough importance to deserve more financial assistance. On the contrary, in a number of States not only had the administration of justice been starved so as to affect its efficiency, but it has also been made to yield revenue to the State." The report made recommendations in respect of various aspects of the service conditions of the judicial officers and also emphasised that there was no connection between the service conditions of the judiciary and those of the other services. The report further pointed out the salient features of the distinct work of the Judges and emphasised the need among others, to increase the salaries and the superannuation age of the Judges as well as to improve the other facilities available to them including the provision for official residential accommodation.

13. These recommendations were made to

improve the system of justice and thereby to improve the content and quality of justice administered by the courts. The recommendations were made in the year 1958. Over the years the circumstances which impelled the said recommendations have undergone a metamorphosis. Instead of improving, they have deteriorated making it necessary to update and better them to meet the needs of the present times.

14. Although the report made the recommendations in question to further the implementation of the Constitutional mandate to make proper justice available to the people, the mandate has been consistently ignored both by the executive and the legislature by neglecting to improve the service conditions. By giving the directions in question, this Court has only called upon the executive and the legislature to implement their imperative duties. The Courts do issue directions to the authorities to perform their obligatory duties whenever there is a failure on their part to discharge them. The power to issue such mandates in proper cases belongs to the Courts. As has been pointed out in the judgment under review, this Court was impelled to issue the said directions firstly because the executive and the legislature had failed in their obligations in that behalf. Secondly, the judiciary in this country is a unified institution judicially though not administratively. Hence uniform designations and hierarchy, with uniform service conditions are unavoidable necessary consequences. The further directions given, therefore, should not be looked upon as an encroachment on the powers of the executive and the legislature to determine the service conditions of the judiciary. They are directions to perform the long overdue obligatory duties.

15. The contention that the directions of this Court supplant and bypass the constitutionally permissible modes for change in the law, we think, wears thin if the true nature and character of the directions are realised. The directions are essentially for the evolution of an appropriate national policy by the Government in regard to the judiciary's condition. The directions issued are mere aids and incidental to and supplemental of the main direction and as a transitional measure till a comprehensive national policy is evolved. These directions, to the extent they go, are both reasonable and necessary.

16. The contention with regard to the financial

burden likely to be imposed by the directions in question, is equally misconceived. Firstly, the Courts do from time to time hand down decisions which have financial implications and the Government is obligated to loosen its purse recurrently pursuant to such decisions. Secondly, when the duties are obligatory, no gr evance can be heard that they cast financial burden. Thirdly, compared to the other plan and non-plan expenditure, we find that the financial burden caused on account of the said directions is negligible. We should have thought that such plea was not raised to resist the discharge of the mandatory duties. The contention that the resources of all the States are not uniform has also to be rejected for the same reasons. The directions prescribe the minimum necessary service conditions and facilities for the proper administration of justice. We believe that the quality of justice administered and the calibre of the persons appointed to administer it are not of different grades in different States. Such contentions are ill-suited to the issues involved in the present case.

17. Coming now to the specific directions given in the judgment under review:

(i) *All India Judicial Service*:- The objection of the review petitioners to the direction to set up the All India Judicial Service is that it would eliminate chances and scope for prescribing service conditions of the judicial officers in conformity with the local needs, which is the intention of the Constitution. The second objection is that the service conditions of the judicial officers should be identical to those of the members of the other services in the same State and not to those of the judicial officers of the other States. The last objection is that the matter has to be considered by the Union of India in consultation with the other States and it pertains to the executive policy which cannot be dictated by this Court.

18. These objections ignore the fact that while giving the said direction, this Court has only reiterated the view expressed by the Law Commission in its 14th report and in paragraph 12 of the judgment has specifically observed that "we do not intend to give any particular direction on this score particularly when the point was not seriously pressed. But, we would commend to the Union of India to undertake appropriate exercise quickly so that the feasibility of implementation of the recommendations of the Law Commission

may be examined expeditiously and implemented as early as possible. It is in the interest of the health of the judiciary throughout the country that this should be done". This being the case, it is for the Union of India if it is so advised to take the initiative in the matter in the light of the discussion and recommendations of the Law Commission where all the objections which are now taken in the review petition have been fully dealt with by the Commission. If and when the Union of India takes such an initiative, the procedure for the formation of the All India Service as provided in Art.312 of the Constitution will have to be followed. The objections now taken would be of no relevance if the Council of States by resolution supported by no less than two-thirds of its members present and voting declares that such a service should be created, it being necessary and expedient in the national interest to do so. In that case, the Parliament will have to provide for the creation of such service. The law creating the service will also regulate the recruitment and the service, conditions of the persons appointed to the service. The service however, will provide for the post not inferior to that of the District Judge as defined under Art.236. Hence, the judges holding posts below that of the District Judge would not be members of such All India Service and the service conditions of the said judges will continue to be determined as before, by the State executive and the legislature. For the reasons pointed out earlier, even the service conditions of such judges will have to be different from those of the members of the other services, and to achieve the uniformity in the service conditions, there will have to be a parity in the service conditions of such judges in all the States. Much of the misconceptions underlying the demand for review on this point, would, however, stand dispelled if the essentially recommendatory nature of the directions is realised and appreciated.

(II) *Uniform Hierarchy and Designations:* There is no serious objection raised by the review petitioners to have uniform hierarchy and give uniform designations to the judicial offices in the different States and the Union Territories and to confer on them uniform jurisdiction as directed this Court. Hence, it is presumed that the said suggestion has been accepted by them. If this is so, then unless it is contended that the nature and the quantum of work performed by

the judicial officers of the different States varies, it is not understood how the other directions which are given by this Court to achieve uniformity in the service conditions can be seriously resisted. As pointed out earlier, even the ground that the financial capacities of the different States/Union Territories vary is not available since the directions conceive the minimum essential facilities. It is a settled proposition of law that the minimum service conditions will have to be ensured irrespective of the capacity to fund them. The law should apply *proprio vigore* in the case of the minimum service conditions of the judiciary.

19. It has, however, become imperative, in this connection, to take notice of the fact that the qualifications prescribed and the procedure adopted for recruitment of the judges at the lowest rung are not uniform in all the States. In view of the uniformity in the hierarchy and designations as well as the service conditions that we have suggested, it is necessary that all the States should prescribe uniform qualifications and adopt uniform procedure in recruiting the judicial officers at the lowest rung in the hierarchy. In most of the States, the minimum qualifications for being eligible to the post of the Civil Judge-cum-Magistrate First Class/Magistrate First Class/Munsiff Magistrate is minimum three years' practice as a lawyer in addition to the degree in law. In some States, however, the requirement of practice is altogether dispensed with and judicial officers are recruited with only a degree in law to their credit. The recruitment of law graduates as judicial officers without any training or background of lawyering has not proved to be a successful experiment. Considering the fact that from the first day of his assuming office, the judge has to decide, among others, questions of life, liberty, property and reputation of the litigants, to induct graduates fresh from the Universities to occupy seats of such vital powers is neither prudent nor desirable. Neither knowledge derived from books nor pre-service training can be an adequate substitute for the first-hand experience of the working of the court-system and the administration of justice begotten through legal practice. The practice involves much more than mere advocacy. A lawyer has to interact with several components of the administration of justice. Unless the judicial officer is familiar with the working of the said components, his education

and equipment as a judge is likely to remain incomplete. The experience as a lawyer is, therefore, essential to enable the judge to discharge his duties and functions efficiently and with confidence and circumspection. Many States have hence prescribed a minimum of three years' practice as a lawyer as an essential qualification for appointment as a judicial officer at the lowest rung. It is, hence, necessary that all the States prescribe the said minimum practice as a lawyer as a necessary qualification for recruitment to the lowest rung in the judiciary. In this connection, it may be pointed out that under Art.233(2) of the Constitution, no person is eligible to be appointed a District Judge unless he has been an advocate or a pleader for no less than seven years while Arts.217(2)(b) and 224(3)(b) require at least ten years' practice as an advocate of a High Court for the appointment of a person to the posts of the judge of the High Court and the judge of the Supreme Court, respectively. We, therefore, direct that all States shall take immediate steps to prescribe three years' practice as a lawyer as one of the essential qualifications for recruitment as the judicial officer at the lowest rung.

20. As regards the procedure adopted for recruiting judicial officers at the lowest rung, in some States, the recruitment is done by the High Courts whereas in others, it is done by the Public Service Commission. Even where the recruitment is done by the Public Service Commission, there is a diversity of practice in that in some States, a representative of the High Court who is mostly a sitting Judge of the Court sits in the Committee as one of its members to interview the candidates. In other States, the representative of the High Court is not even invited for interviewing the candidates. In the latter class of cases, it may happen and in fact, it does very often happen that none of those who interview the candidates are even qualified in law. Again in some States, the opinion of the representative of the High Court when he participates in the selection process, is not given a special weight while in others, it is accorded predominant consideration. The decision of this Court in *D.R.Choudhary v. Ashok Kumar Yadav and others*, (1985) 4 S.C.C. 417, has already stated the correct position of law on the subject both with regard to the obligation to invite the High Court's representative to participate in the selection process and the weightage to be given to the opinion of such

representative with regard to the suitability of the candidates. We may do no better than reproduce here the relevant part of that decision:

"We should also like to point out that in some of the States, and the State of Haryana is one of them, the practice followed is to invite a retired Judge of the High Court as an expert when selections for recruitment to the judicial service of the State are being made and the advice given by such retired High Court Judge who participates in the *viva voce* test as an expert is sometimes ignored by the Chairman and members of the Public Service Commission. This practice is in our opinion undesirable and does not commend itself to us. When selections for the judicial service of the State are being made, it is necessary to exercise the utmost care to see that competent and able persons possessing a high degree of rectitude and integrity are selected, because if we do not have good, competent and honest judges, the democratic policy of the State itself will be in serious peril. It is, therefore, essential that when selections to the Judicial Service are being made, a sitting Judge of the High Court to be nominated by the Chief Justice of the State should be invited to participate in the interview as an expert and since such sitting judge comes as an expert who, by reason of the fact that he is a sitting High Court Judge, knows the quality and character of the candidates appearing for the interview, the advice given by him should ordinarily be accepted, unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and members of the Public Service Commission. We are giving this direction to the Public Service Commission in every State because we are anxious that the finest talent should be recruited in the Judicial Service and that can be secured only by having a real expert whose advice constitutes a determinative factor in the selection process".

21. To the above observations, we may add that the separation of the judiciary from the executive as ordained by Art.50 of the Constitution, also requires that even the judicial appointments at the lowest rung are made in consultation with the High Court. If the judicial stream is polluted at its very inception, the independence of judiciary will

remain in jeopardy, for ever.

22. To ensure uniform practice in selecting judicial officers, therefore, we direct that in all cases, where the selection of the judicial officers is made by the Public Service Commission, the representative of the High Court shall be one of the members of the Selection Committee and the opinion given by him with regard to the suitability of the candidate shall not be disregarded unless there are strong and cogent reasons for not-accepting the opinion, which reasons must be recorded in writing.

23. It should be remembered that both the directions given above, viz. prescription of minimum of legal practice of three years as an essential qualification to be eligible for being appointed as a judicial officer and the obligation to invite the representative of the High Court to participate in the selection process and to accord his advice dominating weight are calculated to ensure recruitment of competent, independent and honest judicial officers and thus to strengthen the administration of justice and the confidence of public in it. The States should, therefore, take immediate steps to comply with the said directions by amending the relevant Rules.

(III) *Superannuation Age*: The objection to the direction for enhancement of the superannuation age of all the subordinate judicial officers upto 60 years, is firstly on the ground that the determination of the superannuation age is a matter of policy of the executive and hence the said direction is in violation of the basic structure of the Constitution which envisages separation of powers between the three organs of the State. The further objection is that the distinction made between the members of the judicial service and those of the other services on the ground of the late entry into the service and the sedentary nature of the work of the former is an error on the face of the record. It is contended that members of the other services like the College Teachers, Doctors, Engineers, have also to spend longer period in acquiring qualifications required for appointment to their respective services and almost all officers around the age of superannuation reach the highest level and usually carry on sedentary duties.

24. This argument misses the point that the longer period required for acquiring the necessary

academic qualifications is only one of the grounds on which the enhancement of the superannuation age is directed. Even after the acquisition of the relevant academic qualifications, a minimum practice at the Bar is in most of the States, a prerequisite for recruitment to the post of the judge even at the lowest level. There is no such waiting period for the candidates of the other services after the acquisition of the academic qualifications. Thus the judicial officer enters the service at a relatively higher age than the member of the other services. Secondly, as observed by the Law Commission in its 14th report, the judicial service stands by itself in the matter of the age of retirement by reason of the great importance of a long experience and a mature mind in the judicial office. The recognition of such importance has led most countries to prescribe a much higher age for the retirement of judicial personnel as compared with that of the personnel in other services. In England, the judicial service is governed by special rules both in regard to the emoluments and the age of retirement. While the civil servants retire at the age of 60 years, the County Court Judges and Metropolitan Magistrates retire at 72. In our country also the tenure and other terms and conditions of service of the Supreme Court and the High Court Judges stand out from those relating to the administrative service. Lastly, we cannot shut our eyes to the reality that on account of the sizeable earnings at the Bar, many times out of proportion to the skill and the labour put in, the competent lawyers are reluctant to accept the judicial posts. There is thus a dearth of proper talent available to man the judicial service. It is, therefore, for the health of the administration of justice that attractive service conditions including a higher retirement age, is prescribed for the members of the judiciary. For the same reasons it is necessary that whatever trained talent is available is utilised for as long a period as is feasible.

25. There is also no similarity in the nature of the sedentary work done by the judge and the members of the other services. The sedentary work is mainly of two types-mechanical and creative. Each case coming before the judge has its own peculiarities requiring application of fresh mind and skill. The judge has constantly to be a creative artist. His work, therefore, requires constant thinking and display of talent. The exertions involved in the duties of the judge cannot be

compared with the duties of other services. Thus, looked at from any angle, there is need to increase the superannuation age of the judges as compared to that of the members of the other services. This is apart from the fact that as has been repeatedly pointed out earlier, it is a fallacious to compare the judicial service with other services for any purpose, since the judicial service by its very nature stands on a different footing and should be treated as such.

26. What is further, while directing the enhancement of the superannuation age to 60 years, this Court had taken into consideration the fact that the age of retirement in different States varied from 55 to 60 years. Secondly, the age of retirement for the High Court Judges was in the meanwhile increased from 60 to 62 years. The age of retirement of the Supreme Court Judges is 65 years. If the nature and the magnitude of work done by the judicial officers all over the country is the same and if further the members of the higher judiciary, who have to discharge more onerous workload, do it efficiently even at the still higher age, there is no reason why in view of the shortage of the proper talent, the age of retirement of the members of the subordinate judiciary should not be increased to 60 years. The said retirement age is prevalent in some of the States for some of the judicial posts. The only reason why the age of superannuation of the judicial officer is at present kept at 55 or 58 is the misconceived requirement of the parity of service conditions between those of the judicial officers and the members of the other services. That consideration, as pointed out earlier, being both irrelevant and erroneous must fail.

27. The alleged financial burden that would be thrown on the State-exchequer on account of the enhancement of the superannuation age as a result of the payment of the maximum salary in the pay scale to the officers for a further period of 2 or 5 years as the case may be, and on account of the higher outlay on their retiral benefits, is negligible considering the enormous advantage that the administration of justice and the society at large would derive from the enhancement in the age of retirement. The additional financial outlays have also to be weighed against those occasioned by the training of the new recruits, comparatively lower and slower rate of disposal of cases, higher rate of incorrect decisions and the consequent more

number of appeals etc. Further, a simple arithmetical exercise would show that there is in fact little extra financial outlay involved. For, as against the payment of the maximum salary for another 2 or 5 years as the case may be, we have to calculate, for that period, the salary of the new recruit and the pension of the incumbent. The further contention that it would affect the employment conditions in different States is equally misconceived since all over India there are not more than about 10,000 judicial posts and most of the judicial officers after their retirement come to be appointed to the quasi judicial or administrative tribunals. Thus, we see no merit in any of the objections to the enhancement of the retiring age.

28. There is, however, one aspect we should emphasise here. To that extent the direction contained in the main judgment under review shall stand modified. The benefit of the increase of the retirement age to 60 years, shall not be available automatically to all judicial officers irrespective of their past record of service and evidence of their continued utility to the judicial system. The benefit will be available to those who, in the opinion of the respective High Courts, have a potential for continued useful service. It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility. The potential for continued utility shall be assessed and evaluated by appropriate Committees of Judges of the respective High Courts constituted and headed by the Chief Justices of the High Courts and the evaluation shall be made on the basis of the judicial officers' past record of service, character rolls, quality of judgments and other relevant matters.

29. The High Court should undertake and complete the exercise in case of officers about to attain the age of 58 years well within time by following the procedure for compulsory retirement as laid down in the respective Service Rules applicable to the judicial officers. Those who will not be found fit and eligible by this standard should not be given the benefit of the higher retirement age and should be compulsorily retired at the age of 58 by following the said procedure for compulsory retirement. The exercise should be undertaken before the attainment of the age of 58 years even in cases where earlier the age of superannuation was less than 58 years. It is necessary to make it clear that this assessment is for the purpose of finding out

the suitability of the concerned officers for the entitlement of the benefit of the increased age of superannuation from 58 years to 60 years. It is in addition to the assessment to be undertaken for compulsory retirement and the compulsory retirement at the earlier stage/s under the respective Service Rules.

30. The enhancement of the superannuation age to 60 years coupled with the provision for compulsory retirement at the age of 58 years does introduce a change in the service condition of the existing personnel. There may be judicial officers who are not desirous of availing of the benefit of the enhanced superannuation age with the condition of compulsory retirement and may like to opt for retirement at the age of 58 years. In such cases, the concerned officers should intimate in writing their desire to retire at the age of 58 years well in advance and in any case before they attain the age of 57 years. Those who do not do so will be deemed to have exercised their option to continue in service till they attain 60 years of age subject to the liability of being retired compulsorily at the age of 58 years according to the procedure for compulsory retirement laid down in the Service Rules.

31. Those who have already crossed the age of 57 years and those who will cross the age of 58 years soon after the date of this decision, will exercise their option within one month from the date of this decision. If they do not do so, they will be deemed to have opted for continuing in service till the age of 60 years. In that case, they will also be subjected to the review for compulsory retirement, if any, notwithstanding the fact that there was not enough time to undertake such review before they attained the age of 58 years. However, in their case, the review should be undertaken within two months from the date of the expiry of the period given to them above for exercising their option and if found unfit, they should be retired compulsorily according to the procedure for compulsory retirement under the Rules.

32. Since those who have already crossed the age of 58 years have had no benefit of exercising their option to retire earlier and the point of time at which their assessment could be undertaken for compulsory retirement, if any, has also passed, it is not considered proper to subject them to the review for compulsory retirement at this stage. They may, therefore, be given the benefit of the enhanced superannuation age of 60 years without

subjecting them for such review.

(IV) *Uniform Pay Scales*: In the first instance, it is necessary to recapitulate here the observations made and the directions given in the judgment under review on the question of the uniform pay scales. The court had found from the data before it that there was a wide variance in the pay structure prevailing in the various States and Union Territories and for the same nature of work performed, the judicial officers were remunerated differently. However, the court found that it was difficult to get into the exercise of fixing appropriate pay scales in the absence of full details. In the absence of such data, there was a likelihood of affecting special benefits which the judicial officers may be getting in some States. The court, therefore, declined to direct fixation of any pay scales. Instead, the court directed the Pay Commissions or the Committees to be set up in the States and the Union Territories to separately examine and review the pay structure of judicial officers keeping in view the relevant aspects some of which have been adverted to in the 14th Report of the Law Commission. The relevant passage from the said report which has been quoted in the judgment highlights that the entry in the judicial service is late compared to the entry into the executive service and the promotions in the judicial service come less quickly. Both these factors affect the judicial officers' pension and other retirement benefits compared to those of the members of the executive service.

33. We have already discussed the need to make a distinction between the political and the administrative executive and to appreciate that parity in status can only be between judges and the political executive and not between judges and the administrative executive. Hence, the earlier approach of comparison between the service conditions of the judges and those of the administrative executive has to be abandoned and the service conditions of the judges which are wrongly linked to those of the administrative executive have to be revised to meet the special needs of the judicial service. Further, since the work of the judicial officers throughout the country is of the same nature, the service conditions have to be uniform. We have also emphasised earlier the necessity of entrusting the work of prescribing the service conditions for

the judicial officers to a separate Pay Commission exclusively set up for the purpose. Hence, we reiterate the importance of such separate commission and also of the desirability of prescribing uniform pay scales to the judges all over the country. Since such pay scales will be the minimum deserved by the judicial officers, the argument that some of the States may not be able to bear the financial burden is irrelevant. The uniform service conditions as and when laid down would not, of course, affect any special or extra benefits which some States may be bestowing upon their judicial officers.

(V) *Allowances:* By the judgment under review, this Court had directed two separate allowances to be given, viz. Residential office-cum-library allowance to all the subordinate judges, and sumptuary allowance to district judges and chief judicial magistrates.

34. The reasons which prompted this Court to direct the grant of residence-cum-library allowance to every judicial officer was that it was found that there was no provision for a judges' library in most of the courts of the subordinate judicial officers. As a result, they have either to depend upon the library maintained by the Bar, if any, or to go without the assistance of the books. At many places, particularly, at the taluk/tehsil level, there is not even an adequate Bar library available. It is difficult to understand the attitude of the State Governments towards the provision of the facility of law books and journals to the Judges when the judges' whole duty consists of interpreting the law and applying it to the facts before them. It is like asking the artisans to work without their tools. The lawbooks, not to speak of the other books, are the essential tools of the judges. The minimum that is expected of the State is to provide every court with the up-to-date texts of and commentaries on the relevant statutes and the law journals which report decisions of the High Courts and the Supreme Court, for the exclusive use of the judges. Since the Governments consistently failed to provide this primary facility to the courts, it became necessary for this Court to direct the payment of Rs.250 per month to Civil Judge (Junior Division) and Civil Judge (Senior Division) and Rs.300 per month to officers of the higher category as residential office-cum-library allowance. We have been unable to understand the objection to the grant of the said allowance. The duty of the State towards

the administration of justice is not discharged by appointing judges who are also rarely appointed in time and in requisite number. But that is a different aspect. To enable the judges to perform their duties properly and efficiently, they must also be provided with all the facilities. For want of even the minimum facilities such as the law books and journals the cause of justice is bound to suffer.

35. The only alternative to the grant of the allowance in question is for the Governments themselves to undertake to supply to every court the necessary books and journals. If more than one Court is located at the same place, one set of such books and journals, depending upon the number of courts, may be sufficient. The books and journals to be supplied to the Courts may be determined in consultation with the respective High Courts. The books and journals will then remain in the concerned courts instead of travelling with the judges. We would in fact commend to the respective Governments this alternative course in place of the allowance in question to the individual judges.

36. The direction to give sumptuary allowance to the District Judge in his capacity as the principal judicial officer of the concerned district and to the Chief Judicial Magistrates at the rate of Rs.300 and Rs.200 per month respectively was in consideration of the fact that they had to hold monthly meetings with the Collector, District Magistrate and Superintendent of Police, etc. and also to meet the judicial officers, working under them as well as the members of the Bar, occasionally. In such meetings, they are expected to extend small courtesies. It is now represented that whenever official meetings are held, there is a provision which enables the District Judge as well as the Chief Judicial Magistrate to spend from the amounts at the disposal of the Court. In view of this, we rescind the said directions. However, we make it clear that the sumptuary allowance, if already paid to the District Judges and the Chief Judicial Magistrates, should not be recovered from them.

(VI) *Provision for residential accommodation:*

In the directions given, this Court has emphasised that the judicial officers cannot be left without proper accommodation for any length of time. Secondly, the accommodation available to the judicial officer must be adequate and consist also of a separate and exclusive office-cum-study room as an indispensable

component of such residence. Thirdly, it was pointed out that in the absence of official residences, the judicial officers are required to pay exorbitant rent out of proportion to their salaries. Lastly, it was emphasised that in the pool of the Government accommodation which is available in any town, the judiciary gets the last priority. The Governments have not so far shown any keen awareness of the problems faced by the judges for want of accommodation and of the manner in which it affects the discharge of their duties. It is for these reasons that it was suggested that the Government should give top priority to the provision of residential accommodation to the judges and construct enough houses with the requisite facilities.

37. It is difficult to understand the objections raised by the review petitioners to the said direction. The attitude adopted by the petitioners itself bears out that the Governments are not at all keen on providing proper residential accommodation to the members of the judiciary and justifies the necessity to give the said direction. On the admission of the review petitioners, there is at present a shortage of about 5,000 houses. This means that about 50 per cent of the judicial officers are facing trials and tribulations for want of proper accommodation at rentals within their means. The estimated expense of Rs.150 to 200 crores for constructing the said houses which is to be incurred by all the States and the Union Territories is according to us not forbidding even assuming that the estimate is correct.

38. We now understand that the judiciary has been included as a plan subject by the Planning Commission. If this is so, the construction of adequate number of houses with the necessary facilities should be given the top priority being the most primary requirement of the judges at any place. The provision of house rent allowance is not an answer much less a substitute for the adequate housing facility. In the judgment under review, it has been specifically emphasised that the provision of a separate and exclusive office room is an indispensable component of the official accommodation allotted to the judicial officer. In order to ensure that the quarters constructed for the judicial officers are of proper dimension and with adequate number of rooms, their future construction should be made in

consultation with and under the supervision of the respective High Court and the High Court should take adequate interest in their construction.

39. It may be noted in this connection that the direction is not to provide rent-free housing accommodation but accommodation at a rental not exceeding 12 1/2 per cent of the salary of the occupant. We, therefore, reiterate the said direction and reject the objections of the petitioners.

(VII) *The provision of conveyance, loans for conveyance and conveyance allowance:* It has been pointed out in the judgment under review that in most of the States the District Judge has been provided with a motor car and in some of the States the Chief Judicial Magistrate is also provided with transport whether car or a jeep. It is only in some States that the car is not provided for every District Judge. The need for such car both to the District Judge and the Chief Judicial Magistrate is also pointed out in the judgment. Both of them have to undertake touring in their District to supervise the work of the Judges and Magistrates working under them. They are not expected to undertake the touring either by public transport or by transport borrowed from the Government departments which is on many occasions not available when needed. What is further, the reliance on the Government departments for transport itself makes them supplicant which from the point of view of the judicial independence is undesirable. Further, the conveyance provided to them is meant to be used strictly for official purpose. Since for reasons more than one, there is a need to minimise the contacts between the judges and the public and particularly to avoid their being exposed to physical risks at the hands of the dissatisfied litigants, their travelling by the same public conveyance by which the litigants and their witnesses travel, has to be avoided. Hence, the direction given is also for a pool vehicle for other judicial officers in sets of 5 and failing that for a loan on suitable terms to enable the judges to acquire atleast two wheeler automobiles. In this context, the direction to construct official residences for judges at one place becomes more relevant. The judges can then travel by the same vehicle from and to the court. The provision of the conveyance allowance is no substitute for an independent conveyance. As has

been rightly pointed out "It is impossible for a Judge to discharge his functions properly if he knows that during the day he will sit on the Bench with a prisoner in the dock before him and later in the evening he may have to sit side by side with the same prisoner in the public transport". In the circumstances, the necessity to distance the Judges from the public needs no emphasis. Amidst the growing cult of violence today, it has become imperative. Fortunately, we do not find much opposition to this direction and we learn that most of the States have by now carried out the same.

40. However, a doubt has been expressed as to whether all District Judges posted at one place such as the judges of the City Civil and Sessions Courts are each entitled to an independent vehicle. It is, therefore, necessary to make it clear that the direction given in the judgment under review is for providing vehicle to the Principal District Judge at the district headquarters including the metropolitan towns. The provision for an independent vehicle to such principal officer is linked with the inspection work which he has to carry out. Hence, whether it is at the district headquarters or in the metropolitan town, it is only the Principal District Judge or the Principal Judge as the case may be, who would be entitled to such independent conveyance. All other District Judges whether at the district headquarters or in the metropolitan town would only be entitled to the pool vehicle on the basis of one vehicle for 5 Judges for their conveyance from their residences to court and back.

41. Where for some reason, the judges other than the District Judge cannot be provided with a pool vehicle or where they desire loan for purchasing two wheeler automobiles, there is no reason why they should not be given such loans on suitable terms and also the conveyance allowance.

42. We are further informed that where the motor-vehicles are provided to District Judges/Principal Judges of the City Civil Courts/Chief Judicial Magistrates and the pool vehicles to others, they are not provided with petrol in some States. This is an incomplete compliance with our direction. We, therefore, also direct that in all such cases, the State Governments should make arrangements to provide free adequate quantity of petrol for the said vehicles subject to the maximum of 100 litres per month depending upon the distance from the

court to the residence in respect of the pool vehicles and the vehicles provided for the Principal Judges of City Civil Courts and the size of the district and the distances of the courts to be inspected by the District Judges and the Chief Judicial Magistrates in respect of the cars provided to them. The State Governments should fix the quantum of petrol to be provided in consultation with the respective High Courts.

(VIII) *In-service training:* Subsequent to the hearing of the main petitions, the Union Government has announced the establishment of a National Judicial Academy for comprehensive training of judicial personnel. A Committee under the chairmanship of the Chief Justice of India has been constituted. The National Judicial Academy when constituted, we hope, will take over in a comprehensive way all aspects of the training of judicial officers at all stages. In this view of the matter, we delete the directions issued to the States for the establishment of training institutes and make it optional for the States to have such Training Institutes either independently or jointly with other States, if they find it necessary.

43. Having dealt with the objections of the review petitioners to the directions in general as well as to the specific directions, it would be appropriate to remind all concerned of the distinct nature of the duties that a judge is called upon to discharge, the society's expectations of the conduct of the judge, the lifestyle of the judge, the occupational hazards to which he is exposed and of the need to keep judges above their essential wants. We can do no better than to quote in this behalf, relevant excerpts from David Pannick's book "Judges", after omitting those which have already been referred to earlier. Although the observations made there are in the context of English judges, they are equally, if not more, applicable to the judges in this country:

"The reasons which judges must give to justify their decisions can be gnawed over at their leisure by the teams of lawyers trained (and generously paid) to extract for the purpose of an appeal, every morsel of error.... The Judge has 'the burden of resolving, day after day and week after week, a long succession of issues, each one of which occupies the professor-critic for months and even years of specialized study'."

"The English Judge has no clerks or assistants to research or write his judgments. The barristers who argue the case before him will 'vary much in their ability'. Sometimes they help but often they may be a hindrance to the just determination of the issues...."

"The judge has burdensome responsibilities to discharge. He has power over the lives and livelihood of all those litigants who enter his court... His decisions may well affect the interests of individuals and groups who are not present or represented in court. If he is not careful, the judge may precipitate a civil war... or he may accelerate a revolution.... He may accidentally cause a peaceful but fundamental change in the political complexion of the country."

"Judges today face tribulations, as well as trials, not contemplated by their predecessors... Parliament has recognised the pressures of the job by providing that before the Lord Chancellor recommends anyone to the Queen for appointment to the Circuit Bench, the Lord Chancellor 'shall take steps to satisfy himself that the person's health is satisfactory'.... This seems essential in the light of the reminiscences of Lord Roskill as to the mental strain which the job can impose.... Lord Roskill added that, in his experience, 'the work load is intolerable; seven days a week, 14 hours a day...'"

"Only in England could the vocation of the Judge be described as 'something like a priesthood' or 'analogous to the Royal Family', requiring practitioners to 'seclude themselves' in various ways...."

"In England, we expect the judge to adopt a respectable lifestyle, free from any hint of the unusual, let alone the deviant".

"In 1950 a Member of Parliament.... recommended an even greater degree of judicial isolation.... So effective is the isolation of our judiciary that the personalities and characteristics of our judges are unknown to laymen..."

"The English Judge ensures in a quiet but effective manner that his pay accords with his status. He avoids the public display of militancy... Judge rank Coffin of the US Court of Appeals complained in 1985 about the inadequacy of 'compensation' for judges. In the previous few years, he lamented, judicial salaries had become so insufficient that only the

mediocre or the wealthy would henceforth be willing to take judicial appointments. Perhaps disappointing pay levels help to explain why a clinical psychologist was helping judges in Massachusetts to cope with stress.... He also provided counselling to enable the retired judge 'to maintain self-esteem'..."

"He (judge) is a symbol of that strange mixture of reality and illusion, democracy and privilege, humbug and decency, the subtle network of compromises, by which the nation keeps itself in its familiar shape."

"The qualities desired of a judge can be simply stated: 'that if he be a good one and that he be thought to be so'. Such credentials are not easily acquired. The judge needs to have 'the strength to put an end to injustice' and 'the faculties that are demanded of the historian and the philosopher and the prophet'."

"It is unlikely that men and women will ever cease to wound, cheat, and damage each other. There will always be a need for judges to resolve their disputes in an orderly manner. As people grow ever less willing to accept unreservedly the demands of authority, the judiciary like other public institutions, will be subjected to a growing amount of critical analysis. The way in which 'Judge & Co.' is run is a matter of public interest and will increasingly become a matter of public debate."

44. It will also be relevant to quote what the Law Commission in its 14th report had to say in connection with the work of the judicial officers -- "The great responsibility of the work which a judicial officer is called upon to discharge needs no emphasis. Judicial integrity is of the greatest importance and to expect persons discharging responsible functions to live on low salaries not commensurate with their office and responsibility is unrealistic and ignores present day living conditions. Elsewhere, we have also dealt with the difficulties which judicial officers, as a class, have to face in the matter of securing residential accommodation and how, in some parts of the country, a very high percentage of their salary has to be spent towards house rent alone. Considering these facts and circumstances, we are of the view that the scales of pay should be substantially higher than it is at present in order to enable an officer to maintain a proper standard of living and avoid obligations which may be embarrassing to him in the

discharge of his duties...."

45. To sum up, we hold as follows:

(a) The legal practice of three years should be made one of the essential qualifications for recruitment to the judicial posts at the lowest rung in the judicial hierarchy.

Further, wherever the recruitment of the judicial officers at the lowest rung is made through the Public Service Commission, a representative of the High Court should be associated with the selection process and his advice should prevail unless there are strong and cogent reasons for not accepting it, which reasons should be recorded in writing.

The rules for recruitment of the judicial officers should be amended forthwith to incorporate the above directions.

(b) The direction with regard to the enhancement of the superannuation age is modified as follows:

While the superannuation age of every subordinate judicial officer shall stand extended upto 60 years, the respective High Courts should, as stated above, assess and evaluate the record of the judicial officer for his continued utility well within time before he attains the age of 58 years by following the procedure for the compulsory retirement under the Service rules applicable to him and give him the benefit of the extended superannuation age from 58 to 60 years only if he is found fit and eligible to continue in service. In case he is not found fit and eligible, he should be compulsorily retired on his attaining the age of 58 years.

The assessment in question should be done before the attainment of the age of 58 years even in cases where the earlier superannuation age was less than 58 years.

The assessment directed here is for evaluating the eligibility to continue in service beyond 58 years of age and is in addition to and independent of the assessment for compulsory retirement that may have to be undertaken under the relevant Service rules, at the earlier stage/s.

Since the service conditions with regard to superannuation age of the existing judicial officers is hereby changed, those judicial officers who are not desirous of availing of the benefit of the enhanced superannuation age with the condition for compulsory retirement

at the age of 58 years, have the option to retire at the age of 58 years. They should exercise this option in writing before they attain the age of 57 years. Those who do not exercise the said option before they attain the age of 57 years, would be deemed to have opted for continuing in service till the enhanced superannuation age of 60 years with the liability to compulsory retirement at the age of 58 years.

Those who have crossed the age of 57 years and those who cross the age of 58 years soon after the date of this decision will exercise their option within one month from the date of this decision. If they do not do so, they will be deemed to have opted for continuing in service till the age of 60 years. In that case, they will also be subjected to the review for compulsory retirement, if any, notwithstanding the fact that there was not enough time to undertake such review before they attained the age of 58 years. However in their case, the review should be undertaken within two months from the date of the expiry of the period given to them above for exercising their option, and if found unfit, they should be retired compulsorily according to the procedure for compulsory retirement under the Rules.

Those judicial officers who have already crossed the age of 58 years, will not be subject to the review for compulsory retirement and will continue in service upto the extended superannuation age of 60 years since they have had no opportunity to exercise their option and no review for compulsory retirement could be undertaken in their case before they reached the age of 58 years.

(c) The direction for granting sumptuary allowance to the District Judges and Chief Judicial Magistrates stands withdrawn for the reasons given earlier.

(d) The direction with regard to the grant of residence-cum-library allowance will cease to operate when the respective State Governments/ Union Territory Administrations start providing the Courts, as directed above, with the necessary law books and journals in consultation with the respective High Courts.

(e) The direction with regard to the conveyance to be provided to the District Judges and that with regard to the establishment of the training institutes for the judges have been

clarified by us in paragraphs 7 (vii) & (viii) respectively. It is the Principal District Judge at each district headquarters or the metropolitan town as the case may be, who will be entitled to an independent vehicle. This will equally apply to the Chief Judicial Magistrate and the Chief Metropolitan Magistrate. The rest of the Judges and magistrates will be entitled to pool-vehicles - one for every five judges for transport from residence to Court and back - and when needed, to loans for two wheeler automobiles and conveyance allowance. The State Governments/ Union Territory Administrations are directed to provide adequate quantity of free petrol for the vehicles not exceeding 100 litres per month in consultation with the High Court.

(f) In view of the establishment of the National Judicial Academy, it is optional for the States to have their independent or joint training judicial institutes.

(g) The rest of the directions given in the judgment under review are maintained.

(h) In view of the pendency of these review petitions,

(i) the time to comply with the directions for bringing about uniformity in hierarchy, designations and jurisdictions of judicial officers on both civil and criminal sides is extended upto 31st March, 1994;

(ii) the time to comply with the directions to provide law books and law journals to all courts is extended upto 31st December, 1993 failing which the library allowance should be paid to every judicial officer with effect from 1st January, 1994 if it is not paid already;

(iii) the time to provide suitable residential accommodation, requisitioned or Government, to every judicial officer is extended upto 31st March, 1994;

(iv) the time to comply with the rest of the directions is maintained as it was directed by the judgment under review.

46. The review petitions are disposed of accordingly. I.A.Nos. 2 and 3 which are for intervention and I.A.No.4 for impleadment are dismissed. No order as to costs.

S.L.P.(C) No. 14505 of 1992

47. In view of the above decision in the review petitions, this S.L.P. is dismissed. I.A. 1 of 1992

which is for exemption from filing certified copy of the impugned judgment is allowed and I.A.No. 2 of 1992 which is for interim stay of the impugned order is dismissed.

Writ Petition No.71 of 1993

48. By the judgment of this Court reported in 1992(1) S.C.C. 119, it was directed that the State Governments should take appropriate steps to raise the retirement age of judicial officers by 31st December, 1992. It meant that those who were to retire on or before 31st December, 1992 would not get the benefit of the enhanced age of retirement. In the present case, the writ petitioner was admittedly to retire on 31st December, 1992 according to the superannuation age prevalent till that time, viz., 58 years. He would not, therefore, be entitled to the benefit of the enhanced retirement age which is to come into force from 1st January, 1993. The writ petition is accordingly dismissed. I.A.No. 1 of 1993 which is for ad-interim relief will also stand dismissed.

49. Any clarification that may be required in respect of any matter arising out of this decision will be sought only from this Court and from no other Court. Further, the proceedings for implementation of the directions given in this judgment shall be filed only in this Court and no other Court shall entertain them.

B.S. ----- *Petitions disposed of.*

IN THE SUPREME COURT OF INDIA.

Present: Kuldip Singh, Madan Mohan Punchhi and Bharucha, JJ.

C.A.No.3086 of 1980 24th August, 1993.

O.T.M.O.M.Mcyyappa Chettiar ...Appellant
v.

O.T.M.S.M.Kasi Viswanathan Chettiar and another ...Respondents.

Civil Procedure Code (V of 1908), Sec.100 - Second appeal - High Court - If can reappraise evidence on

record stating that finding of courts below was perverse.

The High Court in hearing and deciding the second appeal was not justified in re-appraising the evidence on record nor could it justify its conduct in doing so by merely stating that the finding of the courts below was perverse. Learned counsel for the respondents submitted that Sec.100 of the Code of Civil Procedure, as it stood before it was amended by the Amendment Act, 1976, applied and that the High Court was therefore, justified in re-evaluating the oral evidence. It is so well settled that this is not the law that no citation of procedure in this behalf is called for. [Para 3.]

The Judgment of the Court was delivered by *Bharucha, J.*: This appeal by special leave is directed against the judgment and order of the High Court at Madras dated 15th March, 1977, whereby, in a second appeal the concurrent findings of fact of the trial court and the first appellate court were reversed.

2. The plaintiff claimed possession of the properties described in Schedule A to the plaint and joint possession of properties described in Schedules B and C to the plaint. There was no dispute before the High Court and there is no dispute before us as to the properties described in Schedule A to the plaint, so that no further reference in that regard is required. The claim in respect of the Schedule B & C properties was that they were trust properties and consequential reliefs in respect of a one-fourth share in Schedule B properties and a one-half share in the Schedule C properties was made. The defendants denied the case in the plaint and averred that the Schedule B and C properties were joint family properties that had been purchased much after the date of the deed of settlement and there had been no endowment of any share in those properties in favour of the trust. The trial court found that one-fourth share in the Schedule B properties and a one-half share in the Schedule C properties were trust properties and decreed the suit accordingly. The trial court's judgment was confirmed in appeal by the learned Additional District Judge. The defendants preferred a second appeal to the High Court. Upon a re-appraisal of the evidence on record the High Court came to the conclusion that the plaintiff had not proved that a one-fourth share in the Schedule B properties and a one-half share in the Schedule C properties were trust properties and that "the finding of the Courts

below that they are trust properties is perverse". Accordingly, the second appeal was allowed regarding the Schedule B and C properties.

3. We have no doubt that the High Court in hearing and deciding the second appeal was not justified in re-appraising the evidence on record nor could it justify its conduct in doing so by merely stating that the finding of the courts below was perverse. Learned counsel for the respondents submitted before us that Sec.100 of the Code of Civil Procedure, as it stood before it was amended by the Amendment Act, 1976, applied and that the High Court was therefore, justified in re-evaluating the oral evidence. It is so well settled that this is not the law that no citation of precedents in this behalf is called for.

4. The appeal is allowed. The judgment and order under appeal is set aside and the judgment and order of the first appellate court is restored.

5. There shall be no order as to costs.

B.S.

Appeal allowed.

IN THE SUPREME COURT OF INDIA.

Present: *B.P.Jeevan Reddy and N.Venkatachala, JJ.*

C.A.No.1730-31 of 1993

15th April, 1993.

Mrs.Asha Kaul and another
v.

...Appellants.

State of J. & K. and others.

...Respondents.

Jammu and Kashmir Civil Services (Judicial) Recruitment Rules (1967), Rules 39 and 41 - Constitution of India (1950), Arts.317 to 320 - Recruitment of Munsifs - State Government if has absolute power to accept or reject recommendations of Public Service Commission - Whether it can approve the select list in part.

It is true that the Government is the appointing authority for the munsifs but it is misleading to assert that in the matter of selection and appointment the Government has an absolute power. The Constitution has created a Public Service Commission and assigned it the function of conducting

examinations for appointments to the services of the State. The Government is directed to consult the Public Service Commission on all matters relating to methods of recruitment to civil services and to civil posts on the suitability of candidates for such appointment, among other matters. The idea is not to allow the concentration of Government power in the hands of one person, authority or organ. [Para. 6]

Construed in the above light, Rule 30 of the Jammu and Kashmir Civil Services (Judicial) Recruitment Rules, 1967 does not confer an absolute power upon the Government to disapprove or cancel the select list sent by the Public Service Commission. Where, however, the Government is satisfied after due enquiry that the selection has been vitiated either on account of violation of a fundamental procedural requirement or is vitiated by considerations of corruption, favouritism or nepotism, it can refuse to approve the select list. In such a case the Government is bound to record the reasons for action, and produce the same before a court if and when summoned to do so apart from placing the same before the Legislature as required by Clause (2) of Art. 323 of the Constitution of India. For the same reason it must be held that the Government cannot pick and choose candidates out of the list. It is equally not open to the Government to approve a part of the list and disapprove the balance. The number of vacancies available on the date of approval and publication of the list is not material. [Para. 7]

Cases referred to:

State of Haryana v. Subhash Chandra Marwaha, A.I.R. 1973 S.C. 2216: 1973 Lab.I.C. 1212. [Para. 8]

M.S.Jain v. State of Haryana, A.I.R. 1977 S.C. 276: (1977) 1 S.C.J. 456: (1977) 1 S.C.C. 486. [Para. 8]
State of Kerala v. A.Lakshmikutty, A.I.R. 1987 S.C. 331: 1986 J.T. 819. [Para. 8]

Shankarsan Dash v. Union of India, 1991 (2) J.T. S.C. 380: (1991) 3 S.C.C. 47. [Para. 8]
 (Arising out of S.L.P.(C) Nos.12608 of 1992 and 16418 of 1992 with Writ Petition (C) No.81 of 1993) From the Judgment and Order dated 30.6.1992 and 2.9.1992 of the Jammu and Kashmir High Court in L.P.A.No.161 of 1990 and C.W.P.No.1352 of 1988.

D.D.Thakur and M.H.Baig, Senior Advocates, *Rajendra Mal Tatia*, *Indra Makwana* and *K.K.Gupta* for *Suresh A.Shroff & Co.*, for Appellants.

V.R.Reddy, Additional Solicitor General and *Ashok Mathur*, for Respondents.

The Judgment of the Court was delivered by *B.P.Jeevan Reddy, J.*: Heard counsel for the parties. Leave granted in S.L.P. Nos.12608 of 1992 and 16418 of 1992.

2. The appeals are directed against the judgment of the Division Bench of the Jammu and Kashmir High Court allowing a special appeal preferred by the State of Jammu and Kashmir against the judgment of the learned single Judge. The learned single Judge had allowed the writ petition filed by the appellants herein. The matter pertains to approval and publication of the select list of District Munsifs prepared by the Jammu and Kashmir Public Service Commission.

3. On May 28, 1984 the High Court intimated the Government of ten vacancies in the category of munsifs and requested the Government to initiate appropriate steps for selection of candidates. The Government wrote to the Public Service Commission and the latter issued the notification and put the process in motion. Written test was held in the year 1985. *Viva-voce* was also held. At that stage, the High Court requested the Government (with a copy forwarded to the Public Service Commission) to select twenty candidates in the place of ten. This was done on December 10, 1985. The Government, in turn, requested the Public Service Commission on December 27, 1985 to select twenty candidates. On March 11, 1986 the Public Service Commission sent three select lists, one containing twenty candidates, the other containing three scheduled castes candidates and a waiting list of ten candidates.

4. From the record placed before us by the learned counsel for the State of Jammu and Kashmir, it appears that the Government received several complaints against the selection process. The Government appears to have been satisfied *prima facie* with some of those complaints and was toying with the idea of scrapping the entire list and asking for a fresh selection. The select list sent by the Commission was kept pending without being approved as required by Rule 39 of the Jammu and Kashmir Civil Services (Judicial) Recruitment Rules, 1967. Meanwhile, the High Court has been pressing for approval of the names in view of a number of vacancies and the consequent accumulation of work. Number of courts were without presiding officers. In particular, the High Court

said, there was urgent need for at least thirteen Munsifs. In the circumstances, the Government approved on December 23, 1986, the names of thirteen persons out of the list recommended by the Public Service Commission and published the same. They were appointed on December 30, 1986. Meanwhile, a writ petition had been filed in the High Court for a direction to the Government to approve and publish the list recommended by the Public Service Commission. On December 30, 1986, the Advocate General for the State stated before the court that the Government has already approved thirteen names and that the question of approval of the remaining persons in the list was under the active consideration of the Government. Recording the said statement, the writ petition was dismissed as settled. The Government, however, did not approve any of the other names in the lists, evidently in view of the very same reasons for which they were disinclined initially to approve the said lists. Meanwhile, the candidates in the select list below serial No.13 were pressing the Government to approve and publish the list. The High Court was also addressing the Government from time to time to approve the list in view of certain vacancies arising since the appointment of the thirteen Munsifs aforementioned. Since no further names were being approved by the Government, the writ petition, from which these appeals arise, was filed on September 14, 1988. The writ petition was allowed on July 11, 1990 by a learned single Judge and a direction was issued to the State Government to approve and publish the list of the remaining candidates submitted by the Public Service Commission to it for appointment as munsifs immediately in accordance with the Rules of 1967 and to consider the appointment of such candidates (including the writ petitioners) as munsifs in the vacancies existing or likely to exist in accordance with the recommendations to be made by the High Court. On appeal, the Division Bench disagreed with the learned single Judge. The Bench held that approval and publication of the select list by the Government under Rule 39 is not a mere ministerial act but a meaningful one. It is open to the Government to examine the select list carefully and to reach its own conclusion regarding the suitability and merits of the candidates and publish the names of only those candidates who are found suitable. While approving the list, the Division Bench held, the

State Government cannot alter or tamper with the order of merit determined by the commission but it is certainly open to the Government to stop at a particular point where it feels that a particular candidate is not meritorious and not to approve the remaining list. The Government is not bound to fill up the existing vacancies within a particular time-frame. The mere inclusion in the select list also does not confer upon the candidates any indefeasible right to appointment. The recommendations of the commission are not binding upon the State Government held the Division Bench. In the facts and circumstances of the case, it must be held that the remaining seven names in the select list have been disapproved by the Government. The writ petition also suffers from laches. The persons who had meanwhile become eligible and qualified to apply for the said post should also be given a chance. A list prepared as far back as 1985-86 cannot be directed to be approved in the year 1992.

5. In these appeals, it is submitted by the learned counsel for the appellants that once the Public Service Commission prepares and recommends a select list, the Government has no power to sit in judgment over it. It is bound to approve the list as recommended. The function of the Government under Rule 39 of the 1967 Rules is merely ministerial and formal. Even otherwise, the Government has not disclosed any reasons for not approving the seven names while approving the first thirteen. The Government's action is arbitrary and capricious. It is indeed vitiated by inadmissible and extraneous considerations. The Government cannot be allowed an absolute power in the matter. On the other hand, it is contended by Sri Dipankar Gupta, learned Solicitor-General appearing for the State of Jammu and Kashmir that the function of the Government under Rule 39 is not merely formal or ministerial. The Government being the appointing authority, is entitled to scrutinise the list prepared by the Public Service Commission. It is open to the Government either to approve or disapprove the list, either wholly or in part. As a matter of fact, a large number of complaints were received by the Government against the said selection and many of them were also found to be not without substance. However, in view of the pressing need expressed by the High Court, the first thirteen candidates in the list were approved in the interest of

judicial administration. The remaining seven names were not approved in as much as no vacancies were available at that time. In all the circumstances of the case, the Hon'ble Chief Minister took a decision on March 28, 1988 not to approve any further names and to go in for fresh selection. Inasmuch as the vacancies at the end of the year 1986 were not more than thirteen, the refusal to approve the remaining seven is a valid and *bona fide* exercise of power and discretion on the part of the Government. The appellants have no legal right to be appointed just because their names have been included in the select list prepared by the Public Service Commission. The first requisition by the High Court was sent in May, 1984. The written test was held in 1985. The select list was recommended in March, 1986. After a lapse of more than seven years, the said list cannot now be directed to be given effect to, the learned Solicitor-General submitted. Such a direction would deprive a large number of persons, who have become qualified and eligible to apply and compete for the said post meanwhile of the opportunity of applying for the said post. Many of them may even become age-barred meanwhile, he submitted.

6. It is true that the Government is the appointing authority for the munsifs, but it is misleading to assert that in the matter of selection and appointment the Government has an absolute power. Such an argument does violence to the constitutional scheme. The Constitution has created a Public Service Commission and assigned it the function of conducting examinations for appointments to the services of the State, as the case may be. According to Art.320, Clause (1) this is the primary function of the commission. The Government is directed to consult the Public Service Commission on all matters relating to methods of recruitment to civil services and to civil posts and on the principles to be followed in making appointment to civil services and posts and on the suitability of candidates for such appointment, among other matters. An examination of Arts.317 to 320 makes it evident that the Constitution contemplates the commission to be an independent and effective body outside the Governmental control. This is an instance of application of the basic tenet of democratic form of Government viz., diffusion of governing power. The idea is not to allow the concentration of governing power in the hands of one person, authority or organ. It is in

the light of this constitutional scheme that one has to construe Rules 39 and 41 of the 1967 Rules. They read as follows:

"39. *Final list*: The list of selected candidates after it is approved shall be published by the Government Gazette and a copy thereof shall be sent to the court along with the Waiting list, if any furnished by the Commission for record in their office."

41. *Security to the list*: The list and the waiting list of the selected candidates shall remain in operation for a period of one year from the date of its publication in the Government Gazette or till it is exhausted by appointment of the candidates whichever is earlier, provided that nothing in this Rule shall apply to the list and the waiting list prepared as a result of the examination held in 1981 which will in operation till the list or the waiting list is exhausted."

7. Construed in the above light, Rule 39, in our opinion, does not confer an absolute power upon the Government to disapprove or cancel the select list sent by the Public Service Commission. Where, however, the Government is satisfied, after due enquiry that the selection has been vitiated either on account of violation of a fundamental procedural requirement or is vitiated by consideration of corruption, favouritism or nepotism, it can refuse to approve the select list. In such a case, the Government is bound to record the reasons for its action, and produce the same before a court, if and when summoned to do so, apart from placing the same before a court, if and when summoned to do so, apart from placing the same before the Legislature as required by Clause (2) of Art.323. Indeed, Clause (2) of Art.323 obliges the Governor of a State to lay a copy of the annual report received from the commission before the Legislature "together with a memorandum explaining, as respects the cases, if any, where the advice of the commission was not accepted (and) the reasons for such non-acceptance." Evidently, this is meant as a check upon the power of the Government. This provision too militates against the theory of absolute power in the Government to disapprove or reject the recommendations of the commission. For the same reason, it must be held that the Government cannot pick and choose candidates out of the list. Of course, where in respect of any particular candidate any material is discovered

disclosing his involvement in any criminal activity, the Government can always refuse to appoint such person but this would not be a case touching the select list prepared and recommended by the commission. It is equally not open to the Government to approve a part of the list and disapprove the balance. In this case, it may be remembered that the Government itself had asked for a list of twenty and the commission had sent a list of twenty. (We are not concerned with the waiting list sent by the commission, at this stage). It could not have been approved in part and rejected in part. The number of vacancies available on the date of approval and publication of the list is not material. By merely approving the list of twenty, there was no obligation upon the Government to appoint them forthwith. Their appointment depended upon the availability of vacancies. A reading of Rule 41 makes this aspect clear. The list remains valid for one year from the date of its approval and publication. If within such one year, any of the candidates therein is not appointed, the list lapses and a fresh list has to be prepared. In this case, no doubt, a number of complaints appear to have been received by the Government about the selection process. We have seen the note file placed before us. It refers to certain facts and complaints. But if the Government wanted to disapprove or reject the list, it ought to have done so within a reasonable time of the receipt of the select list and for reasons to be recorded. Not having done that and having approved the list partly (thirteen out of twenty names), they cannot put forward any ground for not approving the remaining list. Indeed, when it approved the list to the extent of thirteen, it ought to have approved the entire list of twenty or to have disapproved the entire list of twenty. The objections, the Government have pertains to the very process of selection *i.e.*, to the entire list, and not individually to any of the remaining seven candidates.

8. It is true that mere inclusion in the select list does not confer upon the candidates included therein an indefeasible right to appointment *State of Haryana v. Subbash Chandra Marwaha*, A.I.R. 1973 S.C. 2216; 1973 Lab.I.C. 1212, *M.S.Jain v. State of Haryana*, A.I.R. 1977 S.C. 276: (1977)1 S.C.J. 456: (1977)1 S.C.C. 486, *State of Kerala v. A.Lakshmiikutty*, A.I.R. 1987 S.C. 331: 1986 J.T. 819, but that is only one aspect of the matter. The other aspect is the obligation of the Government

to act fairly. The whole exercise cannot be reduced to a force. Having sent a requisition/request to the commission to select a particular number of candidates for a particular category, in pursuance of which the commission issues a notification, holds a written test, conducts interviews, prepares a select list and then communicates to the Government, the Government cannot quietly and without good and valid reasons nullify the whole exercise and tell the candidates when they complain that they have no legal right to appointment. We do not think that any Government can adopt such a stand with any justification today. This aspect has been dealt with by a Constitution Bench of this Court in *Shankarsan Dash v. Union of India*, 1991 (2) J.T. S.C. 380: (1991)3 S.C.C. 47, where the earlier decisions of this Court are also noted. The following observations of the court are apposite:

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subbash Chandra Marwaha*, A.I.R. 1973 S.C. 2216; 1973 Lab.I.C. 1212, *Neelima Shangla v. State of Haryana or Jatendra Kumar v. State of Punjab*."

9. We may reiterate that the principle of Art.323, referred to hereinabove, is equally relevant on the nature of the power of the Government in such a matter.

10. Looked at from the above stand point, it appears that the Government's action in not

approving the rest of the seven names in the select list is unsustainable but there are certain circumstances which induce us not to interfere in this matter. They are:

(i) During the period of one year from the date of approval of thirteen names (23.12.1986/30.12.1986) no vacancy had arisen, which means that even if the list of twenty had been approved and published on December, 23 or December 30, 1986 none of the seven persons would have been appointed. At the end of one year, the list lapses and becomes inoperative. The first letter of the High Court stating that one or two more vacancies have arisen and requesting the Government to approve the remaining names, was sent only on August 13, 1988 i.e. long after the expiry of the one year period. Any direction at this stage to approve the list would be a futile exercise. The list cannot be operated with respect to the vacancies existing as on today; and

(ii) When the Government failed to act within a reasonable period from the date of the order (December 30, 1986) of the High Court in W.P.No.1316 of 1984 (which was disposed of recording the statement of the Advocate General) the petitioners ought to have moved in the matter. They did not do so. They waited for more than twenty months and approached the High Court only on September 14, 1988. This delay, in our opinion, disentitles the petitioners from any relief in the facts and circumstances of the case.

11. For the above reasons, the appeals fail and are dismissed. No costs.

W.P.(C) No.81 OF 1993: The petitioner in this writ petition was included in the waiting list prepared by the Public Service Commission. Since the appeals preferred by the candidates at serial No.14 onwards in the main list have themselves failed, there is no question of giving any relief to this petitioner.

13. The writ petition accordingly fails and is dismissed. No costs.

B.S. ----- Appeals and petition dismissed.

IN THE SUPREME COURT OF INDIA.

Present: *Kuldip Singh and S.Mohan, JJ.*

C.A.No.6120 of 1983

7th April, 1993.

J.S.Jadhav

...Appellant

v.

Mustafa Haji Mohammed Yusuf and others

...Respondents.

Advocates Act (XXV of 1961), Sec.38 - Advocate found to have misappropriated clients money - Proper punishment - Sum misappropriated, if can be directed to be paid to the client without driving him to a civil court for the recovery.

In this case, admittedly, the complainant (respondent) does not know English. It is equally admitted that the appellant had withdrawn the money from the court receiver. None of the correspondence addressed to the respondent mentioned about the receipt dated 8th of August, 1977. The plea taken by the appellant based on the receipt is clearly false. The appellant has been withdrawing the money over 14 years and he has illegally retained the amount. Out of a sum of Rs.50,379 which was admittedly withdrawn from the Court receiver only Rs.18,000 was paid on different occasions. The said amount was also spread over and paid on different occasions. On a direction of this Court, a sum of Rs.10,000 had been deposited by the appellant which has been withdrawn by the respondent as per order dated 3.9.1991. Still a sum of Rs.22,379 is due. In view of the established finding of misappropriation the proper punishment will be that the name of the advocate must be struck off the rolls. When Sec.38 says 'deems fit' it must be construed as to meet the ends of justice. The respondent should not be driven to a civil court for recovery of this amount even when the appellant has been found guilty by his own peers which has been confirmed. Therefore, it is directed that there shall be a decree in favour of the respondent (complainant) for a sum of Rs.22,379 together with interest at 9% per annum from the date of the complaint till the date of payment.

[Paras. 13, 14 & 15]

Cases referred to:

M.Veerabhadra Rao v. Tek Chand, A.I.R. 1985 S.C. 28: (1984) S.C.C. (Supp.) 571. [Para.10]
Bar Council of Maharashtra v. M.V.Dabholkar,

(1975)2 S.C.C. 702. [Para. 10]

The Judgment of the Court was delivered by *Mohan, J.*: This is a statutory appeal under Sec.38 of the Advocates Act of 1961.

2. The brief facts are as under:

The respondent engaged the appellant as a counsel in Suit No.510 of 1964, this was in April, 1976. The suit was ultimately compromised on 14.6.1977. It was ordered that out of the total amount lying with the court receiver, a sum of Rs.64,000 shall be paid over to the plaintiff; the balance was to be paid to the respondent and possession or suit property was to be handed over to the respondent by the court receiver.

3. During the pendency of the suit the court receiver inducted one Usman Ghani Haji Mohammed as a tenant. He filed C.S.No.7 of 1978 praying for an interim injunction restraining the court receiver from handing over possession to the respondent. That suit was continued.

4. After the compromise decree was passed on 14.6.1977, the appellant who was the counsel for the respondent was requested to withdraw the amount lying with the court receiver and hand over the same to the respondent. For this purpose a letter of authorisation to enable the appellant to receive the amount was also issued. Pursuant to the letter of authorisation and instructions, a total amount of Rs.50,379 was withdrawn by the appellant from the court receiver. Out of this, he paid only Rs.18,000 and the rest was not paid. Therefore, the respondent preferred a complaint before the Bar Council of India on 9.1.1981. The appellant was issued a notice by the Bar Council to which he submitted his reply. On consideration of his reply and hearing the arguments, the Disciplinary Committee of the Bar Council of India, was of the view that the burden of proving the fact that the respondent had paid a sum of Rs.50,379 lay on the appellant. Certain receipts produced to evidence payment to the respondent were not accepted. The plea of the appellant that the account books had been lost was held to be untrue. Ultimately the appellant was suspended for a period of two years and further directed to pay a sum of Rs.500 to the complainant (the respondent herein). It is against this order the present appeal has been preferred.

5. Learned counsel for the appellant took us through the impugned order and urged that the Committee had not properly appreciated the evidence

especially the receipts which were produced by the appellant to evidence the payment. It is incorrect to hold that the receipt dated 8.8.1977 was a suspicious document merely because the account books were not produced, it would not follow that the payments made by the appellant could be disbelieved.

6. We pointed out to the learned counsel for the appellant that the order under appeal is unexceptional and there was no case for interference. We felt that the order of suspension of two years was not commensurate with the charges of misappropriation. Therefore, we directed the issue notice to the appellant which came to be accepted by the learned counsel Mr. Bharat Sangal. In spite of the fact that the appellant has not chosen to appear, in order to make over the payment of the amount voluntarily. Therefore, we are left with no option then to decide the case ourselves on merits.

7. The Disciplinary Committee of the Bar Council on a proper appreciation of the evidence disbelieved the so-called receipts evidencing the payment. It has come to the correct conclusion that the receipt dated 8th of August, 1979 was got up on a blank signed paper. Hence, the due execution of the receipt had not been proved by the appellant. Besides, the statement of the appellant that the account books had been lost in transit had been rightly disbelieved. Under these circumstances this is a clear case wherein the misappropriation by the appellant has been fully established. Once this conclusion is arrived at, the question is what is the punishment to be imposed?

8. Advocacy is not a craft but a calling, a profession wherein devotion to duty constitutes the hall mark. Sincerity of performance and the earnestness of endeavour are the two wings that will bare aloft the advocate to the tower of success. Given these virtues other qualifications will follow of their own account. This is the reason why legal profession is regarded to be a noble one. But it cannot be allowed to become a sorriest of trades. It will be useful to quote what Sharaswood said of this profession:

"A lawyer, without the most sterling integrity, may shine for a while with meteoric splendour; but his light will soon go out in blackness of darkness. It is not in every man's power to rise to eminence by distinguished abilities. It is not in every man's power, with few exceptions, to attain respectability, competence, and

usefulness. The temptations, which beset a young man in the outset of his professional life, especially if he is in absolute dependence upon business for his subsistence, are very great. The strictest principles of integrity and honour are his only safety. Let him begin by swerving from truth or fairness, in small particulars, he will find his character gone-whispered away, before he knows it. Such a one may not indeed be irrecoverably lost; but it will be years before he will be able to regain a firm foothold. There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public. It is well that it is so. The things we hold dearest on earth, our fortunes, reputations, domestic peace, the future of those dearest to us, nay, our liberty and life itself, we confide to the integrity of our legal counsellors and advocates. Their character must be not only without a strain, but without suspicion. From the very commencement of a lawyer's career, let him cultivate above all things, truth, simplicity and candor. They are cardinal virtues of a lawyer. Let him always seek to have a clear understanding of his object; be sure it is honest and right and then march directly to it. The covert, indirect and insidious way of doing anything, is always the wrong way. It gradually hardens the moral faculties, renders obtuse the perception of right and wrong in human actions, weighs everything in the balance of worldly policy, and ends most generally, in the practical adoption of the vile maxim, "that the end sacrifices the means."

9. Therefore an exacting standard is what is expected of an advocate.

10. This Court has taken the view in *M. Veerabhadra Rao v. Tek Chand*, A.I.R. 1985 S.C. 28: (1984) S.C.C. (Supp.) 571, as to how in such a case professional misconduct has to be dealt with. In that case, the advocate committed forgery by attesting false affidavits which was held to be a serious misconduct. This Court pointed out the duties of the members of the bar in the following passage:-

"Legal profession is monopolistic in character and this monopoly itself inheres certain high traditions which its members are expected to upkeep and uphold. Members of the profession claimed that they are the leaders of thought and society. In the words of Justice Krishna

Iyer in *Bar Council of Maharashtra v. M.V. Dabholkar*, (1975) 2 S.C.C. 702, the role of the members of the Bar can be appreciated. he said at page 718;

The bar is not a private guild, like that of 'barbers, butchers and candle stick-makers' but, by bold contract, a public institution committed to public justice and pro bono public service. The grant of a monopoly licence to practice law is based on three assumptions: (1) There is a socially useful function for the lawyer to perform, (2) The lawyer is a professional person who will perform that function, and (3) His performance as a professional person is regulated by himself and more formally, by the profession as a whole. The central function that the legal profession must perform is nothing less than the administration of justice ('The Practice of Law is a Public Utility' 'The Lawyer, the Public and Professional Responsibility' by F. Raymond Marks et al-Chicago American Bar Foundation, 1972, pp.288/289). A glance at the functions of the Bar Council, and it will be apparent that a rainbow of public utility duties, including legal aid to the poor, is cast on these bodies in the national hope that the members of this monopoly will serve society and keep to canons of ethics befitting an honourable order. If pathological cases of member misbehaviour occur, the reputation and credibility of the Bar suffer a mayhem and whom but the Bar Council, is more concerned with and sensitive to this potential disrepute the few black sheep bring about? The official heads of the Bar, i.e. the Attorney General and the Advocate General too are distressed if a lawyer 'stoops to conquer' by resort to soliciting, touting and other corrupt practices.

If these are the high expectations of what is described as a noble profession, its members must set an example of conduct worthy of emulation. If any of them falls from that high expectation, the punishment has to be commensurate with the degree and gravity of the misconduct".

11. Accordingly, the punishment was increased to one of suspension for a period of five years, having regard to the gravity of the misconduct and keeping in view of motto that the punishment must be commensurate with the gravity of the misconduct.

12. In the case on hand admittedly the complainant (respondent) does not know English. It is equally admitted that the appellant had withdrawn the money from the court receiver. None of the correspondence addressed to the respondent mentioned about the receipt dated 8th of August, 1977. The plea taken by the appellant based on the receipt is clearly false.

13. The appellant has been withdrawing the money over 14 years and he has illegally retained the amount. Out of a sum of Rs.50,379 which was admittedly withdrawn from the court receiver only Rs.18,000 was paid on different occasions. The said amount was also spread over and paid on different occasions. On a direction of this Court a sum of Rs.10,000 had been deposited by the appellant which has been withdrawn by the respondent as per order dated 3rd September, 1991. Still a sum of Rs.22,379 is due.

14. In view of the established finding of misappropriation, we think the proper punishment will be the name of the Advocate must be struck off the rolls. We order accordingly. In addition to this the question arises, whether we can direct the refund of the sum of Rs.22,379 which still is pending for the appellant. Sec.38 of the Advocates Act says as follows:

"Appeal to the Supreme Court: Any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under Sec.36 or Sec.37 [or the Attorney-General of India or the Advocate-General of the State concerned, as the case may be, may within sixty days of the date on which the order is communicated to him, prefer an appeal to the Supreme Court and the Supreme Court may pass such order [including an order varying the punishment awarded by the disciplinary committee of the Bar Council of India] thereon as it deems fit:

Provided that no order of the disciplinary committee of the Bar Council of India shall be varied by the Supreme Court so as to prejudicially affect the person aggrieved without giving him a reasonable opportunity of being heard."

15. When it says, "deems fit", it must be construed as to meet the ends of justice. We feel the respondent should not be driven to a civil court for recovery of this amount even when the appellant has been found guilty by his own peers which we

have also confirmed. Therefore, we direct that there shall be a decree in favour of the respondent (complainant) for a sum of Rs.22,379 together with interest at 9% per annum from the date of the complaint till the date of payment.

16. The appeal is dismissed in the above terms with costs of the respondent which is quantified at Rs.3,000 (Rs.three thousand only).

17. Before we part with the case we may usefully quote Harry R.Blythe (cited in 21 Green Bag, 224):

"Great God! the hour has come when we must clear

The legal fields from poison and from fear;
 We must remould our standards-build them higher,

And clear the air as though by cleaning fire,
 Weed out the damning traitors to the law,
 Restore her to her ancient place of awe."

V.K.

----- *Appeal dismissed.*

IN THE SUPREME COURT OF INDIA.

Present:- *Kuldip Singh and S.C.Agrawal, JJ.*

W.P.(Civil) No.1049 of 1989 17th August, 1993.

Bharat Petroleum Corporation Limited Ex-Employees Association and others

...Petitioners

v.

Chairman and Managing Director, Bharat Petroleum Corporation Limited, Bombay and others

... Respondents.

Civil Services - Pension commuted portion of - Restoration after 15 years from date of retirement, applicable to employees of Bharat Petroleum Corporation.

The equitable principle underlying the rule for restoration of the commuted portion of the pension after the expiry of 15 years from the date of retirement which is applicable to the Central Government can equally be applied to the employees of the respondent/ Corporation.

[Para. 6]

Cases referred to:

"Common Cause" A Registered Society and others v. Union of India, (1987)3 J.T. 352: (1987)1 S.C.R. 497. [Para. 2]

Bharat Petroleum (Erstwhile Burmah Shell) Management Staff Pensioners v. Bharat Petroleum Corporation Limited and others, (1988)2 J.T. 438: (1988)3 S.C.C. 32. [Para. 2]

Bharat Petroleum Management Staff Pensioners and others v. Bharat Petroleum Corporation Limited and others, (1990)1 J.T. 408: (1990)2 S.C.C. 356. [Para. 3]

Som Prakash Rekhi v. Union of India and another, (1981)2 S.C.R. 111: 42 Fac.L.R. 13: 51 C.C. 71: (1981)1 S.C.C. 449: (1981)1 Lab.L.J. 79: 57 F.J.R. 370: (1981)1 Serv.L.R. 154: (1981)1 Lab.L.N. 322: (1981)1 S.C.J. 458. [Para. 6]

The Judgment of the Court was delivered by S.C. Agrawal, J.: The petitioners in this writ petition filed under Art.32 of the Constitution are retired employees of Bharat Petroleum Corporation Ltd., an undertaking of the Government of India. Originally they were in the employment of Burmah Shell Oil Storage and Distributing Company of India Ltd., (for short 'Burmah Shell'). In Burmah Shell there was a voluntary pension scheme wherein the employees on retirement were entitled to a prescribed percentage of their basic pay as pension. The pension was paid out of the non-contributory pension fund governed by a trust created in the year 1950. The said scheme was effective from January 1, 1947. Under the Regulations governing the payment of pension, provision was made for commutation of a part of the pension at the time of retirement by payment of a lumpsum amount and making of a proportionate deduction from the monthly pension paid to the employee for repayment of the said amount. Burmah Shell was nationalised and taken over by the Government of India by the Burmah Shell (Acquisition of Undertakings in India) Act, 1976. Subsequently the shares of Burmah Shell Refineries (India) Ltd. were also acquired by the Government of India and the activities of Burmah Shell as well as Burmah Shell Refineries (India) Ltd., were merged to constitute the Bharat Petroleum Corporation Ltd., By a trust deed dated December 31, 1976, the original trust deed dated December 21, 1950, as modified from time to time, was supplemented and the said trust deed governs the payment of pension to the retired employees of the

Burmah Shell. The petitioners are clerical employees of Burmah Shell who retired from service more than 10 years back. They are receiving pension and at the time of retirement they obtained payment of a lump sum amount by way of commutation of a part of the pension and a proportionate deduction is being made from pension amount payable to them for repayment of the said lump sum amount. In this writ petition the petitioners have prayed for restoration of the full pension after 10 1/2 years from the date of retirement to those employees who retired prior to April 1, 1985 and after 9 1/3 years from the date of retirement to those employees who retired after April 1, 1985. 2. The matter of restoration deduction in monthly pension of the employees of the Central Government who obtained lumpsum payment by way of commutation of a part of the pension was considered by this Court in *"Common Cause" A Registered Society and others v. Union of India*, (1987)3 J.T. 352: (1987)1 S.C.R. 497, wherein this Court has taken note of the decision of the Government of India, contained in the communication dated March 20, 1976 sent to the Attorney General of India, that the recovery from pension payable every month towards commuted value of pension would stop on the completion of 15 years from the date of retirement on superannuation or on the pensioner completing the age of 70 years, whichever is later. Under the directions of this Court, the said benefit was extended with effect from April 1, 1936 so far as civilian employees are concerned. After the said decision of this Court, W.P.No.590 of 1987 was filed by the Bharat Petroleum (erstwhile Burmah Shell) Management Staff Pensioners wherein a similar extension of the benefit of restoration of commuted value of pension after the expiry of the period of 15 years from the date of commutation was sought. Another relief that was sought in the said writ petition was regarding escalation in the amount of pension keeping in view the loss of purchasing power of the rupee and general rise in the cost of living. The said writ petition was decided by the judgment dated May 11, 1988 reported as *Bharat Petroleum (Erstwhile Burmah Shell) Management Staff Pensioners v. Bharat Petroleum Corporation Limited and others*, (1988)2 J.T. 438: (1988)3 S.C.C. 32. During the course of hearing of the said writ petition, the petitioners requested that the question of restoration of the commuted value of the pension may not be

adjudicated and the said matter was, therefore; not examined by the court and the question about the escalation of pension amount alone was dealt with. Keeping in view the fact that in the sister concern owned by the Central Government, namely, Hindustan Petroleum Corporation, increase in pension had been granted to the employees, this Court directed that the petitioners in the said writ petition, viz., the management staff of the Burmah Shell would be entitled to a hike in the pension admissible at the same rate as is being given by the Hindustan Petroleum Corporation. The said hike in pension was made effective from May 1, 1988. The contention urged on behalf of the Bharat Petroleum Corporation that if the escalation admitted by Hindustan Petroleum Corporation is accepted as the basis for escalation in Burmah Shell a burden would arise which the respondent-company cannot discharge, was not accepted.

3. It appears that another writ petition (W.P.No.215 of 1989) was filed by the Bharat Petroleum Management Staff Pensioners wherein the restoration of full pension was sought upon the expiry of 12 1/2 years from date of retirement in case of those who retired prior to April, 1985 and after 11 1/3 years to those who retired after April 1, 1985. The said writ petition was dismissed by this Court by judgment dated March 13, 1990 reported as *Bharat Petroleum Management Staff Pensioners and others v. Bharat Petroleum Corporation Limited and others*, (1990) 1 J.T. 408; (1990) 2 S.C.C. 356. This Court was of the view that the matter has been considered in the earlier writ petition (W.P.No.590 of 1987), wherein similar relief was prayed and that the order passed by this Court in that case was as recent as May 11, 1988 and after such a short time lag and in the absence of any substantial change in the position, it was not desirable to entertain the claim for restoration of commuted pension.

4. Shri Pai, learned counsel appearing for the respondent/ Corporation, has submitted that the matter stands concluded by the aforementioned decisions of this Court and in view of the said decisions, the petitioners are not entitled to any relief in the matter of restoration of commuted pension. Ms.Indira Jaising, learned counsel appearing for the petitioners, has, on the other hand, submitted that the petitioners in this writ petition belong to the clerical wing whereas the earlier W.P.No.590 of 1987 and W.P.No.215 of

1989 had been filed on behalf of the management staff and moreover the matter of restoration of commuted portion of the pension has not been dealt with on merits in these cases. Ms.Jaising has also urged that there is no reason why retired employees of Burmah Shell should not be given the benefit of restoration of the commuted portion of their pension on the same principle on which restoration of the commuted portion of pension has been allowed to Central Government employees.

5. We have examined the two judgments of this Court referred to above in the writ petitions filed by the management staff. The subsequent judgment in W.P.No.215 of 1989 is based on the earlier decision in W.P.No.590 of 1987. As indicated earlier, although the relief of restoration of commuted portion of the pension was sought in W.P.No.590 of 1987 the said matter was not examined by the court in view of the statement made by the learned counsel during the course of hearing of the said writ petition that the question of restoration of commuted value of the pension may not be adjudicated by that Bench. This Court has, however, taken note of the statement made by Shri Pai on behalf of the respondent that as and when Hindustan Petroleum Corporation revised its scheme and gives the relief of restoration of the commuted portion of the pension, the petitioners would be entitled to the same benefit. This would indicate that this Court had not rejected the claim of the petitioners for restoration of the commuted portion of the pension.

6. In "*Common cause*" *A Registered Society and others v. Union of India*, (1987) 3 J.T. 352; (1987) 1 S.C.R. 497, this Court has observed that 15 years is a reasonable period after which the commuted portion of the pension could be restored. In arriving at this conclusion, this Court adopted the principle of 'years of purchase' and observed that an addition of two years to the period necessary for the recovery on the basis of years of purchase justifies the adoption of the 15 year rule and that appeared to be equitable. We find no reason why the same principle should not apply to the petitioners who were originally employed with Burmah Shell and subsequently became the employees of the respondent/ Corporation which is an undertaking of the Government of India and "State" within the meaning of Art.12 of the Constitution See: *Som Prakash Rekhi v. Union of India and*

another, (1981)2 S.C.R. 111: 42 Fac.L.R. 13: 51 C.C. 71: (1981)1 S.C.C. 449: (1981)1 Lab.L.J. 79: 57 F.J.R. 370: (1981)1 Serv.L.R. 154: (1981)1 Lab.L.N. 322: (1981)1 S.C.J. 458. The equitable principle underlying the rule for restoration of the commuted portion of the pension after the expiry of the 15 years from the date of retirement which is applicable to the Central Government can equally be applied to the employees of the respondent/ Corporation.

7. Shri Pai has urged that since pension is paid out of a special pension fund governed by a trust and in view of the limited resources in the said fund, it would not be possible for the respondent/ Corporation to bear the additional burden on account of the restoration of the commuted portion of the pension. Similar contention was urged on behalf of the respondent/ Corporation in W.P.No.590 of 1987 with regard to escalation of pension. Rejecting the said contention, this Court has observed:

"Nothing acceptable has been placed before us from where support can be received for the argument of Mr.Pai, learned counsel for respondent No.1, that if the escalation admitted by Messrs.Hindustan Petroleum Corporation is accepted as the basis for escalation in Burmah Shell there would be injustice or a burden would arise which the respondent/ Corporation cannot discharge. The respondent/ Company has an obligation to pay from its earnings into the fund and merely because the existing fund is not adequate to bear the additional liability the claim which is otherwise justified cannot be rejected. As we have already pointed out, the company's current funds are available to supplement the pension fund." (p.35)

These observations would also apply in the matter of restoration of the commuted portion of the pension.

8. The writ petition is, therefore, allowed and it is directed that the benefit of the restoration of the commuted portion of the pension after the expiry of a period of 15 years from the date of commutation be extended to the petitioners who were on the clerical staff of the Burmah Shell prior to its acquisition by the State and who were taken over by the respondent/ Corporation. The benefit of this restoration would be effective from April 1, 1993. No order as to costs.

B.S.

Petition allowed.

IN THE SUPREME COURT OF INDIA.

Present: S.Ratnavel Pandian and R.M.Sahai, JJ.

C.A.Nos.4017-18 of 1993 (arising out of S.L.P.(C) Nos.1707-08 of 1993) 17th August, 1993.

V.Mahadevan and others ...Appellants
v.
D.C.Aggarwal ...Respondent.

Civil Services - Bias - Respondent filing contempt petition - against Managing Director, State Bank of India, Central Office, Bombay and Managing Director (Personnel) State Bank of India, Central Office, Bombay - Committee interviewing respondent for promotion comprising of those two - Propriety of.

From the records produced by the learned Additional Solicitor General, the court finds that the Committee which interviewed (the respondent) comprised of two of the persons against whom the respondent had filed contempt petition in the High Court. They are appellants in this Court. This, in the opinion of the court, was neither proper nor fair. Those officers who are occupying very high position in the bank, in all propriety, should have withdrawn from the committee constituted for the purpose. The court may not be understood as imputing any bias to them. But the principle of fairness required that they should not have sat on the Board. [Para. 3]

The Judgment of the Court was delivered by R.M.Sahai, J.: This appeal is directed against issuance of notice in Contempt Petition filed by the respondent against Managing Director, State Bank of India, Central Office, Bombay, Chief General Manager, State Bank of India, Chandigarh and Managing Director, Central Office, Bombay by the High Court of Punjab and Haryana as an abuse of process of court which has seriously prejudiced the appellants in complying with the judgment and orders passed by this Court and High Court. 2. The respondent, a senior officer in the State Bank of India had filed a petition before the High Court for quashing the order dated 14th November, 1987 imposing penalty of reduction in rank from scale VI to the bottom of scale IV. The petition was allowed and the order dated 31st October, 1987 passed by the disciplinary authority was quashed and the bank was directed not only to reinstate him, pay all allowances but also to grant

him consequential benefits. This order was affirmed by a Division Bench of that court. In an appeal filed in this Court we refrained from entering into merits as we were of opinion that in view of the finding recorded by the Disciplinary Authority that the action of the respondent did not cause any harm to the bank nor he gained anything out of it, the order passed by the High Court quashing the proceedings for procedural errors was well founded. On 29/30th October, 1992 the respondent filed a contempt petition in the High Court which was withdrawn on the next day. On 7th November, 1992 letter was issued posting him as Deputy General Manager State Bank Staff College, Hyderabad. On 12th November, 1992 the Bank filed a review petition of our order on which notice was issued. On 23rd November, 1992 the respondent filed another contempt application in the High Court. On 28th December, 1992 the bank issued notice to the respondent for continuing inquiry proceedings from the stage it was held invalid. On 22nd January, 1993 notice was issued by the High Court in contempt application. It is against this order that the special leave petition was filed. When it was listed before us we felt that considering the nature of allegations it was not proper for the bank to pursue the matter. We were also of opinion that posting of respondent to Hyderabad was not fair. Nor was it proper to deny promotional benefits to him. The learned Additional Solicitor General stated earlier that so far consequential benefits were concerned the bank was willing to consider his claim for promotion to higher scale in accordance with Rules. Now an affidavit has been filed on behalf of the appellant that such a committee was constituted but in interview held in Bombay the committee did not find the respondent to be fit for being promoted to higher scale in accordance with policy of the bank. The learned Additional Solicitor General further stated that the bank was willing to drop the proceedings which had been initiated after the judgment was delivered by this Court and they have also posted the respondent as Deputy General Manager, Chandigarh.

3. Long arguments were advanced both on behalf of appellants and the respondent. Maintainability of the appeal was also challenged. We do not propose to enter into any of these aspects as we are of opinion that in view of the statements made by learned Additional Solicitor General the

continuance of contempt proceedings in the High Court would not be in interest of justice. Main grievance of the respondent that survives is for promotion. From the records produced by the learned Additional Solicitor General we find that the committee which interviewed comprised of two of the persons against whom the respondent had filed contempt petition in the High Court. They are appellants in this Court. This, in our opinion, was neither proper nor fair. Those officers who are occupying very high position in the bank in all propriety should have withdrawn from the committee constituted for this purpose. We may not be understood as imputing any bias to them. But in our opinion the principle of fairness required that they should not have sat on the board. For these reasons we decide these appeals by issuing following directions:

(i) The statement of the learned Additional Solicitor General is accepted that no fresh enquiry shall be held against the respondent for the act or commission for which action was taken against him which resulted in reduction from rank in 1987. Notice dated 28th December, 1992 shall stand withdrawn.

(ii) The State Bank of India shall reconsider the claim of promotion of the respondent to higher scale in accordance with rules. We do not express any opinion on the question if interview for higher scale is necessary and if there was any valid justification for not promoting the respondent whose record prior to these proceedings is unblemished but if under the policy framed by the bank and followed in other cases constitution of a committee and interview is necessary then the committee be constituted but the Managing Director, State Bank of India, Central Office, Bombay and Managing Director, (Personnel), State Bank of India, Central Office, Bombay who are appellants in this Court may not be its members.

(iii) The committee shall be constituted within three weeks from today which shall decide if respondent was entitled to be promoted to higher scale in which his juniors are working as we are informed that the respondent is reaching his age of superannuation. In case the committee does not find the respondent suitable for promotion it shall give reasons for the same.

(iv) In view of these facts and circumstances the contempt proceedings in the High Court shall stand dropped.

4. Parties shall bear their own costs.

B.S. ---- *Appeal allowed with directions.*

IN THE SUPREME COURT OF INDIA.

Present: *K.Ramaswamy and R.M.Sahai, JJ.*

C.A.No.3947 of 1993 (Arising out of S.L.P.(Civil) No.14304 of 1992). *17th August, 1993.*

Ramchandra Ganpat Shinde and another
...*Appellants*

v.

State of Maharashtra and others ...*Respondents.*

(A) *Constitution of India (1950), Arts.226, 32 and 136 - High Court exercising power under Art. 226 - Giving directions contract to statutory mandate - Order, if can be reviewed judicially, by an independent proceeding - Elections held in pursuance of order - Election Tribunal under the Act, if can determine the correctness or otherwise of the orders passed by High Court or Supreme Court in election petition.*
(B) *Constitution of India (1950), Art.142 - 'To pass such orders as is necessary for doing complete justice in any cause or matter coming before it' - Supreme Court, if can impose costs on respondent when he is not contesting the case.*

The 4th respondent 'Society' is a Co-operative Society under the Maharashtra Co-operative Societies Act. Its 5 year term was due to expire on 3.12.1991. The District Collector who is the competent authority to initiate election process initiated it. The Society submitted a list of voters as on 30.6.1991. The District Collector fixed 17.12.1991 as the last date for publishing the provisional list of voters and the list was published accordingly. The Government postponed the conduct of elections to all Societies till 30.9.1992. Two members filed a writ petition before the Bombay High Court for a direction to conduct the election after 30.9.1992. The Chairman of the Society consented to it. The

High Court passed an order that the elections to that Society shall commence from 1.10.1992. Again the two persons filed another writ petition. For a direction to hold the election on the basis of the final voters' list published on 17.12.1991. The Chairman again had no objection. The Division Bench passed an order that the society shall submit provisional list of voters as on 30.6.1992. The appellants filed a writ petition to modify the orders and to direct the election he conducted on the basis of the final list of voters published on 17.12.1991. The petition was dismissed. According to Rule 4(1) of the Maharashtra Specified Co-operative Societies Elections to Committee Rules, 1971, the Society shall prepare the provisional list of members as on 30th June of the year 'immediately' preceding the year'. The two persons in collusion with the Chairman of the Society got an order contrary to the provisions of Rule 4(1). The appellants filed an appeal by special leave. In the meantime, elections were directed to be held provisionally.

Held: Collusion thus, is the foundation to put forward a format of judicial process and a pretext of contest which, in effect, unreal and farce and the decree or order obtained on its basis is a mere mask having similitude of judicial determination with the object of confounding third parties. The offending order is vitiated by collusion and formed foundation for election to the committee of the society. Undoubtedly, the order passed by the High Court under Art.226 is by the exercise of plenary constituent power and jurisdiction. It is neither a void nor voidable order. As seen, no fault could be found in the format of legal process in the pleadings and the reliefs sought for. But when it came up for admission, by consent, orders of minutes were drawn up which have become foundation for avoidance of mandate of Rule 4(1) of the Rules. It is not a case of irregularity in the exercise of the jurisdiction so as to set it right by a review. Since the petitioners therein, being henchmen of Chairman cannot be expected to invoke the review jurisdiction of the court. Third party has no right to file an application for review. Obviously in this backdrop, the order being vitiated by collusion at the behest of the Chairman, the two persons appellants, instead of filing an appeal under Art.136 with leave of this Court appear to have sought the remedy by way of filing a fresh writ petition under Art.226 and sought modification of the order so

that the order of the court in the second writ petition would be in conformity with Rule 4(1) of the Rules. Undoubtedly, the order passed by the High Court under Art.226 is a judicial order exercising its constituent power but when its process is abused and an order of minutes obtained by consent hedged with collusion and fraud on the court and obviously, though not pleaded, on general body of the members of the society, when the facts were brought to the notice of the High Court, it is the High Court alone or on appeal, this Court to correct such an order. Therefore, the High Court should have exercised its power under Art.226 and should have modified the order as prayed for. Once the election process was set in motion according to law any illegality or irregularity committed while the election is in progress or the conduct of the election if, vitiated by any illegality in its process, the proper remedy is to lay the action before the Tribunal constituted under that Act by means of an election petition and have the dispute adjudicated without the election process being interdicted or retarded in its midway. The High Court or this Court while exercising the constituent plenary power under Art.226 or 32 or under 136, as the case may be would decline to interfere with the election process and relegate the parties to take recourse to the alternative remedy of the election petition provided under the statute. When the order of the court issued under Art.226 is the foundation for a preparation for electoral roll contrary to or *de hors* the Act or Rules and bye-laws and the election process is founded thereon, it is not during the election process. If the order is vitiated by an error of law, the tribunal has no power or jurisdiction to go into its legality which is destructive of judicial discipline. Moreover, that cannot be impugned in an election petition nor the tribunal has the power or jurisdiction to determine the correctness or otherwise of the orders passed by the High Court or this Court. The only appropriate forum would, therefore, be the High Court itself as on appeal this Court to correct it, if need be, and no other forum. [Paras. 9, 10, 11, 15 & 17]

Though, normally, when a respondent is not contending its case, costs would not be awarded, an exception would be carved out and in a suitable case, cost should be awarded on persons that set the law its motion, had benefit thereof and remained obviously *ex parte*. This Court, under Art.142

has plenary power to pass such orders as is necessary for doing complete justice in any cause or matter coming before it'..... This is a fit case for exercising power under Art.142 to impose cost on the non-contesting respondents A.K.Patil, More and Mule. [Para. 19]

Cases referred to:

Nagubai Ammal and others v. B.Shamma Rao and others, A.I.R. 1956 S.C. 593: 1956 S.C.R. 451: 1956 S.C.A. 959: 1956 S.C.C. 321: 1956 S.C.J. 655: 1956 An.L.T. 1029. [Para. 9]

Roop Chand Gupta v. Raghuvanshi Private Limited and another, (1964) 7 S.C.R. 761. [Para. 10]

Naresh Shridhar Mirajkar and others v. State of Maharashtra and another, (1966) 3 S.C.R. 744. [Para. 11]

N.P.Ponnuswami v. Returning Officer and others, A.I.R. 1952 S.C. 64: 1952 S.C.R. 218. [Para. 17]

S.T.Muthusami v. K.Natarajan and others, (1988) J.T. (1) S.C. 159: (1988) 2 S.C.R. 759. [Para 17].

Rashpal Malhotra v. Mrs.Satya Rajput and another, (1987) 3 J.T. 546: (1987) 4 S.C.C. 391. [Para. 18]

The Judgment of the Court was delivered by K.Ramaswamy, J.: Leave granted.

2. Important twin questions of law, namely, whether the court while exercising its power under Art.226, could give direction contrary to the statutory mandate, if so whether such an order is liable to judicial review by an independent proceeding under Art.226 and if so under what circumstances and to what extent, arise for decision in this appeal. Shri Vital Sakhar Sehakari Karkhana Ltd., Venu Nagar, Gurusale in Solapur District, the 4th respondent, for short "the Society" is a specified Cooperative Society under the Maharashtra Cooperative Societies Act, 1960 (Act 21 of 1961) for short 'the Act'. Its term of office is 5 years. It was due to expire by December 3, 1991. The District Collector, 2nd respondent is the competent authority under the Act to initiate election process in accordance with the Act and the Maharashtra Specified Cooperative Societies Elections to Committee Rules, 1971 for short 'the Rules'. The District Collector accordingly initiated the process pursuant to which the society submitted to the Collector on October 18, 1991 the List of Voters as on June 30, 1991. Thereon the Collector issued the following programme to finalise the list of voters. November 12, 1991 was fixed as the date to display on the notice board of the provisional voters list

inviting claims or objections or suggestions for the inclusion or omission from the provisional list. November 20, 1991 was the last date to present such claims or objections to the Collector in terms of Rule 6(2) of the Rules. The Collector had to take a decision therein under Rule 6(4) on December 7, 1991 and the final list of the voters should be published under Rule 7 on December 17, 1991. In terms of the programme the provisional list was published on November 12, 1991 and after consideration of the objection or claims the final list was published on December 17, 1991. 3. The Government in exercise of its power under Sec.77-IB of the Act postponed the conduct of election to the committees of all Co-operative Societies except those covered by orders of the courts till September 30, 1992. Two members by name Narayan Ganpat More and Mahadeo Bhanudas Mule, filed W.P.No.2970 of 1992 in Bombay High Court on July 13, 1992 for a *mandamus* to the District Collector and election officer to conduct election to the committee of the Society forthwith that is to say after the expiry of 30.9.1992 in accordance with Sec.73-GL and Chapter XI-A of the Act and the Rules and to complete the same within the minimum period as provided under the Act. By consent of the Society, through its Chairman A.K.Patil, the 5th respondent herein, the Division Bench passed minutes order that since the Government postponed the election upto September 30, 1992, the process of election to the Society shall commence from October 1, 1992 and the Collector shall accordingly take suitable steps for holding the election. Following its heels More and Mule again filed another W.P.No.4107 of 1992 on September 15, 1992, for a direction to hold election on the basis of final voters list published on December 17, 1991. Again A.K.Patil, Chairman took notice put forth consent minutes and the Division Bench accepted it and directed by order dated September 28, 1992 that "respondent No.4 (Society) shall submit provisional list of voters as on June 30, 1992 as per Rule 4 of the Rules on or before October 10, 1992. The Collector thereupon shall complete the finalisation of the said list under Rule 6 and then shall pronounce election programme under Rule 16 for holding the elections of the Committee of the Society and to complete the same within the prescribed time under the Rules". Thereafter on October 6, 1992 the election officer asked the

society to submit fresh provisional list as on June 30, 1992. On becoming aware of the above order, on October 16, 1992, the appellants filed W.P.No.4400 of 1992 to modify the order dated September 28, 1992 made in W.P.No.4107 of 1992 and to direct the respondents 1 to 3 the State Government (District Collector and election officer) to hold election to the committee on the basis of the final voters list published on December 17, 1991 and to set aside the consequential orders. The Division Bench by the impugned judgment dated October 19, 1992 dismissed the writ petition *in limine*. Thus this appeal by special leave. Notice was served on all the respondents in this appeal. A.K.Patil, Chairman, respondent No.5 was served on December 23, 1992. More, 6th respondent was served on December 18, 1992 and Mule, 7th respondent was served on December 16, 1992. They did not appear either in person or through counsel. The Society was represented by counsel.

4. Rule 4(1) of the Rules provides thus:

"4(1) A provisional list of voters shall be prepared by every society for the year in which general election is due to be held. Persons who are members as on the 30th June of the year immediately preceding the year in which such election is due shall be included in the provisional list. If different constituencies are provided in the bye-laws, the names of voters shall be arranged constituency-wise as laid down in the bye-laws:

Provided that, if any case, the preparation of the provisional list of voters falls due after the expiry of a period of six months from the 30th June, the Collector may, in consultation with the Registrar in respect of the societies, of the categories mentioned in Clauses (i), (v), (vi) and (vii) of Sub-sec.(1) of Sec.73-C, and in consultation with the District Deputy Registrar in respect of the societies the other categories mentioned in Sub-sec.(1) of Sec.73-C, by order, change the date of the 30th June and subsequent dates and fix revised dates for the purpose of these rules".

5. Its reading adumbrates that the provisional list of voters of every society shall be prepared by the society for "the year in which general election is due to be held". Persons who are members as on 30th June of the year immediately preceding the year in which such election is due, shall alone be included in the provisional list. Thereby, it is clear

that the society shall prepare a provisional list of voters, comprising of all the members of that society for the year in which general election is due to be held. But the persons who are members of the society as on 30th June of the year immediately preceding the year in which such election is due should alone be included in the provisional list and eligible to vote at the election. Under the proviso, if the preparation of the provisional list falls due after the expiry of the period of six months from 30th June, then the Collector is enjoined to consult the Registrar or the District Deputy Registrar as the case may be, based on the class of society envisaged under Sec.73-C; he should pass an order changing the date of 30th June and prescribe a subsequent date; fix revised date for the purpose of preparing the provisional list and ensure the procedure for declaration of the final list.

6. It is the case of the appellants that after the final list was published by the District Collector on December 17, 1991, A.K. Patil, the Chairman, got enrolled 2,000 members and made them eligible to exercise franchise in his favour apprehending that he would be defeated in the general election, colluded with More and Mule, i.e. Director and a member of the society respectively, got filed collusive writ petitions, abused the process of the court, played fraud on the court and obtained collusive orders to make the provisional list of voters to be as on June 30, 1992 and to conduct elections on that basis. The District Collector filed counter-affidavit in this Court admitting that Rule 4 and the circular issued by the Government in this behalf envisage that the final list of voters in force before the postponement of the election by the State Government shall be valid, but since the High Court issued the direction to treat June 30, 1992 to be the date for reckoning the provisional list of voters to be valid. He had no option but to abide by the direction and to conduct the election in terms thereof. As stated earlier that though respondents 5 to 7 were served, they did not file any counter denying the allegations of the appellants made against them.

7. We have already noted that under Rule 4 provisional list of voters shall be prepared by every society "in the year in which general election is due to be held". It is not due under law as contended for the society. What is the meaning of the above quoted phrase is to be gathered from the statutory operation of the law. The term of the

Managing Committee was to expire on December 3, 1991. Under the Act the election to the managing committee of the society shall be held under Sec.73-G before the expiry of the term in accordance with the provision in Chapter 11-A of the Act, the Rules and the bye-laws of the society. The year in which the general election due is, therefore, the year 1991. If the elections were not conducted before its expiry, by operation of Sub-sec.2-B of Sec.73-G, the members of the existing committee should cease to hold office on its expiry or extended term as the case may be and should be deemed to have vacated their offices. By operation of Sub-sec.(3) of Sec.73-G, the general body of the members of the society should elect the members of the managing committee. Therefore, before the expiry of the term of the committee the general election to the Managing Committee is due. Black's Law Dictionary, sixth edition at p.500, meaning of the words 'due date' has been stated thus: "In general, the particular day on or before which something must be done to comply with law or contractual obligation". When Sec.73-G, provisions in Chapter 11-A and the bye-laws read with Rule 4 envisage that the election to the managing committee should be conducted before the expiry of the term, the Society has been enjoined under Rule 4(1) to prepare the provisional voters list of the members as on June 30th of the year "immediately preceding the year" in which such general election is due to be held and submit the same to the District Collector. The Legislature, thereby intended that despite the existence of the members on the admission register of the society, only those members who were admitted and valid as members on or before 30th June of the year immediately preceding the year in which such general election is due alone are eligible to exercise the franchise and to be included in the provisional list. Thereafter on publication in the Notice Board under Rule 6(1) and considering the objections, suggestions or improvements if any made, the Collector is enjoined to finalise the list under Rule 7 and have it published as "final list of voters". The proviso would operate only in case the preparation of the provisional list of voters falls due after the expiry of the period of six months from the 30th June, then only, after consultation with the designated officer, the Collector, by an order, may change the date of 30th June and fix a subsequent date as revised date to submit the

provisional list of voters. In this case the proviso has no application for the reason that the provisional list had already been approved and published by the Collector as per the law on December 17, 1991. It was not challenged. Therefore, the year in which the general election to the society is due is the date as per the operation of law i.e. 1991 but not due after the expiry of the period as postponed by the State Government. Obviously, for that reason the Government also had issued instructions on September 28, 1992 that in case the provisional list was approved and the final list was published prior to the postponement of the election, the election should be conducted in accordance with the final list published under Rule 7 of the Rules.

8. It would be obvious that A.K. Patil, Ex-chairman of the defunct Committee with a view to get over that impediment and to enable newly admitted 2000 members after December 17, 1991, set up More, a co-director and Mule, alleged to be his friend, got filed the first writ petition and obtained a direction to conduct election following its heels got filed second writ petition with a format of legal process but immediately Patil intervened and appeared on the very date of admission; put forth consent order and obtained the order from the court to conduct election as per the provisional list existing as on June 30, 1992 and got issued the direction to the Collector with the mandate to conduct election in accordance with that list. It was specifically alleged that Patil colluded with More and Mule, abused the process of the court, played fraud on the court and obtained minutes order by consent without knowledge to any member of the society. In the absence of any denial of the allegations and in the light of the background of the case the necessary inference to be unerringly deduced would be that the consent order is a collusive and fraudulent order; made format of due process of law but obtained orders contrary to the statutory mandate of Rule 4(1) of the Rules. It could thus be seen that none of the members of the society had any opportunity to know or to oppose the consent order. Thereby the necessary conclusion would be that a collusive order obtained by abuse of the process of the court by playing fraud on the court, became foundation to conduct elections to the Managing Committee of the society circumventing the mandate of Rule 4(1) of the Rules.

9. In *Nagubai Ammal and others v. B. Shamma Rao and others*, A.I.R. 1956 S.C. 593; 1956 S.C.R. 451; 1956 S.C.A. 959; 1956 S.C.C. 321; 1956 S.C.J. 655; 1956 An.L.T. 1029, this Court held that collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. This was reiterated in *Roop Chand Gupta v. Raghuvanshi Private Limited and another*, (1964) 7 S.C.R. 761, in which this Court held that the collusion is an improper act done by an improper refraining from doing an act, for a dishonest purpose. In these two cases this Court set aside the collusive decree obtained by the parties. Collusion, thus, is a the foundation to put forward a format of judicial process and a pretext of contest which in effect unreal and farce and the decree or order obtained on its basis is a mere mask having similitude of judicial determination with the object of confounding third parties. The offending order is vitiated by collusion and formed foundation for election to the committee of the society.

10. The question emerges whether the said order is liable to be interfered with and if so in what proceeding and to what extent? The order in the second writ petition cannot be reviewed because the appellants are not parties to the proceedings. Undoubtedly, the order passed by the High Court under Art. 226 is by the exercise of plenary constituent power and jurisdiction. It is neither a void nor voidable order. As seen no fault could be found in the format of legal process in the pleadings and the reliefs sought for. But when it came up for admission, by consent, orders of minutes were drawn up which have become foundation for avoidance of mandate of Rule 4(1) of the Rules. It is not a case of irregularity in the exercise of the jurisdiction so as to set it right by a review. Since the petitioners therein, namely, More and Mule being henchmen of Patil cannot be expected to invoke the review jurisdiction of the court. Third party has no right to file an application for review. Obviously in this backdrop the order being vitiated by collusion at the behest of Patil, More and

Mule, the appellants, instead of filing an appeal under Art.136 with leave of the court, appears to have sought the remedy by way of filing a fresh writ petition under Art.226 and sought modification of the order so that the order of the court in the second writ petition would be in conformity with Rule 4(1) of the Rules.

11. Obviously finding the piquant situation in which Patil, More and Mule have been placed themselves, Sri Ashok Desai the learned Senior counsel appearing for Society, sought to salvage their problem placing reliance on the ratio of this Court in *Naresh Shridhar Mirajkar and others v. State of Maharashtra and another*, (1966)3 S.C.R. 744. Therein the facts were that the High Court of Bombay, while trying a suit for defamation against the editor of a weekly newspaper, exercised its inherent power under Sec.151, C.P.C., conducted the trial of the suit *in camera* and prohibited publication of the evidence and the proceedings so as to prevent business of the editor of the newspaper being affected. A writ petition was filed under Art.32 in this Court challenging the validity of the order of the High Court contending *inter alia* that the High Court had no jurisdiction to prohibit publication of the news; it affected their rights under Art.19(1)(a) and it was resisted on the ground that the writ petition under Art.32 was not maintainable to review judicial order of the court. This Court by seven Judges per majority held that the petitioners had no fundamental right under Art.19(1)(a). The court had inherent power and jurisdiction under Sec.151, C.P.C. to conduct *in camera* trial and to prohibit publication of its proceeding or evidence and that writ petition under Art.32 is not maintainable to quash the judicial order. It is seen that the court, in order to protect the interest of one of the parties to the suit, exercised inherent power and jurisdiction under Sec.151, C.P.C., passed a judicial order prohibiting publication of the proceeding in the suit or the evidence of the witness. It being a judicial order no third party has a right to intervene and challenge the same in the proceedings under Art.32 of the Constitution. The ratio therein has no application to the facts of this case. Undoubtedly, the order passed by the High Court under Art.226 is a judicial order exercising its constituent power but when its process is abused and obtained an order of minutes by consent hedged with collusion and fraud on the court and obviously, though not

pleaded, on general body of the members of the society, when the facts were brought to the notice of the High Court it is the High Court alone or on appeal this Court to correct such an order.

12. Mr. Justice Arthur T. Vanderbilt in his "The Change of Law Reform 1955" at pages 4 and 5, stated that:

".....it is in the Courts and not in the legislature that our citizens primarily feel the keen, the cutting edge of the law. If they have respect for the work of their courts, their respect for law will survive the shortcomings of every other branch of the Government; but if they lost their respect for the work of the courts, their respect for the law and order will vanish with it to the great detriment of society."

13. (vide the Judicial Process by H.J. Abraham, p.3)

14. Respect for law is one of the cardinal principles for an effective operation of the constitution, law and the popular Government. The faith of the people is the source and succour to invigorate justice intertwined with the efficacy of law. The principle of justice is ingrained in our conscience and though ours is a nascent democracy which has now taken deep roots in our ethos of adjudication be it judicial, quasi-judicial or administrative as hallmark, the faith of the people in the efficacy of judicial process would be disillusioned, if the parties are permitted to abuse its process and allowed to go scot free. It is but the primary duty and highest responsibility of the court to correct such orders at the earliest and restore the confidence of the litigant public, in the purity of fountain of justice; remove stains on the efficacy of judicial adjudication and respect for rule of law, lest people would lose faith in the courts and take recourse to extra-constitutional remedies which is a death-knell to the rule of law.

15. In *M.V. Venkataramana Bhat v. The Returning Officer*, C.A.No.3607 of 1993 dated 30th July, 1993, this Court set aside the election. The facts were that one Jaiprakash Rai filed a writ petition in the High Court of Karnataka one day prior to the date of election of the Pradhan of the Samithi, obtained *ad interim* order and prevented two members to participate and exercise their franchise in the election of the Pradhan. His candidate was elected with a margin of one vote. The writ petition was, ultimately, dismissed. The writ petition under appeal was filed to declare the election as illegal, void,

etc., The High Court dismissed it. On appeal, this Court taking notice of the background of these facts and circumstances held that an interim order was obtained by abuse of the process of the court to help the successful candidate. Even if the remedy by election petition was available, the tribunal had no jurisdiction to sit over the correctness of the order passed by the High Court. Therefore, the High Court alone had to correct it by exercising its power under Art.226 to prevent such abuse of judicial process and should exercise its power of high responsibility to undo injustice done to the adversary undoing the effect of the order obtained in abusing the process of the court. The ratio would apply with equal force to the facts of this case. Therefore, the High Court should have exercised its power under Art.226 and should have modified the order as prayed for.

16. Since there is no stay of election the 5th respondent was alleged to have prevailed upon respondent No.3 to proceed with the conduct of the election. Accordingly election process was initiated and election was to take place on April 27, 1993. This Court by order dated April 26, 1993 directed that the election may go on and every process may be completed but the result may not be declared till further orders and directed to post the special leave petition for final disposal on May 3, 1993 on which date this Court further clarified that the aforesaid order "does not come in the way of completing the process of counting being undertaken provided the results are not announced". S.L.P. was directed to be listed on July 30, 1993. Thus we have heard the S.L.P.

17. Sri Ashok Desai contended that Sec.144-T provides remedy of election petition. The specified officer is empowered to decide the election dispute expeditiously and his decision shall be final and conclusive. The writ petition, therefore, is not maintainable. It is further contended that every grower of sugarcane within the area of the operation of the society is entitled to become a member of the society. The State Government postponed the election due to drought etc., from time to time upto September 30, 1992. In the interregnum the growers that became members of the society became entitled to participate in the democratic process of exercising their franchise to elect the members to manage the affairs of the committee. The court, therefore, with a view to enable them to participate in the election process

and to elect members of their choice permitted to incorporate their names in the provisional voters list as on June 30, 1992, since elections were not held till September 30, 1992. The words "general elections due" should be construed to be due according to law as on the date when the elections are to be held. Since the results are now known in the counting, the 5th respondent had secured more than 4 to 5 thousand votes while new members enrolled were only 2 thousand. This case does not warrant interference under Art.136. Shri Bhasme, the learned Senior counsel resisted the contentions. We have given our anxious consideration to the contentions on either side. In *N.P.Ponnuswami v. Returning Officer and others*, A.I.R. 1952 S.C. 64; 1952 S.C.R. 218, the legality and validity of rejection of the nomination of the intending candidate to the Parliamentary election was challenged by way of a writ petition under Art.226. The High Court held that the writ petition was not maintainable. On appeal, by leave under Art.132, this Court held that the wider meaning of the word election connotes the entire process culminating in a candidate being elected. The election should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protected. No significance should be attached to anything which does not affect the 'election', and if any irregularities are committed while, it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the election and enable the person affected to impugn in question, they should be brought up before a special tribunal by means of an election petition and not being made the subject of a dispute before any court while the election is in progress'. [Italics supplied] Accordingly, this Court upheld the view of the Madras High Court. In *S.T.Muthusami v. K.Natarajan and others*, (1988) J.T. (1) S.C. 159; (1988) 2 S.C.R. 759, in Tamilnadu when elections to the Panchayat Union were being held, there was a dispute between two candidates as to who is the official candidate on behalf of the Indian National Congress (I) and entitled to the allotment of the symbol 'hand'. Both the candidates, appellant and the respondent claimed as official candidate, but the Returning Officer on

consent allotted different symbols as it was not cleared before acceptance of nomination. Later on clarification was issued by the Tamilnadu Congress (I) that the appellant was allotted symbol of 'hand'. The Returning Officer issued errata accordingly. Calling in question the errata the respondent filed the writ petition which was dismissed by a single Judge and on appeal the division bench allowed the writ petition and quashed the Errata. When the matter was brought by special leave under Art.136, this Court held that Tamil Nadu Panchayats Act, 1958 and the Rules provided forum to decide election disputes though *alternative forum does not have the effect of overriding the powers of the High Court under Art.226, [Italics supplied]* but it may be taken into consideration in determining whether it would be appropriate for the High Court to exercise its powers under Art.226 in a particular case. Taking an overall view of the facts, this Court held that the exercise of the jurisdiction under Art.226 cannot be supported and the validity of the election should be decided in the alternative forum provided under that Act. Accordingly the appeal was allowed. Therefore, this Court held that there is no constitutional bar in the exercise of the jurisdiction in respect of election to local bodies. It is equally sound exercise of discretion to bear in mind the policy of the legislature to have the dispute decided speedily through the machinery of election petition and decline to exercise its writ jurisdiction in election dispute. Once the election process was set in motion according to law any illegality or irregularity committed while the election process is in progress or the conduct of the election is vitiated by any illegality or irregularity in its process, the proper remedy is to lay the action before the tribunal constituted under that Act by means of an election petition and have the dispute adjudicated without the election process being interdicted or retarded in its mid way. The High Court or this Court while exercising the constituent plenary power under Art.226 or 32 or under 136, as the case may be, would decline to interfere with the election process and relegate the parties to take recourse to the alternative remedy of the election petition provided under the statute. When the order of the court issued under Art.226 is the foundation for a preparation for electoral roll contrary to or *de hors* the Act or Rules and bye-laws and the election process is

founded thereon, it is not during the election process. If the order is vitiated by an error of law, the tribunal has no power or jurisdiction to go into its legality which is destructive of judicial discipline. Moreover, that cannot be impugned in an election petition nor the tribunal has the power or jurisdiction to determine the correctness or otherwise of the orders passed by the High Court or this Court. The only appropriate forum would, therefore, be the High Court itself or on appeal this Court, to correct it, if need be and no other forum. The appellants had approached the High Court, apprised the facts and sought modification of the order so as that it be in conformity with the Rule 4(1) of the Rules. The High Court should have corrected the order but it failed to exercise that power.

18. It is next contended that this Court exercising the power under Art.136 would be loath to upset the order of the High Court placing reliance on *Rashpal Malhotra v. Mrs. Satya Rajput and another*, (1987)3 J.T. 546: (1987)4 S.C.C. 391: Therein the order of ejectment was passed by the court below against the tenant who was *eo nomine*, not a party but known to the parties. The appellant to be ejected, was the nominee of the company. In that background, this Court held that though the order was not legal but being for *bona fide* self-occupation, this Court declined to exercise the power under Art.136 and dismissed the appeal. The ratio therein has no application to the facts of this case. An order obtained by abuse of the process of the court or by playing fraud or collusion, this Court would not countenance such an argument and should not allow such an order to remain operative for a moment. We are not equally impressed with the argument that the respondent now became aware that Mr. Patil secured more than 4 to 5 thousand votes though the invalid votes are only of 2 thousand, being the members admitted after December 17, 1991, and that be a factor for our declining to exercise the power under Art.136 to set aside the order of the High Court or the elections conducted pursuant to the permission granted by this Court. In our view, acceding to it would amount to putting a premium on fraud, collusion or abuse of the process of the court creating disbelief and disillusionment of the efficacy of judicial process and rule of law and a feeling would be generated that persons capable to manoeuvre and abuse the judicial process would

reap the benefit thereof and get away with the orders. Every endeavour would be made to inculcate respect for fair judicial process and faith of the people in the efficacy of law.

19. Though normally when a respondent is not contesting its case, costs would not be awarded. But an exception would be carved out and in a suitable case cost should be awarded on persons that set the law in motion; had benefit thereof and remained obviously *ex parte*. This Court under Art.142 has plenary power "to pass such orders as is necessary for doing complete justice in any cause or matter coming before it". The facts of this case already established that the respondents Nos.5 to 7, in particular A.K.Patil, must be lurking and loitering in the corridors of this Court for the outcome, though obviously remained *ex parte*. It is a fit case for exercising our power under Art.142 to impose cost on the non-contesting respondents, A.K.Patil, More and Mule, jointly or severally. Costs are quantified at Rs.20,000 and the appellants are entitled to recover the costs of this appeal against any one of them or all of them.

20. It is hereby declared that election process conducted by the third respondent, District Deputy Registrar, Co-operative Society, Solapur to the Society is illegal. The final list of voters published by the District Collector, Solapur, as on June 30, 1992 is declared illegal. The final voters list declared on December 17, 1991 relating to the society is the valid list. Accordingly the order of the High Court in W.P.No.4107 of 1992 dated September 15, 1992 is modified. The direction to the District Collector and the 3rd respondent, District Deputy Registrar, Co-operative Society, Solapur to proceed as per Rules 4 to 7 and 16 to conduct election to the committee of the society in accordance with the Rules is upheld with the above modification. The election held to the Managing Committee of the society on April 27, 1993 is declared illegal and invalid. Respondent Nos.2 and 3 are directed to conduct the election as per Rules consistent with the above order. The appeal is allowed accordingly with costs as fixed above.

B.S.

Appeal allowed.

IN THE SUPREME COURT OF INDIA.

Present: K.Ramaswamy and S.Mohan, JJ.

C.A.No.3549 of 1979 12th August, 1993.

Guru Amarjit Singh

...Appellant

v.

Rattan Chand and others

...Respondents.

(A) Evidence Act (I of 1872), Sec.35 - Entries in Jamabandi - Evidentiary value of.

(B) Transfer of Property Act (IV of 1882), Sec.111(g)(2) - Lease executed by predecessors of respondents - Predecessors constructing buildings and enjoying land and buildings - Respondents not parties to lease deed - Had no knowledge of lease - Its proof that they acknowledged the lease or acted on it Jamabandi entries showing covenanting to pay Rs.2 per annum as ground rent - No proof of payment of any rent - Respondents setting up title in themselves as owners - Pleading adverse possession and acquisition of title by operation of law - Such claim if amounts to forfeiture.

The appellant plaintiff filed a suit for ejectment of the respondents pleading that the suit land belonged to his grandfather Guru Nannilal Singh who leased the same to Sardha Ram and Narsingh Das predecessors of the respondents on 20.10.1905 on payment of an annual rent of Rs.2 they constructed the buildings at their own cost. The first respondent sold 30 Marlas to the defendants 5 to 7 on 9.10.1967 and defendants 2 to 5 sold some plots to defendant 8 on 4.1.1968 the appellant came to know of the sales in 1970. He issued a notice of forfeiture under Sec.111(g) (2) of the Transfer of Property Act and laid the suit. The respondents, in their written statement pleaded that they had no knowledge of the lease, that the lands were in the possession of their predecessors even prior to 1905, that even if a lease deed was executed it was not intended to be acted upon, that no rent was paid to the appellant, that they were paying revenue to Government, that they became owners by operation of the Punjab Occupancy Tenants (Vesting of Property Right) Act, 1958 or the Punjab Village Common Lands Act, 1961 and that they had prescribed adverse possession. The trial Court dismissed the suit. On appeal, the District Judge contended that the entry in the Jamabandi proved payment of rent of Rs.2 per

year and allowed the appeal. The High Court, in the second appeal, held that there was no covenant prohibiting sale or its breach right of re-entry. It also held that Sec.111(g)(2) of the Transfer of Property Act was not applicable. The appeal was allowed.

Held: It is settled law that entries in the Jamabandi are not proof of title. They are only statements for revenue purpose. [Para. 2]

The right of forfeiture is founded upon the existence of a lease and the jural relationship of lessor and lessee as contemplated under Sec.105 of the Transfer of Property Act. It is implicit that the lease is in operation, the lessor has been given right to determine such a lease for breach of a covenant or for disclaimer by the lessee or for the insolvency of the lessee. The happening of any of the three specified events *ipso facto* does not put an end to the lease but it only exposes the lessee to the risk of forfeiting his lease and gives a right to the lessor, if he so elects, to determine the lease. Under clause (2) disclaimer by denial of the landlord's title or setting up a title in himself or third party is ground for forfeiture. In other words, there must be a renunciation of the character of the lessee as such either by setting up a title in himself or in other person or unequivocal plea of adverse possession. But the repudiation must be clear and unequivocal and anterior to the issuance of the notice determining the lease under Sec.111(g) of the Act and put the lessor to notice of determination of the lease. The disclaimer may be in the pleading anterior to the suit in question or in any other documents but directly relatable to the knowledge of the lessor. An incidental statement *per se* does not operate forfeiture. Some State Buildings (Lease and Rent) Acts provide plea of *bona fide* denial of title and on its being upheld, landlord has to establish title in a civil court. If the plea of the tenant is found not *bona fide*, it itself is a ground for eviction. Non-acceptance of the relationship of landlord and tenant, therefore, does not amount to disclaimers of title as stated earlier. It is implicit that the very existence of the lease and jural relationship of lessor and lessee is a pre-condition to evoke forfeiture under Sec.111(g) of the Act. It is, therefore, necessarily to plead and establish, if denied, the relationship of landlord and tenant and on proof thereof the condi-

tion prescribed in Sec.111(g) gets attracted and itself is a ground for election to the landlord to determine the lease under Sec.111(g) and lay the suit for eviction. From the copy of the alleged lease, it is clear that predecessors of respondents Shardha Ram and Nar Singh Dass had already constructed the buildings and they were in enjoyment of the land and buildings and they continued to enjoy the property. The statutory operation of law conferring title was pleaded. The respondents were not parties to the lease deed and they had no knowledge of it. There is no proof that they had knowledge of 1905 lease or that they acknowledged or acted on it. There is no clear proof or finding that they received any notice under Sec.111(g) said to have been issued by the appellant. For the entries in the Jamabandi respondents had no knowledge. It is common knowledge that the tiller of the land primarily preoccupies with cultivation and seldom notices the entries made by the Patwari in revenue records unless he is of litigious mind. Maintenance and custody of revenue records is the exclusive domain of the Patwari and it is not uncommon that revenue records are after tinkered by him to suit the exigencies. Therefore, the entries often are not to the knowledge of the respondents and may not be genuine or accurate. There is no proof that the respondents had such knowledge as brought to their notice and that they accepted or acquiesced. If the entries are made in the regular course of duty, the entries may furnish presumptive rebuttable evidence of being correct Jamabandi entries at best would show of the lessee covenanting to pay Rs.2 per annum as ground rent. They do not, therefore, establish any proof of payment of rent. Admittedly no iota of evidence to prove payment of rent or passing of receipts were, thus, produced by the appellant. Under those circumstances and in the light of the statutory operation of the aforesaid two Acts, pleadings of the respondents that they became owners is not a clear unequivocal disclaimer of title. The plea cannot be said that it is unequivocal disclaimer. In this background, the plea of adverse possession and particularly in the face of the non-payment of rent and their payment of revenue to the State also cannot be said to be unequivocal. As seen earlier, lease is only unproved document of 30 years old to which knowledge was disclaimed by the respondents. Therefore, it does not amount to

unequivocal and clear disclaimer of title but at best denial of relationship of lessor and lessee and does not entail forfeiture. [Paras. 6, 7 & 10]

Cases referred to:

Raja Mohammed Amir Ahmad Khan v. Municipal Board of Sitapur and another, A.I.R. 1965 S.C. 1923; I.L.R. (1965) 1 All. 909; (1966) 1 S.C.J. 484. [Paras. 5, 8]

Sada Ram v. Gajjan Shiana, A.I.R. 1970 P. and H. 511; 72 Punj.L.R. 223; 1970 Ren C.J. 616. [Para. 5]

Abdulla v. Mohammed Muslim, A.I.R. 1926 Cal. 1205; 96 I.C. 1056. [Para. 7]

Bhiwaji v. Tuka Ram, A.I.R. 1916 Nag. 15. [Para. 7]

Prag Narain v. Kadir Baksh, I.L.R. (1913) 35 All. 145 (D.B.). [Para. 7]

Mohamed Mahud Khan v. Laja Mal, A.I.R. 1934 Lqh. 289, 290; 15 Lah. 683; 151 I.C. 209; 36 P.L.R. 495. [Para. 7]

Vithoba and another v. Bapu, I.L.R. 1891 Bom. 110 (D.B.). [Para. 7]

V.M. Tarkunde, Senior Advocate (*E.C. Agarwala, Anant V. Palli, Ms. Purnima Bhat and Atul Sharma*), for Appellant.

R.C. Gubrele, Ms. Nanita Sharma, Vivek Sharma and J.D. Jain, for Respondents.

The Judgment of the Court was delivered by *K. Ramaswamy, J.*: The appellant-plaintiff laid the suit for ejectment of the respondents pleading that the property in question belongs to Guru Naunihal Singh, his grandfather, and he succeeded by inheritance to 5 Kanals, 17 Marlas of land in Kartarpur Village. His grandfather had leased the same to Sardha Ram and Nar Singh Dass, predecessors of the respondent on October 20, 1905 on payment of Rs.2 as yearly rent. They constructed the buildings at their own cost, but the first respondent sold 30 Marlas to the defendants 5 to 7 on October 9, 1967 and defendants 2 to 5 had sold some plots to defendant 8 on January 4, 1968, which came to his knowledge in 1970. A notice of forfeiture under Sec.111(g) of the Transfer of Property Act, for short 'the Act' was got issued and served on June 4, 1971 and the suit laid. The respondents in their written statements pleaded that the father of the first defendant and the father of defendants 2 to 5 died in the year 1955. They have no knowledge of execution of any lease deed by the predecessor-in-interest. The land was in possession and enjoyment of their predecessors as owners even prior to 1905. No lease deed was executed. Even if there was any such lease, it was

only nominal and never intended to be acted upon. They did not pay any rent to the appellant. Even if the tenancy is proved, being occupancy tenants they became owners by operation of Punjab Occupancy Tenants (Vesting of Property Right) Act, 1958. If the respondents are proved to be raiyats, they became owners, by operation of Punjab Village Common Lands Act, 1961. Alternatively they pleaded they had prescribed adverse possession as they were not paying any rent at any time since 1905, but as owners they have been paying property tax to the Government. On merits they denied the allegations made in the plaint. They disclaimed any receipt of notice prior to the suit.

2. The trial court found that the original lease deed was not produced. A copy of more than 30 years old was produced and was admissible in evidence which would show that Sardha Ram and Nar Singh Dass had executed a lease deed on October 20, 1905 in favour of Guru Naunihal Singh. But there is no proof of payment of any rent of Rs.2 per year. Jamabandi entries did not show any payment of rent, but only existence of terms of lease to pay rent at Rs.2 per annum. Non-production of the receipts of the payment of rent clearly indicates that there was no relationship of landlord and tenants. "There is hardly any evidence if the plaintiff accepted them to be his tenants. In these circumstances it can hardly be stated that defendants 1 to 5 are the tenants of the plaintiff". The trial court concluded that from 1955 the respondents were holding the land as trespassers, and they had no relationship of tenancy with the appellant and that the suit was barred by limitation and the defendants have become owners by adverse possession. Accordingly, the trial court dismissed the suit. On appeal, the Additional District Judge assumed several things in favour of the appellant and concluded that there is a proof of payment of rent of Rs.2 per year till 1966-67 as per Jamabandi, though Jamabandi only mentioned the lease and rent of Rs.2 per year. It is settled law that entries in the Jamabandi are not proof of title. They are only statements for revenue purpose. It is for the parties to establish the relationship or title to the property unless there is unequivocal admission. Yet the appellate court contrarily deduced inference and findings in favour of the appellant and thereby it held that the respondents are continuing as tenants at sufferance on permissive possession and there was no hostile assertion

of title to the knowledge of the appellant, so the question of adverse possession does not arise. Therefore, he allowed the appeal and decreed the suit.

3. The High Court has rightly placed the case squarely within the four corners of the pleadings of the appellant. The appellant pleaded that the respondents forfeited their lease by sale of the land to third parties claiming themselves as owners of the property. Admittedly, the sale deeds have not been produced. Therefore, in what character the respondents have sold the lands is not proved. The copy of the lease-deed was in Urdu and the learned Judge got it translated into English. It is part of the record. It does not disclose that there is any covenant prohibiting alienation of the land and for breach thereof right of re-entry was provided thereunder. The only ground on which the right of re-entry by forfeiture was provided thereunder was non-payment of annual ground rent of Rs.2. But that is not the ground on which the suit was laid. Sec.111(g) of the Transfer of Property Act provides that a lease of immovable property determines by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself;.... and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease.

4. The High Court held that the first clause has no application to the facts of this case as there was no covenant prohibiting sale or on its breach providing the right of re-entry. Accordingly the suit is liable to be dismissed on this ground alone. Then it was contended that since the respondents had set up title in themselves renouncing their character as tenants and also pleaded adverse possession in the written statement, it entails forfeiture under clause (2) of Sec.111(g) and thereby the appellant became entitled to have the respondents ejected in this suit. That was rejected by the High Court holding that the respondents had not unequivocally set up adverse possession or title in themselves. In the background of facts in this case they would be justified in raising those pleas, and therefore, clause (2) of Sec.111(g) does not apply. Thus

the High Court in regular Second Appeal No.1962 of 1977 by judgment and decree dated July 5, 1979 allowed the appeal, set aside the decree of the appellate court and confirmed that of trial court. Thus this appeal by special leave.

5. Shri Tarkunde, the learned senior counsel for the appellant placing reliance on the decision of this Court in *Raja Mohammed Amir Ahmad Khan v. Municipal Board of Siapur and another*, A.I.R. 1965 S.C. 1923; I.L.R. (1965) 1 All. 909; (1966) 1 S.C.J. 484 and *Sada Ram v. Gajjan Shiama*, A.I.R. 1970 P. and H. 511; 72 Punj.L.R. 223; 1970 Ren C.J. 616, contended that the respondents successively denied the title firstly by claiming title in themselves and secondly renouncing their character as tenants and selling the lands to third parties and thirdly setting up adverse possession each of which constitute clearly and separately forfeiture of lease under clause (2) of Sec.111(g) of the Act. Though *prima facie* the argument impressed us at first instance, but on our probing deep into the facts of the case and circumstances surrounding the litigation, we find that the view of the High Court is correct and that the plea of forfeiture is not available to the appellant. It would appear from the evidence on record that on October 20, 1905 Sardha Ram and Nar Singh Dass, sons of Bihari appear to have executed a deed, ryatanama. It was mentioned therein that their predecessors had already constructed permanent house and they were living therein. They were also in possession and enjoyment of the property. They undertook to pay ground rent at the rate of Rs.2 per annum and on their committing default, right of re-entry was provided. There is no covenant therein that they have no right to sell the property in their occupation and enjoyment or on breach thereof right of re-entry was provided for. Therefore, the first clause of Sec.111(g) has no application and the foundation of the plaintiff's case in his pleading of forfeiture by sale of land to defendants 6 to 8 had fallen to the ground as held by the High Court.

6. The question then emerges whether setting up a title in themselves as owners or acquisition of title and continuance in possession by operation of law or plea of adverse possession entails forfeiture, under clause (2) in the background and circumstances of the case. The right of forfeiture is founded upon the existence of a lease and the jural relationship of lessor and the lessee as contemplated under Sec.105 of the Act. It is implicit that if the

lease is in operation the lessor had been given right to determine such a lease for committing breach of a covenant or for disclaimer by the lessee or for the insolvency of the lessee and the happening of any of the three specified events *ipso facto* does not put an end to the lease, but it only exposes the lessee to the risk of forfeiting his lease and gives a right to the lessor, if he so elects, to determine the lease. Under clause (2) disclaimer by denial of the landlord's title or setting up a title in himself or third party is a ground for forfeiture. In other words, there must be a renunciation of the character of the lessee as such either by setting up a title in himself or in other person or unequivocal plea of adverse possession. But the repudiation must be clear and unequivocal and anterior to the issuance of the notice determining the lease under Sec.111(g) of the Act and must put the lessor to notice of determination of the lease. The disclaimer may be in the pleading anterior to the suit in question or in any other documents, but directly relatable to the knowledge of the lessor. An incidental statement *per se* does not operate forfeiture.

7. In *Abdulla v. Mohammed Muslim*, A.I.R. 1926 Cal. 1205; 96 I.C. 1056, it was held that a denial of the execution of Kabuliati is not denial of title. So it would mean only repudiation of jural relationship as lessor and lessee and does not touch upon title. In case of proof of lease tenant is estopped under Sec.116 of the Evidence Act to deny title of the landlord. In *Bhiwaji v. Tukaram*, A.I.R. 1916 Nag. 15, it was held that selling or mortgaging the property by the lessee is not necessarily a denial of the title of the lessor. The same view was reiterated in *Prag Narain v. Kadir Baksh*, I.L.R. (1913) 35 All. 145 (D.B.), *Mohamed Mahud Khan v. Laja Mal*, A.I.R. 1934 Lah. 289, 290; 15 Lah. 683; 151 I.C. 209; 36 P.L.R. 495 and *Vithoba v. Bapu*, I.L.R. 1891 Bom. 110 (D.B.). Some State Buildings (Lease and Rent) Acts provide for plea of *bonafide* denial of title and on its being upheld landlord has to establish title in a civil court. If the pleas of tenant is found not *bona fide*, it itself is a ground for eviction. Non-acceptance of the relationship of landlord and the tenant, therefore, does not amount to disclaimer of title as stated earlier. It is implicit that the very existence of the lease and jural relationship of lessor and the lessee is a pre-condition to invoke forfeiture under Sec.111(g) of the Act. It is, therefore, necessary to plead and establish, if

denied, the relationship of landlord and tenant and on proof thereof the condition prescribed in Sec.111(g) gets attracted and itself is a ground for deletion by the landlord to determine the lease under Sec.111(g) and lay the suit for eviction.

8. This Court in *Raja Mohammed Amir Ahmad Khan v. Municipal Board of Sitapur and another*, A.I.R. 1965 S.C. 1923; I.L.R. (1965) 1 All. 909; (1966) 1 S.C.J. 484, held that Sec.111(g) applies to permanent tenancy and if there is disclaimer of tenancy by denial of title of the landlord, it must be clear and unequivocal and must be to the knowledge of the landlord. It was held that the background of the case and nature of the pleadings must also be looked into. On a construction of the pleadings in that case it was held that the denial was not unequivocal and the pleas set up in the circumstances emerging from the history of the treatment of the land and the nature of the enjoyment and the rights emerging therefrom do not constitute forfeiture. This Court had considered the effect of the enjoyment of the lands, history of the case and held that the plea that property belonged to the appellant therein was merely of substantial character and the plea cannot be said to be a disclaimer of the right of the Government. Similarly, in paragraph 16 also it was held that the statements by the appellants claiming to have permanent and heritable interest in the land "Belong to him" and that he was the "owner" of it, etc. did not amount to denial of landlord's title. Similarly setting up of the title thus for declaration of his title or his character in the suit property does not amount to unequivocal disclaimer inviting forfeiture under Sec.111(g) of the Act.

9. In Punjab's decision there is an unequivocal admission of the relationship of landlord and tenant in prior litigation and on the basis thereof, it was held that the lessee forfeited his right to lease. This ratio also is of little assistance to the appellant.

10. From the copy of the alleged lease, it is clear that predecessors of respondents Sardha Ram and Nar Singh Dass, had already constructed the buildings and they were in enjoyment of the land and buildings and they continued to enjoy the property. The statutory operation of law conferring title was pleaded. The respondents were not parties to the lease deed and they had no knowledge of it. There is no proof, that they had knowledge of 1905 lease or that they acknowledged or acted on it. There is no clear proof or finding that they

received any notice under Sec.111(g) said to have been issued by the appellant. The respondents had no knowledge of the entries in the Jamabandi. It is common knowledge that the tiller of the land primarily pre-occupies with cultivation and seldom notices the entries made by the Patwari in revenue records unless he is of litigious mind. Maintenance and custody of revenue records is the exclusive domain of the Patwari and it is not uncommon that revenue records are often tinkered by him to suit the exigencies. Therefore, the entries often are not to the knowledge of the respondents and may not be genuine or accurate. There is no proof that the respondents had such knowledge or it was brought to their notice and that they accepted or acquiesced. If the entries are made in the regular course of duty, the entries may furnish presumptive rebuttable evidence of being correct. Jamabandi entries of best would show of the lease covenanting to pay Rs.2 per annum as ground rent. They do not, therefore, establish any proof of payment of rent. Admittedly no iota of evidence to prove payment of rent or passing of receipts were thus produced by the appellant. Under those circumstances and in the light of the statutory operation of the aforesaid two Acts pleadings of the respondents that they became owners is not a clear unequivocal disclaimer of title. The plea cannot be made that it is unequivocal disclaimer. In this background the plea of adverse possession and particularly in the face of the non-payment of rent and their payment of revenue to the State also cannot be said to be unequivocal. As seen earlier lease is only unproved document thirty days old of which knowledge was disclaimed by the respondents. Therefore, it does not amount to unequivocal and clear disclaimer of title but at best denial of relationship of lessor and lessee and does not entail forfeiture. The High Court rightly, in the nature of pleadings and scope of the suit, did not go into the plea of adverse possession on merits.

11. Under these circumstances, we have no hesitation to hold that the findings of the High Court are not beset with any illegality warranting interference. The appeal is accordingly dismissed with costs quantified at Rs.2,500.

B.S.

Appeal dismissed.

IN THE SUPREME COURT OF INDIA.

Present: *Kuldip Singh and R.M.Sahai, JJ.*

C.A.Nos.6237 of 1990 with S.L.P.(C) Nos.659 of 1991 and 16842 of 1992, C.A.Nos.3963 of 1989, 5534, 6236, 5257 and 2954-59 of 1992

5th November, 1993.

Lucknow Development Authority ...Appellant
v.

M.K.Gupta ...Respondent.

Consumer Protection Act (1986), Secs.2(o), 2(n) (ii), 11, 16, 21 - Word 'service' - Meaning of - Unfair Traffic - What is - Housing construction or building activity carried on by a private or statutory body - If service before Ordinance (XXIV of 1993) - Authorities created by statute - If beyond purview of Act - Commission or consumer forums, if can award compensation to consumer for injustice suffered by him.

The definition of service in Sec.2(o) of the consumer protection is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause is itself very wide. It applied to any service made, available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude..... Service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc., Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied, there is no reason to hold that authorities created by statute are beyond the purview of the Act. When private undertakings are taken over by the Government or Corporations are created to discharge what is otherwise State's function, one of the inherent objectives of such social welfare measures is to provide, better, efficient and cheaper services to the people. Any attempt, therefore to exclude services offered by statutory or official bodies to the common man would be against the provisions

of the Act and the spirit behind it. A Government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service..... When a statutory body develops land or allots a site or constructs a house for the benefit of common man, it is as much service as by a builder or constructor. The one is constructed service and the other statutory service. If the service is defective or it is not what represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of a comfort and service to a consumer. When possession of property is not delivered within stipulated period, the delay so caused is denial of service. Such disputes or claims are not in respect of immovable property as argued but deficiency in rendering of service of particular standard, quality of grade. Such deficiencies or omissions are defined in Sub-clause (ii) of clause (r) of Sec.2 as unfair trade practice. If a builder of a house used sub-standard material in construction of a building or makes false a misleading representation about the conditions of the house, then it is denial of the facility or benefit of which the consumer is entitled to claim value under the Act. When the contractor or builder undertakes to erect a house or flat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof or erecting wall or sub-standard floor is denial of service. Similarly when a statutory authority undertakes to develop land and frame housing scheme, it while performing statutory duty, renders service to the society in general and individual in particular. A development authority while developing the land or framing a scheme for housing discharges statutory duty the purpose and objective of which is service to the citizens. The entire purpose of widening the definitions is to include in it not only the day to day buying of goods by a common man but even such activities which are otherwise not commercial but professional or service-oriented in nature. The provisions in the Acts namely Lucknow Development Act, Delhi Development Act or Bangalore Development Act clearly provide for preparing plan, development of land and framing of scheme etc., Therefore, if such authority undertakes to construct building or allot houses or building sites to citizens of the State either as amenity or as benefit, then it amounts to rendering of service and will be covered, in the

expression 'service made available to potential users'. A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction, is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening the scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993. When the Commissioner has been vested with the jurisdiction to award value of goods or services and compensation, it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision, in court's opinion, enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him. [Paras. 4, 5, 6 & 8]

Cases referred to:

Dilworth v. Commissioner of Stamps, 1899 A.C. 99: 15 T.L.R. 61. [Para. 2]
Regional Director, Employees' State Insurance Corporation v. High Land Coffee Works of P.F.X., Saldanha and Sons, (1991) 3 S.C.C. 617. [Para. 2]
C.I.T. v. Taj Mahal Hotel, Secunderabad, (1971) 3 S.C.C. 550. [Para. 2]
State of Bombay v. Hospital Mazdoor Sabha, A.I.R. 1960 S.C. 610: (1960) 2 S.C.R. 866: (1960) 1 L.L.J. 251. [Para. 2]
Jose Da Costa v. Bascora Sadasiva Sinai Narcornim, (1976) 2 S.C.C. 917. [Para. 7]
State of M.P. v. Rameshwar Rathod, A.I.R. 1990 S.C. 1849: (1990) 4 S.C.C. 21: 1990 S.C.C. (Cri.) 522. [Para. 7]
Pulborough School Board Election v. Nutt, (1891-94) All E.R. 834. [Para. 7]
State of Gujarat v. Memon Mahomed Haji Hasam, A.I.R. 1967 S.C. 1885: (1967) 3 S.C.R. 938. [Para. 8]
Lala Bishambar Nath v. Agra Nagar Mahapalika, Agra, A.I.R. 1973 S.C. 1289: (1973) 1 S.C.C. 788.

[Para. 8]

Kasturi Lal Ralia Ram Jain v. State of U.P., A.I.R. 1965 S.C. 1039; (1965) 1 S.C.R. 375; (1966) 2 L.L.J. 583. [Para. 8]

Shyam Sunder v. State of Rajasthan, (1974) 1 S.C.C. 690. [Para. 8]

Geddis v. Proprietors of Bann Reservoir, (1878) 3 A.C. 430. [Para. 8]

Cassell and Company Limited v. Broome, 1972 A.C. 1027; (1972) 1 All E.R. 801. [Para. 10]

Rookes v. Barnard, 1964 A.C. 1129; (1964) 1 All E.R. 367, 410. [Para. 10]

Ashby v. White, (1703) 2 Ld., Raym. 938. [Para. 10]

Roncarelli v. Duplessis, (1959) 16 D.L.R. 2d. 689. [Para. 10]

Smith v. East Elloe Rural District Council, 1956 A.C. 736; (1956) 1 All E.R. 855. [Para. 10]

Farrington v. Thomson, 1959 U.R. 286. [Para. 10]

Wood v. Blair, *The Times* July 3, 4, 5, 1957 (*Hallet J and Court of Appeal*). [Para. 10]

Ms. Saharya and Co., Surya Kant, Anil Kumar Gupta, S.A. Syed, V.J. Francis, K.V. Mohan, A.K. Gupta, Naresh K. Sharma, Rahiv Gupta, Ms. Bina Gupta, S.K. Garg, R.K. Virmani, for appearing parties.

The Judgment of the Court was delivered by *R.M. Sahai, J.*: The question of law that arises for consideration in these appeals, directed against orders passed by the National Consumer Disputes Redressal Commission (referred hereinafter as National Commission), New Delhi is if the statutory authorities such as Lucknow Development Authority or Delhi Development Authority or Bangalore Development Authority constituted under State Acts to carry on planned development of the cities in the State are amenable to Consumer Protection Act, 1986 (hereinafter referred to as 'the Act') for any act or omission relating to housing activity such as delay in delivery of possession of the houses to the allottees, non-completion of the flat within the stipulated time, or defective and faulty construction etc. Another aspect of this issue is if the housing activity carried on by the statutory authority or private builder or contractor came within the purview of the Act only after its amendment by the Ordinance No. 24 in 1993 or the Commission could entertain a complaint for such violations even before.

2. How the dispute arose in different appeals is not of any consequence except for two appeals which shall be adverted to later, for determining right and power of the Commission to award exemplary

damages and accountability of the statutory authorities. We therefore come straightaway to the legal issue involved in these appeals. But before doing so and examining the question of jurisdiction of the District Forum or State or National Commission to entertain a complaint under the Act, it appears appropriate to ascertain the purpose of the Act, the objective it seeks to achieve and the nature of social purpose it seeks to promote as it shall facilitate in comprehending the issue involved; and assist in construing various provisions of the Act effectively. To begin with, the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot. A scrutiny of various definitions such as 'consumer',

'service', 'trader', 'unfair trade practice' indicates that legislature has attempted to widen the reach of the Act. Each of these definitions are in two parts, one, explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep, then its ambit is widened to such things which otherwise would have been beyond its natural import. Manner of construing an inclusive clause and its widening effect has been explained in *Dilworth v. Commissioner of Stamps*, 1899 A.C. 99: 15 T.L.R. 61, as under:

"'include' is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the definition clause declares that they shall include."

It has been approved by this Court in *Regional Director Employees' State Insurance Corporation v. High Land Coffee Works of P.F.X. Saldanha and Sons*, (1991) 3 S.C.C. 617, *C.I.T. v. Taj Mahal Hotel, Secunderabad*, (1971) 3 S.C.C. 550 and *State of Bombay v. Hospital Mazdoor Sabha*, A.I.R. 1960 S.C. 610: (1960) 2 S.C.R. 866: (1960) 1 L.L.J. 251. The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to the attempted objective of the enactment.

3. Although the legislation is a milestone in the history of socio-economic legislation and is directed towards achieving public benefit we shall first examine if on a plain reading of the provisions unaided by any external aid of interpretation it applies to building or construction activity carried on by the statutory authority or private builder or contractor and extends even to such bodies whose ancillary function is to allot a plot or construct a flat. In other words could the authorities constituted under the Act entertain a complaint by a consumer for any defect or deficiency in relation to construction activity against a private builder or statutory authority. That shall depend on ascer-

taining the jurisdiction of the Commission. How extensive it is? A National or a State Commission under Secs. 21 and 16 and a Consumer Forum under Sec. 11 of the Act is entitled to entertain a complaint depending on valuation of goods or services and compensation claimed. The nature of a 'complaint' which can be filed, according to clause (c) of Sec. 2 of the Act is for unfair trade practice or restrictive trade practice adopted by any trader or for the defects suffered for the goods bought or agreed to be bought and for deficiency in the service hired or availed of or agreed to be hired or availed of, by a 'complainant' who under clause (b) of the definition clause means a consumer or any voluntary consumer association registered under the Companies Act, 1956 or under any law for the time being in force or the Central Government or any State Government or where there are one or more consumers having the same interest, then a complaint by such consumers. The right thus to approach the Commission or the Forum vests in consumer for unfair trade practice or defect in supply of goods or deficiency in service. The word 'consumer' is a comprehensive expression. It extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store, fair price shop to use of private or public services. In Oxford Dictionary a consumer is defined as, "a purchaser of goods or services". In Black's Law Dictionary it is explained to mean, "one who consumes. Individuals who purchase, use, maintain, and dispose of products and services. A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which state and federal consumer protection laws are enacted." The Act opts for no less wider definition. It reads as under:

"'consumer' means any person who,--

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial

purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

[*Explanation:* For the purposes of sub-clause (i), 'commercial purpose' does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;]"

It is in two parts. The first deals with goods and the other with services. Both parts first declare the meaning of goods and services by use of wide expressions. Their ambit is further enlarged by use of inclusive clause. For instance, it is not only purchaser of goods or hirer of services but even those who use the goods or who are beneficiaries of services with approval of the person who purchased the goods or who hired services are included in it. The legislature has taken precaution not only to define 'complaint', 'complainant', 'consumer' but even to mention in detail what would amount to unfair trade practice by giving an elaborate definition in clause (r) and even to define 'defect' and 'deficiency' by clauses (f) and (g) for which a consumer can approach the Commission. The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services. The common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss. 'Goods' have been defined by clause (i) and have been assigned the same meaning as in Sale of Goods Act, 1930 which reads as under:

"'goods' means every kind of movable property other than actionable claims and money;

and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;"

It was therefore urged that the applicability of the Act having been confined to movable goods only a complaint filed for any defect in relation to immovable goods such as a house or building or allotment of site could not have been entertained by the Commission. The submission does not appear to be well founded. The respondents were aggrieved either by delay in delivery of possession of house or use of substandard material etc., and therefore they claimed deficiency in service rendered by the appellants. Whether they were justified in their complaint and if such act or omission could be held to be denial of service in the Act shall be examined presently, but the jurisdiction of the Commission could not be ousted (*sic. merely*) because even though it was service it related to immovable property.

4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory, etc., The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment. Clause (o) of the definition section defines it as under:

"'service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service"

It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The

words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionary means 'one or some or all'. In Black's Law Dictionary it is explained thus, "word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute". The use of the word 'any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all. The other word 'potential' is again very wide. In Oxford Dictionary it is defined as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined as "existing in possibility but not in fact, Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future instalments or payments on a contract or engagement already made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility.

5. This takes us to the larger issue if the public authorities under different enactments are ame-

nable to jurisdiction under the Act. It was vehemently argued that the local authorities or government bodies develop land and construct houses in discharge of their statutory function, therefore, they could not be subjected to the provisions of the Act. The learned counsel urged that if the ambit of the Act would be widened to include even such authorities it would vitally affect the functioning of official bodies. The learned counsel submitted that the entire objective of the Act is to protect a consumer against malpractices in business. The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of service to be more objective and caretaking. It is still more so in public services. When private undertakings are taken over by the Government or corporations are created to discharge what is otherwise State's function, one of the inherent objectives of such social welfare measures is to provide better, efficient and cheaper services to the people. Any attempt, therefore, to exclude services offered by statutory or official bodies to the common man would be against the provisions of the Act and the spirit behind it. It is indeed unfortunate that since enforcement of the Act there is a demand and even political pressure is built up to exclude one or the other class from operation of the Act. How ironical it is that official or semi-official bodies which insist on numerous benefits, which are otherwise available in private sector, succeed in bargaining for it on threat of strike mainly because of larger income accruing due to rise in number of consumers and not due to better and efficient functioning claim exclusion when it comes to accountability from operation of the Act. The spirit of consumerism is so feeble and dormant that no association, public or private spirited, raises any finger on regular hike in prices not because it is necessary but either because it has not been done for sometime or because the operational cost has gone up irrespective of the efficiency without any regard to its impact on the common man. In our opinion, the entire argument found on being statutory bodies does not appear to have any substance. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service. Truly speaking it would be a service to the society if such bodies instead of claiming exclusion subject themselves

to the Act and let their acts and omissions be scrutinised as public accountability is necessary for healthy growth of society.

6. What remains to be examined is if housing construction or building activity carried on by a private or statutory body was service within the meaning of clause (o) of Sec.2 of the Act as it stood prior to inclusion of the expression 'housing construction' in the definition of "service" by Ordinance No.24 of 1993. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or contractor. The one is contractual service and other statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of immovable property as argued but deficiency in rendering of service of particular standard, quality or grade. Such deficiencies or omissions are defined in sub-clause (ii) of clause (r) of Sec.2 as unfair trade practice. If a builder of a house uses substandard material in construction of a building or makes false or misleading representation about the condition of the house then it is denial of the facility or benefit of which a consumer is entitled to claim value under the Act. When the contractor or builder undertakes to erect a house or flat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof, or cracking wall or substandard floor is denial of service. Similarly when a statutory authority undertakes to develop land and frame housing scheme, it, while performing statutory duty renders service to the society in general and individual in particular. The entire

approach of the learned counsel for the development authority in emphasising that power exercised under a statute could not be stretched to mean service proceeded on misconception. It is incorrect understanding of the statutory functions under a social legislation. A development authority while developing the land or framing a scheme for housing discharges statutory duty the purpose and objective of which is service to the citizens. As pointed out earlier the entire purpose of widening the definitions is to include in it not only day to day buying of goods by a common man but even such activities which are otherwise not commercial but professional or service-oriented in nature. The provisions in the Acts, namely, Lucknow Development Act, Delhi Development Act or Bangalore Development Act clearly provide for preparing plan, development of land, and framing of scheme etc., Therefore if such authority undertakes to construct building or allot houses or building sites to citizens of the State either as amenity or as benefit then it amounts to rendering of service and will be covered in the expression 'service made available to potential users'. A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993.

7. In Civil Appeal No.2954 filed by a builder it was urged that inclusion of 'housing construction' in clause (o) and 'avail' in clause (d) in 1993 would indicate that the Act as it stood prior to the amendment did not apply to hiring of services in respect of housing construction. Learned counsel submitted that in absence of any expression making the amendment retrospective it should be held to be prospective as it is settled that any law including amendments which materially affect the vested rights or duties or obligations in respect of past transactions should remain untouched. Reliance was placed on *Jose Da Costa v. Bascora Sadasiva Sinai Narcornim*, (1976)2 S.C.C. 917,

State of M.P. v. Rameshwar Rathod, (1990) 4 S.C.C. 21: 1990 S.C.C. (Crl.) 522: A.I.R. 1990 S.C. 1849 and *Pulborough School Board Election v. Nutt*, (1891-94) All E.R. 834. It was also argued that when definition of 'service' in Monopolies and Restrictive Trade Practices Act was amended in 1991 it was made retrospective. Therefore, in absence of use of similar expression in this Act it should be deemed to be prospective. True, the ordinance does not make the definition retrospective in operation. But it was not necessary. In fact it appears to have been added by way of abundant caution as housing construction being service was included even earlier. Apart from that what was the vested right of the contractor under the agreement to construct the defective house or to render deficient service? A legislation which is enacted to protect public interest from undesirable activities cannot be construed in such narrow manner as to frustrate its objective. Nor is there any merit in the submission that in absence of the word 'avail of' in the definition of 'consumer' such activity could not be included in service. A perusal of the definition of 'service' as it stood prior to 1993 would indicate that the word 'facility' was already there. Therefore the legislature while amending the law in 1993 added the word in clause (d) to dispel any doubt that consumer in the Act would mean a person who not only hires but avails of any facility for consideration. It in fact indicates that these words were added more to clarify than to add something new.

8. Having examined the wide reach of the Act and jurisdiction of the Commission to entertain a complaint not only against business or trading activity but even against service rendered by statutory and public authorities the stage is now set for determining if the Commission in exercise of its jurisdiction under the Act could award compensation and if such compensation could be for harassment and agony to a consumer. Both these aspects specially the latter are of vital significance in the present day context. Still more important issue is the liability of payment. That is, should the society or the tax payer be burdened for oppressive and capricious act of the public officers or it be paid by those responsible for it. The administrative law of accountability of public authorities for their arbitrary and even *ultra vires* actions has taken many strides. It is now accepted both by this Court and English Courts that the State is liable to compen-

sate for loss or injury suffered by a citizen due to arbitrary actions of its employees. In *State of Gujarat v. Memon Mahomed Haji Hasam*, (1967) 3 S.C.R. 938: A.I.R. 1967 S.C. 1885, the order of the High Court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of decision in appeal was upheld both on principle of bailee's 'legal obligation to preserve the property intact and also the obligation to take reasonable care of it.. to return it in the same condition in which it was seized' and also because the Government was, 'bound to return the said property by reason of its statutory obligation or to pay its value of it had disabled itself from returning it either by its own act or by act of its agents and servants'. It was extended further even to *bona fide* action of the authorities if it was contrary to law in *Lala Bishambar Nath v. Agra Nagar Mahapalika Agra*, (1973) 1 S.C.C. 788: A.I.R. 1973 S.C. 1289. It was held that where the authorities could not have taken any action against the dealer and their order was invalid, 'it is immaterial that the respondents had acted *bona fide* and in the interest of preservation of public health. Their motive may be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action. The theoretical concept that king can do no wrong has been abandoned in England itself and the State is now held responsible for tortuous act of its servants. The First Law Commission constituted after coming into force of the Constitution on liability of the State in tort, observed that the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine liability of the State. Friedmann observed:

"It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental function, but the nature and form of the activity in question."

Even *Kasturi Lal Ralia Ram Jain v. State of U.P.*, A.I.R. 1965 S.C. 1039: (1965) 1 S.C.R. 375: (1966) 2 L.L.J. 583, did not provide any immunity for

ortuous acts of public servants committed in discharge of statutory function if it was not referable to sovereign power. Since house construction or for that matter any service hired by a consumer or facility availed by him is not a sovereign function of the State the ratio of *Kasturi Lal* could not stand in way of the Commission awarding compensation. We respectfully agree with Mathew, J. in *Hyam Sunder v. State of Rajasthan*, (1974) 1 S.C.C. 90, that it is not necessary, 'to consider whether there is any rational dividing line between the so-called sovereign and proprietary or commercial functions for determining the liability of the State' S.C.C. p.695, para 20). In any case the law has always maintained that the public authorities who are entrusted with statutory function cannot act negligently. As far back as 1878 the law was succinctly explained in *Geddis v. Proprietors of Barr Reservoir*, (1878) 3 A.C. 430, thus:

"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing what the Legislature has authorised, if it be done negligently."

Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the Commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word 'compensation' is of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the

Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

9. Facts in Civil Appeal No.6237 of 1990 may now be adverted to as it is the only appeal in which the National Commission while exercising its appellate power under the Act not only affirmed the finding of State Commission directing the appellant to pay the value of deficiency in service, but even directed to pay compensation for harassment and agony to the respondent. The Lucknow Development Authority with a view to ease the acute housing problem in the city of Lucknow undertook development of land and formed plots of different categories/ sizes and constructed dwelling units for people belonging to different income groups. After the construction was complete the authority invited applications from persons desirous of purchasing plots or dwelling houses. The respondent applied on the prescribed form for registration for allotment of a flat in the category of Middle Income Group (MIG) in Gomti Nagar Scheme in Lucknow on cash down basis. Since the number of applicants was more, the authority decided to draw lots in which flat No.II/75 in Vinay Khand-II was allotted to the respondent on April 26, 1988. He deposited a sum of Rs.6,132 on July 2, 1988 and a sum of Rs.1,09,975 on July 29, 1988. Since the entire payment was made in July, 1988 the flat was registered on August 18, 1988. Thereafter the appellant by a letter dated August 23, 1988 directed its Executive Engineer-VII to hand over the possession of the flat to the respondent. This information was given to him on November 30, 1988, yet the flat was not delivered as the construction work was not complete. The respondent approached the authority but no steps were taken nor possession was handed over. Consequently he filed a complaint before the District Forum that even after payment of entire amount in respect of cash down scheme the appellant was not handing over possession nor they were completing the formalities and the

work was still incomplete. The State Commission by its order dated February 15, 1990 directed the appellant to pay 12% annual simple interest upon the deposit made by the respondent for the period January 1, 1989 to February 15, 1990. The appellant was further directed to hand over possession of the flat without delay after completing construction work up to June, 1990. The Commission further directed that if it was not possible for the appellant to complete the construction then it should hand over possession of the flat to the respondent by April 5, 1990 after determining the deficiencies and the estimated cost of such deficient construction shall be refunded to the respondent latest by April 20, 1990. The appellant instead of complying with the order approached the National Commission and raised the question of jurisdiction. It was overruled. And the appeal was dismissed. But the cross-appeal of the respondent was allowed and it was directed that since the architect of the appellant had estimated in October, 1989 the cost of completing construction at Rs.44,615 the appellant shall pay the same to the respondent. The Commission further held that the action of the appellant amounted to harassment, mental torture and agony of the respondent, therefore, it directed the appellant to pay a sum of Rs.10,000 as compensation.

10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or should it be realised from those who were responsible for it? Compensation as explained includes both the just equivalent for loss of goods or services and also for sufferance of injustice. For instance in Civil Appeal No..... of 1993 arising out of S.L.P. (Civil) No.659 of 1991 the Commission directed the Bangalore Development Authority to pay Rs.2,446 to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No misfeasance was found. The moment the authority came to know of the mistake committed by it, it took immediate action by allotting alternative site to the respondent. It was compensation for exact loss suffered by the respondent. It arose in due discharge of duties. For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability

changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc., to a person has now been held to be punitive, exception has been carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the Government' (Salmond and Heuston on the Law of Torts). Misfeasance in public office is explained by Wade in his book on Administrative Law thus:

"Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury." (p.777)

The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in *Cassell & Co. Ltd. v. Broome*, 1972 A.C. 1027: (1972) 1 All.E.R. 801, on the principle that, 'an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law. It acts as a check on arbitrary and capricious exercise of power. In *Rookes v. Barnard*, (1964) 1 All.E.R. 367, 410: 1964 A.C. 1129, it was observed by Lord Devlin, 'the servants of the government' are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and *bona fide*. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially

abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book *Administrative Law* has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. One of the reasons for this appears to be development of law which, apart from other factors succeeded in keeping a salutary check on the functioning in the government or semi-government offices by holding the officers personally responsible for their capricious or even *ultra vires* action resulting in injury or loss to a citizen by awarding damages against them. Various decisions rendered from time to time have been referred to by Wade on Misfeasance by public authorities. We shall refer to some of them to demonstrate how necessary it is for our society. In *Ashby v. White*, (1703) 2 *Ld. Raym* 938, the House of Lords invoked the principle of *ubi jus ibi remedium* in favour of an elector who was wrongfully prevented from voting and decreed the claim of damages. The ratio of this decision has been applied and extended by English Courts in various situations. In *Roncarelli v. Duplessis*, (1959) 16 *D.L.R.* 2d 689, the Supreme Court of Canada awarded damages against the Prime Minister of Quebec personally for directing the cancellation of a restaurant-owner's liquor licence solely because the licensee provided bail on many occasions for fellow members of the sect of Jehovah's Witnesses, which was then unpopular with the authorities. It was observed that, 'what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Alcoholic Liquor Act? Malice in the proper sense is simply acting

for a reason and purpose knowingly foreign to the administration to which was added here the element of intentional punishment by what was virtually vocation outlawry'. In *Smith v. East Elloe Rural District Council*, 1956 A.C. 736: (1956) 1 *All E.R.* 855, the House of Lords held that an action for damages might proceed against the clerk of a local authority personally on the ground that he had procured the compulsory purchase of the plaintiff's property wrongfully and in bad faith. In *Farrington v. Thomson*, 1959 U.R. 286, the Supreme Court of Victoria awarded damages for exercising a power the authorities knew they did not possess. A licensing inspector and a police officer ordered the plaintiff to close his hotel and cease supplying liquor. He obeyed and filed a suit for the resultant loss. The court observed:

"Now, I take it to be perfectly clear, that if a public officer abuses his office, by an act of omission or Commission and the consequence of that is an injury to an individual, an action may be maintained against such public officer."

In *Wood v. Blair*, *The Times* July 3, 4, 5, 1957 (*Hallet J and Court of Appeal*), a dairy farmer's manager contracted typhoid fever and the local authority served notices forbidding him to sell milk except under certain conditions. These notices were void, and the farmer was awarded damages on the ground that the notices were invalid and that the plaintiff was entitled to damages for misfeasance. This was done even though the finding was that the officers had acted from the best motives.

11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socio-economic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and *bona fide*, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is

arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was *mala fide* and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries.

12. For these reasons all the appeals are dismissed. In Appeal No.6237 of 1990 it is further directed that the Lucknow Development Authority shall fix the responsibility of the officers who were responsible for causing harassment and agony to the respondent within a period of six months from the date a copy of this order is produced or served

on it. The amount of compensation of Rs.10,000 awarded by the Commission for mental harassment shall be recovered from such officers proportionately from their salary. Compliance of this order shall be reported to this Court within one month after expiry of the period granted for determining the responsibility. The Registrar General is directed to send a copy of this order to the Secretary, Lucknow Development Authority immediately.

13. In Civil Appeal Nos.6237 of 1990, 5257 of 1990, 3963 of 1989 and 2954-59 of 1992, the appellant shall pay costs to the contesting respondents which are assessed at Rs.5,000 in each case. Since the respondents have not put in appearance in other appeals there shall be no order as to costs.

B.S. ----- *Appeals dismissed.*

IN THE SUPREME COURT OF INDIA

Present: *M.M.Punchhi and N.P.Singh, JJ.*

C.A.No.4208 of 1983 *5th November, 1993.*

Veb Deutfracht Seereederei Rostock (D.S.R. Lines)
A Department of the German Democratic Republic
...Appellant

v.
New Central Jute Mills Co. Ltd. and another
...Respondents.

Civil Procedure Code (V of 1908), Sec.86 - Scope and object of - Suit against department and or agent and/or instrumentality of a foreign Government - Entertainment of - Prior consent of Central Government, if necessary - Commercial contracts relating to trade and business - if outside purview of Section - Question whether suit should be entertained - If can be deferred till date of final disposal of suit.

The respondent filed a suit for a decree of Rs.2,40,000

alleging that it had purchased diverse spare parts and accessories from the appellant which were found to be damaged. The appellant is a company incorporated under the appropriate laws of West Germany and is carrying on the business in West Germany as also at Calcutta. The appellant took an objection to the maintainability of the suit saying that it was a department and/or agent and/or instrumentality of the Government of German Democratic Republic and produced a Certificate to that effect. The carrier also had been granted such a certificate. A learned single Judge of the Calcutta High Court upheld the objection and held that its suit was not maintainable without the consent of the contract Government. But a Division Bench set aside that order directing that the question whether the suit could be entertained or not should be considered during the trial of the suit. On appeal,

Held: The object of Sec.86 of the Civil Procedure Code, it to give effect to the principles of International Law that every sovereign state respects the independence of every other foreign State. But in India, it is only a qualified privilege because a suit can be brought with the consent of the Central Government in certain circumstances. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide rights and liabilities of foreign States to sue and be sued in its courts. It can be said that effect of Sec.86 there is to modify the extent of doctrine of immunity recognised by the International Law. If a suit is filed in India courts with the consent of the Central Government as required by Sec.86, it shall not be open to any foreign State to rely on the doctrine of immunity. In view of the provisions of Sec.86 of the Code, before any action is launched or a suit is filed against a foreign State, person unconnected has to make a request to the Central Government for grant of the necessary consent as required by Sub-sec.(1) of Sec.86 and the Central Government has to accede to the said request or refuse the same after taking into consideration all the facts and circumstances of the case. In a sense, it amounts to a bar on the power of the court itself which is entitled to try all suits of civil nature in view of Sec.9 of the Code. But Sec.9 itself recognises the limitation on such courts to try any suit the cognizance whereof is either expressly or impliedly barred. As such whenever a relief is sought

against a foreign State, the court before which such claim is lodged has to examine whether the person concerned has got the consent of the Central Government in terms of Sec.86 of the Code. From a bare reference to Sub-sec.2(b) of Sec.86, it shall appear that it requires such consent of the Central Government even in respect of agreements relating to commercial or trading contracts, because it says that such consent "shall not be given unless it appears to the Central Government that the foreign State..... by itself or another trades within the local limits of the jurisdiction of the court." When Sub-sec.(2) provides that such consent shall be given by the Central Government in respect of cases covered by Clause (b) of Sub-sec.(2) then a person who is to sue in any Court of competent jurisdiction, against any foreign State or any Company or Corporation which can be held to be a foreign State in respect of any breach of contract is entitled to apply for consent of the Central Government and the Central Government is expected to consider the said request taking into consideration the facts and circumstances of that particular case. While considering the question of grant or refusal of such consent, the Central Government is expected to examine that question objectively. Once the Central Government is satisfied that a case of action has accrued to the applicant against any foreign company or corporation which shall be deemed to be a foreign State, such consent shall be given. The immunity and protection extended to the foreign State on the basis of International Law should not be stretched to a limit so that a foreign Company and Corporation trading within the local limits of the jurisdiction of the Court concerned may take a plea under Sec.86 although *prima facie*, it appears that such company or Corporation is liable to be sued for any act or omission on their part or for any breach of the terms of the contract entered on their behalf. It is neither the purpose nor the scope of Sec.86 to such protect foreign traders who have committed breach of the terms of the contract. Causing loss and injury to the plaintiff. But if it appears to the Central Government that any attempt on the part of the plaintiff to sue a foreign State including any company or corporation is just to harass or to drag them in a frivolous litigation, then certainly the Central Government shall be justified in rejecting any such application for consent because such motivated action on the part of

the plaintiff may strain the relations of this country with the foreign State. The question whether a suit should be entertained cannot be deferred till the stage of the final disposal of the suit because that will serve neither the interest of the plaintiff nor of the defendant. The object of Sec.86 is to save foreign States from being harassed by defending suits in which there are hardly any merits. If the foreign State is required to file written statement and to contest the said suit and only at the stage of final disposal, a verdict is given whether, in the facts and circumstances of the particular case, such foreign State is entitled to the protection of Sec.86 of the Code, the very object and purpose of Sec.86 shall be frustrated. The bar of Sec.86 can be taken at the earliest opportunity and the Court concerned is expected to examine the same.

[Paras. 5, 6, 10, 11 & 12]

Cases referred to:

Mirza Ali Akbar Kashani v. United Arab Republic, A.I.R. 1966 S.C. 230: (1966) 1 S.C.R. 319. [Para. 7]

Baccus S.R.L. v. Servicio Nacional Del Trigo, (1957) 1 Q.B. 438: (1956) 3 All E.R. 715, 732. [Para. 8]

Krajina v. The Tass Agency, (1949) 2 All E.R. 274, 280. [Para. 8]

Royal Nepal Airlines Corporation v. Manorama Meher Singh Legha, A.I.R. 1966 Cal. 319: 69 C.W.N. 767. [Para. 9]

Dr. Shankar Ghose, Senior Advocate (*Parijat Sinha and B.D. Ahmed*, Advocates with him), for Appellant.

P.R. Seetharaman, for Respondents.

The Judgment of the Court was delivered by *N.P. Singh, J.*: The defendant is the appellant in this appeal. The suit in question was filed by the respondent, for a decree for Rs.2,40,000 alleging that the respondent had purchased diverse spare parts and accessories from the appellant, which were found to be damaged. The appellant is a company incorporated under the appropriate laws of West Germany and is carrying on its business in West Germany as also at Calcutta.

2. An objection was taken at the initial stage on behalf of the appellant that it was a department and/or agent and/or instrumentality of the Government of German Democratic Republic, which is recognised as a sovereign foreign State and as such the suit in question cannot be entertained against the appellant without prior consent of the Central Government as required by Sec.86 of the Code of Civil Procedure (hereinafter referred to

as "the Code"). The same plea was taken even on behalf of the carrier, which also belongs to and is owned by the German Democratic Republic. In support of the stand and in order to attract the bar of Sec.86 of the Code, the appellant produced the certificate dated September 18, 1981 granted by the Consul-General of the German Democratic Republic at Bombay saying:

"VEB Deutsfracht Seereederei Rostock, abbreviated as 'D.S.R.' commonly known as D.S.R. Lines constitutes a department of the Government of the German Democratic Republic exercising the rights of a legal entity."

The Constitution of the German Democratic Republic was also produced. Reference was made to Art.12 of the said Constitution which says:

"Mineral resources, mines, power stations, barrages and large bodies of water, the natural resources of the continental shelf, the larger industrial enterprises, banks and insurance companies nationally-owned farms, traffic routes, the means of transport of the railways, ocean shipping and civil aviation, post and telecommunication installations, are nationally-owned property, private ownership thereof is inadmissible."

3. In respect of the carrier also, the Consul-General of the German Democratic Republic at Bombay granted the certificate saying that the said vessel "is owned by the people of the German Democratic Republic and, hence, owned by the State".

4. A learned Judge of the Calcutta High Court by order dated February 3, 1982 allowed the objection taken on behalf of the appellant and rejected the plea saying that in absence of written consent by the Central Government, as required by Sec.86 of the Code, the suit filed on behalf of the respondent could not be entertained. On appeal filed on behalf of the respondent, the Division Bench set aside the order of the trial Judge and directed that whether the suit cannot be entertained in absence of consent of the Central Government, should be considered during the trial of the suit.

5. One of the principles of International Law is that every sovereign State respects the independence of every other foreign State. This absolute independence and the international comity underlines the relationship between sovereign States. The object of Sec.86 of the Code is to give effect to the principles of International Law. But, in India it is only a qualified privilege because a suit can be

brought with the consent of the Central Government in certain circumstances. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued so can it provide rights and liabilities of foreign States to sue and be sued in its courts. It can be said that effect of Sec.86 thus is to modify the extent of doctrine of immunity recognised by the International Law. If a suit is filed in Indian Courts with the consent of the Central Government as required by Sec.86, it shall not be open to any foreign State to rely on the doctrine of immunity. Sub-sec.(1) of Sec.86 says in clear and unambiguous terms that no foreign State may be sued in any court, except with the consent of the Central Government certified in writing by the Secretary to that Government. Sub-sec.(2) prescribes that such consent shall not be given unless it appears to the Central Government that the case falls within any of the clauses (a) to (d) of Sub-sec.(2) of Sec.86. Sub-sec.(6) enjoins that where a request is made to the Central Government for the grant of any consent referred to in Sub-sec.(1), the Central Government shall before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity of being heard. On a plain reading of different subsections of Sec.86, it is apparent that no foreign State may be sued in any court in India, except with the consent of the Central Government which has to be certified in writing by the Secretary to that Government. In view of the provisions aforesaid, before any action is launched or a suit is filed against a foreign State, person concerned has to make a request to the Central Government for grant of the necessary consent as required by Sub-sec.(1) of Sec.86 and the Central Government has to accede to the said request or refuse the same after taking into consideration all the facts and circumstances of the case. In a sense, it amounts to a bar on the power of the court itself which is entitled to try all suits of civil nature in view of Sec.9 of the Code. But Sec.9 itself recognises the limitation on such courts to try any suit the cognizance whereof is either expressly or impliedly barred. As such whenever a relief is sought against a foreign State, the court before which such claim is lodged has to examine whether the person concerned has got the consent of the Central Government in terms of Sec.86 of the Code.

6. The stand of the respondent is that as the

dispute has arisen in connection with a commercial contract, Sec.86 shall not be applicable. According to the respondent, the framers of the Code, while recognising the sovereignty and the immunity of the foreign States on principles recognised by the International Law, never purported to give immunity to the breach and contravention of the terms of the contract entered on behalf of the foreign State, which has nothing to do directly or indirectly with the sovereignty of the one State or the other but relates to commercial trade between the two States. There cannot be any conceivable object to keep such contracts within the scope of Sec.86. As a first impression, this looks attractive. From a bare reference to Sub-sec.(2)(b) of Sec.86, it shall appear that it requires such consent of the Central Government even in respect of agreements relating to commercial or trading contracts, because it says that such consent "shall not be given unless it appears to the Central Government that the foreign State..... by itself or another trades within the local limits of the jurisdiction of the court." If Sub-sec.(2)(b) of Sec.86 itself prescribes that the consent to sue shall not be given unless it appears to the Central Government that the foreign State which is being sued, by itself or by any other authority, trades within the local limits of the jurisdiction of the court, how it can be held that such consent is not required in connection with the commercial contracts. If for granting consent the Central Government is required to be satisfied as to whether such foreign State, by itself or by any other authority, trades within the local limits of the jurisdiction of the court concerned, then can it be urged that commercial contracts relating to trade and business having been entered on behalf of a foreign State are beyond the purview of Sec.86 of the Code?

7. This Court in the case of *Mirza Ali Akbar Kashani v. United Arab Republic*, (1966)1 S.C.R. 319: A.I.R. 1966 S.C. 230, pointed out in respect of Sec.86:

"Sec.86(1) proceeds to prescribe a limited liability against foreign States. The limitation on the liability of foreign States to be sued is twofold. The first limitation is that such a suit cannot be instituted except with the consent of the Central Government certified in writing by a Secretary to that Government. This requirement shows the anxiety of the Legislature to

save foreign States from frivolous or unjustified claims. The second limitation is that the Central Government shall not give consent unless it appears to the Central Government that the case falls under one or the other of clauses (a) to (d) of Sec.86(2)."

8. It is true that Government Corporations have been incorporated to undertake the activities, which at one time were directly part of the activities of the foreign State. A question may arise whether the immunity provided by Sec.86 of the Code can be extended to even such Government Undertakings which have their own legal entity. At one time, in view of their corporate and juristic personality, such Government Corporations were held not to be part of a State having their own independent existence. But, this aspect was re-examined by the English Court as well as this Court. In the case of *Baccus S.R.L. v. Servicio Nacional Del Trigo*, (1957) 1 Q.B. 438; (1956) 3 All E.R. 715, 732, it was said:

"Are we then to hold that the State of Spain is deprived of sovereign immunity with respect to this activity of importing and exporting grain by reason of the fact that the defendants are a corporate body? In my view that would be plainly wrong. In these days the Government of a sovereign State is not as a rule reposed in one personal sovereign; it is necessarily carried out through a complicated organisation which ordinarily consists of many different ministries and departments. Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery."

Again, in *Krajina v. The Tass Agency*, (1949) 2 All E.R. 274, 280, it was pointed out:

"The history of the legislation in this country as regards the departments of State seems to me to show that it is quite possible that a State may for certain purposes under its own legislation give some department of State the status and the rights of a juridical entity without depriving the department of its general immunity from suit and it seems to me that it would be impossible to say—no doubt, our Government would not wish to say—that the Crown had thereby deprived itself of the right to rely on that immunity if an attempt were made to sue it in a foreign country. One must look in every

case at the facts to reach a conclusion whether the Crown has intended to give up its immunity generally or only for limited and defined purposes."

9. In the case of *Royal Nepal Airlines Corporation v. Manorama Meher Singh Legha*, A.I.R. 1966 Cal. 319; 69 C.W.N. 767, a Division Bench of the Calcutta High Court held that Nepal Airlines Corporation having its office at Calcutta shall be deemed to be department of the Government of Nepal on the basis of the documents produced before the court and as such was entitled to claim immunity from the process of the Indian Court to exercise its jurisdiction in respect of the claim for damages which had been brought by the plaintiff of the said suit. But, at the same time it must be impressed that any plea of immunity raised by a corporate undertaking of a foreign State, has to be examined on the basis of materials produced on behalf of such undertaking or corporation. The initial onus of establishing that such corporation or undertaking had right to immunity, must be discharged. If it satisfies the court that because of any constitutional provision, although such corporation has its separate legal entity, still it shall be deemed to be a department of the State for purpose of immunity, then only the onus will shift to the plaintiff to disprove any such claim.

10. In the present case, the appellant had produced the Constitution of the German Democratic Republic, Art.12 whereof has been reproduced above, which provides that larger industrial enterprises, banks, insurance companies, nationally-owned farms, means of transport of the railways, ocean shipping and civil aviation, post and telecommunication installations are nationally-owned property, private ownership thereof is inadmissible. In view of the aforesaid Art.12 of the Constitution and the certificate granted by the Consul General of the German Democratic Republic, the appellant shall be deemed to be a department of the Government of German Democratic Republic.

11. Sub-sec.(2) of Sec.86 of the Code says that such consent shall not be given unless it appears to the Central Government that the suit in question has been filed under the conditions mentioned in clauses (a) to (d) of Sub-sec.(2) of Sec.86. Clause (b) of Sub-sec.(2) provides that consent shall be given, in respect of a suit, which has been filed against a foreign State, if such foreign State 'by

itself or another, trades, within the local limits of the jurisdiction of the court'. When Sub-sec.(2) provides that such consent shall be given by the Central Government in respect of cases covered by Clause (b) of Sub-sec.(2), then a person who is to sue in any court of competent jurisdiction, against any such foreign State or any company or corporation, which can be held to be a foreign State in respect of any breach of contract, is entitled to apply for consent of the Central Government and the Central Government is expected to consider the said request taking into consideration the facts and circumstances of that particular case. While considering the question of grant or refusal of such consent, the Central Government is expected to examine that question objectively. Once the Central Government is satisfied that a cause of action has accrued to the applicant against any foreign company or corporation, which shall be deemed to be a foreign State, such consent should be given. The immunity and protection extended to the foreign State on the basis of International Law should not be stretched to a limit, so that a foreign company and corporation, trading within the local limits of the jurisdiction of the court concerned, may take a plea of Sec.86, although *prima facie* it appears that such company or corporation is liable to be sued for any act or omission on their part or for any breach of the terms of the contract entered on their behalf. It is neither the purpose nor the scope of Sec.86 to protect such foreign traders, who have committed breach of the terms of the contract, causing loss and injury to the plaintiff. But, if it appears to the Central Government, that any attempt on the part of the plaintiff, to sue a foreign State, including any company or corporation, is just to harass or to drag them in a frivolous litigation, then certainly the Central Government shall be justified in rejecting any such application for consent, because such motivated action on the part of the plaintiff, may strain the relations of this country with the foreign State.

12. In the present case, the appellant having been held to be a foreign State within the meaning of Sec.86 and the plaintiff-respondent not having obtained the consent of the Central Government, as required by Sec.86, the suit filed on its behalf was not rightly entertained by the trial court. The question whether a suit should be entertained, cannot be deferred, till the stage of the final dis-

posal of the suit, because that will serve neither the interest of the plaintiff nor of the defendant. The object of Sec.86 is to save foreign States from being harassed by defending suits in which there are hardly any merits. If the foreign State is required to file written statement and to contest the said suit and only at the stage of final disposal, a verdict is given whether in the facts and circumstances of the particular case, such foreign State is entitled to the protection of Sec.86 of the Code, the very object and purpose of Sec.86 shall be frustrated. The bar of Sec.86 can be taken at the earliest opportunity and the court concerned is expected to examine the same.

13. Accordingly, the appeal is allowed. The order of the Division Bench is set aside and that of the trial court is restored. In the facts and circumstances of the case, there shall be no order as to costs.

B.S.

Appeal allowed.

IN THE SUPREME COURT OF INDIA.

Present: Kuldip Singh and B.P. Jeevan Reddy, JJ.

C.A.No.107 (NL) of 1984 16th November, 1993.

Shri Rameshwar Manjhi (deceased) through his son Shri Lakhiram Manjhi ...Appellant
v.

Management of Sangramgarh Colliery and others
...Respondents.

Industrial Disputes Act (XIV of 1947), Secs.2-A and 33-C(2) - Termination of services of workman - Claim of money by workman - Industrial dispute regarding - If services on death of workman - Maxim 'actio personalis moritur cum persona' - Applicability.

It is difficult to understand why a claim of money which became payable to the deceased workman

should not be claimable, upon satisfaction of other relevant conditions by the heirs of the deceased workman by making a claim under Sub-sec.(2) of Sec.33-C of the Industrial Disputes Act. Having regard to the well-established principle that all causes of action except those which are known as dying along with the death of a person must survive to his heirs, the cause of action created in favour of a workman under Sub-sec.(2) of Sec.33-C of the Act should in normal circumstances survive to the heirs.

The applicability of the *maxim* 'actio personalis moritur cum persona' depends upon the 'relief claimed' and the facts of each case. By and large the industrial disputes under Sec.2-A of the Act relate to the termination of services of the concerned workman. In the event of death of the workman during pendency of the proceedings, the relief of reinstatement, obviously, cannot be granted. But the final determination of the issues involved in the reference may be relevant for regulating the conditions of service of the other workmen in the industry. Primary object of the Act is to bring industrial peace. The tribunals and labour courts under the Act are the instruments for achieving the same objective. It is, therefore, in conformity with the scheme of the Act that the proceedings in such cases should continue at the instance of the legal heirs/representatives of the workmen. Even otherwise, there may be a claim for back wages or for monetary relief in any other form. The death of the workman during pendency of the proceedings cannot deprive the heirs or legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workman. The court, therefore, holds that on the death of the workman even when the reference is of an individual dispute under Sec.2-A of the Act, the tribunal does not become *functus officio* or the reference does not abate merely because pending adjudication, the workman concerned dies. It is open to the heirs and legal representatives of the deceased workman to have the matter agitated and decided.

[Paras. 11, 13 & 18]

Cases referred to:

Bihar Working Journalists' Union v. H.K. Chaudhuri, 1968 Lab.I.C. 515: A.I.R. 1968 Pat. 135. [Paras. 1, 3, 5]

Bank of Baroda v. Workmen, (1979) 2 L.L.J. 57 (Guj.). [Paras. 3, 15, 16]

Gwalior Rayons, Mavoor v. Labour Court, (1978) 2 L.L.J. 188 (Ker.). [Paras. 3, 14, 15; 16]

Tocklai Experimental Station v. State of Assam, A.I.R. 1960 Assam 132. [Para. 4]

Haramani Naik v. Management, Samaj, 1978 Lab.I.C. 1630: 46 Cut.L.T. 283 (Ori.). [Para. 6]

Yad Ram v. Bir Singh, 1974 Lab.I.C. 970 (Del.). [Para. 6]

Sitabai v. Auto Engineers, 1972 Lab.I.C. 733: 73 Bom.L.R. 749: (1972) 1 L.L.J. 290 (Bom.). [Paras. 7, 11]

Girja Nandini Devi v. Bijendra Narain Choudhury, A.I.R. 1967 S.C. 1124, 1131: (1967) 1 S.C.R. 93. [Para. 12]

Cawnpore Tannery Limited v. S. Guha, (1961) 2 L.L.J. 110, 112: A.I.R. 1967 S.C. 667. [Para. 14]

Sri Meenakshi Mills Limited v. Labour Appellate Tribunal, (1953) 2 L.L.J. 326. [Para. 14]

B.B. Sinha, for Appellant.

Ms. Shompu Bhattacharya and Parijat Sinha, for Respondents.

The Judgment of the Court was delivered by Kuldip Singh, J.: The question for our consideration, in this appeal, is whether an industrial dispute survives when the workman concerned dies during its pendency? Can the proceedings before the Tribunal/Labour Court be continued by the legal heirs/representatives of the deceased workman? Relying upon the judgment of Patna High Court in *Bihar Working Journalists' Union v. H.K. Chaudhuri*, 1968 Lab.I.C. 515: A.I.R. 1968 Pat. 135, the Central Government Industrial Tribunal-cum-Labour Court, Dhanbad, Bihar (the Tribunal), by its award dated January 4, 1982 has answered the question in the negative. This appeal by way of special leave is against the judgment of the Tribunal.

2. There is sharp difference of opinion between the Assam, Patna, Delhi and Orissa High Courts on the one hand and Kerala and Gujarat High Courts on the other. The first set of High Courts have held that on the death of a workman the industrial dispute cannot survive and the proceedings must come to an end, whereas the Kerala and Gujarat High Courts have held that the industrial dispute survives the deceased workman and the reference can be continued by the legal heirs/representatives of the deceased workman.

3. We may briefly notice the facts of the case. Rameshwar Manjhi was working as coal-cutter in the service of the respondent/management. On

May 3, 1974 he met with an accident while working in the colliery and as a consequence his right leg was amputated. The Medical Board recommended him for light duty on surface. It is his case that he presented himself before the management and requested that he be permitted to resume duties but the management did not permit him to join. The case of the management is that the workman became unfit to perform the duties and as such his services were terminated with effect from July 22, 1974 by giving him adequate compensation. Rameshwar Manjhi raised a dispute under Sec. 2-A of the Industrial Disputes Act, 1947 (the Act), Central Government referred the dispute for adjudication to the Tribunal in the following terms:

"Whether the action of the management of Sangarmgarh Colliery under Eastern Coal-fields Limited, Post Office Samdi, District Burdwan in terminating the employment of Shri Rameshwar Manjhi, coal-cutter with effect from the 22nd of July, 1974 was justified? If not, to what relief is the concerned workman entitled?"

During the pendency of the reference Rameshwar Manjhi died on January 19, 1981. Lekhram Manjhi, son and only heir of Rameshwar Manjhi, filed application dated May 24, 1981 before the Tribunal seeking permission to be substituted in the proceedings. The management contested the application on the ground that after the death of Rameshwar Manjhi the reference did not survive and became infructuous. The Tribunal by its award dated January 4, 1982 rejected the application, accepted the objection of the management and closed the reference on the following reasoning:

"In support of his contention two rulings have been cited on behalf of workman reported in *Bank of Baroda v. Workmen*, (1979) 2 L.L.J. 57 (Guj.) and *Gwalior Rayons, Mavoor v. Labour Court*, (1978) 2 L.L.J. 188 (Ker.). The former ruling is of Gujarat High Court while latter of Kerala High Court. In the above two rulings, it is held that on the death of a workman during the pendency of the proceeding the Tribunal does not cease to exercise jurisdiction as benefits due to the deceased workman can be realised by his legal heir under Sec. 33-C(2) of the Industrial Disputes Act. But the ruling of our own High Court (Patna High Court) is contra. It has been held in *Bihar Working Journalists' Union v. H.K. Chaudhuri*, 1968 Lab.I.C. 515:

A.I.R. 1968 Pat. 135, that in certain cases on the death of a workman the reference will not be infructuous, but it has been held that there can be no doubt that the death of the workman during the pendency of the adjudication proceeding put an end to the industrial dispute for the simple reason that he can no longer be reinstated. We are bound by the ruling of the Patna High Court and in the fact of the ruling of the Patna High Court, we cannot follow the ruling of any other High Court. The position would have been different if there would have been some ruling of the Supreme Court on the point, but no ruling of the Supreme Court on this point has been cited before me by either party.

In the above circumstances, relying on the ruling of the Patna High Court, it is held that due to death of the concerned workman during the pendency of the adjudication proceeding the industrial dispute has come to an end and the reference cannot proceed further and has become infructuous as such."

4. To resolve the controversy it is necessary to examine the reasoning and the conclusions reached by various High Court on the point in issue. The first decision is that of Assam High Court in the *Tocklai Experimental Station v. State of Assam*, *A.I.R. 1960 Assam 132*. The matter was initially before a Division Bench. On difference of opinion it was referred to the third Judge. The majority held that the cause of a dead man could not be taken up by workmen's union and even if they had an interest in the employment or non-employment of the workman, it ceased along with his death. It was further held that in the case of an employer, his antecedent liability would survive the closure of his business, but in the case of an employee, his claim to reinstatement expires along with his death and it no longer remains a dispute capable of settlement or adjudication.

5. Patna High Court in *Bihar Working Journalists' Union v. H.K. Chaudhuri*, 1968 Lab.I.C. 515: *A.I.R. 1968 Pat. 135*, on the interpretation of clauses (c) and (d) of Sec. 18(3) of the Act came to the conclusion that it was not the intention of the legislature to permit continuance of an industrial dispute at the instance of the heirs or the legal representatives of the deceased workman.

6. In *Haramani Naik v. Management, Samaj*, 1978 Lab.I.C. 1630: 46 Cut.L. T. 283 (Ori.), the question

before the Orissa High Court was whether during the pendency of an application under Sec.33-C(2) of the Act, on the death of the workman, his legal representatives could be substituted. R.N.Mishra, J. speaking for the Division Bench of the court came to the conclusion that the heirs and legal representatives of the deceased workman were not entitled to continue the proceedings. The learned Judges of the Orissa High Court followed the judgment of the Delhi High Court in *Yad Ram v. Bir Singh*, 1974 Lab.I.C. 970 (Del.). It would be useful to quote the reasoning of the Delhi High Court in *Yad Ram's case*, which is as under:

"...an application under Sec.33-C(2) of the Act can be made only by the workman himself and it must follow that if the workman dies during the pendency of such application, his heirs, successors and legal representatives cannot continue it in the specified Labour Court because this Court cannot recognize anybody other than a workman as the applicant before it. We should not be taken to have held that the right to sue for money or equivalent of money of the benefit due to a workman does not survive. It survives to the heirs, successors and legal representatives and they can take appropriate proceedings by way of a suit in a civil court. They cannot, however, either continue after his death an application made by the workman under Sec.33-C(2) or make such an application themselves in the event of his death."

7. As regards Sec.33-C(2) of the Act, the Bombay High Court in *Sitabai v. Auto Engineers*, 1972 Lab.I.C. 733; 73 Bom.L.R. 749; (1972) 1 L.L.J. 290 (Bom.), has taken a different view than the Delhi and the Orissa High Courts. The Bombay High Court has held that a widow has a right to apply for computation of gratuity amount which became payable to her late husband. It proceeded on the following reasoning:

"It is well established that all civil rights of every kind vested in a deceased person and all causes of action in that connection, except those which are in the category of not capable of surviving after his death, survive to his heirs. Causes of action, which are personal, and do not survive, consist of damages due to the personal injuries suffered by a deceased and for defamation and assault. In that connection, Fatal Accidents Act was passed so that in

connection with damages suffered in consequence of death of a deceased could be claimed on behalf of the dependants of a deceased person. But apart from certain personal causes of action which died with the death of a deceased person every other cause of action for civil claims has been held to have continued in existence so as to survive to his heirs for more than a century now. The decision that was given by the Labour Court, therefore, appears to us contrary to the above well established position."

8. We are not inclined to agree with the view taken by the learned Judges of the Assam, Patna, Delhi and Orissa High Courts.

9. The Assam High Court has primarily gone on the interpretation of the expression "industrial dispute" under Sec.2(k) of the Act. It is not necessary for us to examine the reasoning of the Assam High Court any further because by insertion of Sec.2-A into the Act with effect from December 1, 1965, any dispute or difference between an individual workman and his employer connected with or arising out of discharge, dismissal, retrenchment or otherwise termination of his services, is deemed to be an industrial dispute notwithstanding that no other workman or any union of workmen is party to the dispute. It is thus obvious that Sec.2-A of the Act makes an individual dispute, though not taken up by the union, an industrial dispute within the ambit of the Act. The judgment of the Assam High Court is, thus no longer an authority on the point.

10. Patna High Court fell into patent error in relying upon clauses (c) and (d) of Sec.18(3) of the Act for reaching the conclusion that the heirs of a deceased workman are not entitled to be substituted in the proceedings before the Tribunal. Sec.18(3) of the Act enumerates the parties who are bound by the settlement arrived at in the manner provided therein. Clause 18(3)(c) refers to a party to the settlement who is an employer and further provides that the settlement shall be binding not only on the employer but his heirs, successors or assigns in respect of the establishment to which the dispute relates. The said provision is obviously to safeguard the interest of the workmen in the sense that after the death of the employer his heirs, successors or assigns may not say that they are not bound by the settlement. It was not necessary to make similar provision in Clause

■ 18(3)(d) because the party referred to in the said clause is composed of workmen and as such the death of an individual workman cannot have any effect on the binding nature of the settlement. The provisions of Sec.18(3) of the Act have been enacted by the legislature with a view to give continuity to the binding effect of the settlements reached between the parties under the Act. Patna High Court was not justified in relying upon the provisions of the said section for the purpose of denying a right to the heirs of a deceased workman to be substituted in a pending industrial dispute.

11. We do not agree with the viewpoint of Delhi and Orissa High Courts to the effect that the claim for computation under Sub-sec.(2) of Sec.33-C of the Act dies with the death of the workman. It is difficult to understand why a claim of money which became payable to the deceased workman should not be claimable, upon satisfaction of other relevant conditions by the heirs of the deceased workman by making a claim under Sub-sec.(2) of Sec.33-C of the Industrial Disputes Act. Having regard to the well-established principle that all causes of action except those which are known as dying along with the death of a person must survive to his heirs, the cause of action created in favour of a workman under Sub-sec.(2) of Sec.33-C of the Act should in normal circumstances survive to the heirs. We approve the reasoning of the Bombay High Court in *Sitabai v. Auto Engineers*, 1972 Lab.I.C. 733: 73 Bom.L.R. 749: (1972)1 L.L.J. 290 (Bom.).

12. The maxim '*actio personalis moritur cum persona*' though part of English Common Law has been subjected to criticism even in England. It has been dubbed as unjust maxim, obscure in its origin, inaccurate in its expression and uncertain in its application. It has often caused grave injustice. This Court in a different context, in considering the survival of a claim for rendition of accounts, after the death of the party against whom the claim was made, in *Girja Nandini Devi v. Bijendra Narain Choudhury*, A.I.R. 1967 S.C. 1124, 1131: (1967)1 S.C.R. 93, observed as under:

"The maxim '*actio personalis moritur cum persona*' a personal action dies with the person has a limited application. It operates in a limited class of actions *ex delicto* such as actions for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the

death of the party the relief granted could not be enjoyed or granting it would be nugatory. An action for account is not an action for damages *ex delicto* and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory".

13. It is thus obvious that the applicability of the maxim '*actio personalis moritur cum persona*' depends upon the 'relief claimed' and the facts of each case. By and large the industrial disputes under Sec.2-A of the Act relate to the termination of services of the concerned workman. In the event of death of the workman during pendency of the proceedings, the relief of reinstatement, obviously, cannot be granted. But the final determination of the issues involved in the reference may be relevant for regulating the conditions of service of the other workmen in the industry. Primary object of the Act is to bring industrial peace. The tribunals and labour courts under the Act are the instruments for achieving the same objective. It is, therefore, in conformity with the scheme of the Act that the proceedings in such cases should continue at the instance of the legal heirs/representatives of the deceased workmen. Even otherwise, there may be a claim for back wages or for monetary relief in any other form. The death of the workman during pendency of the proceedings cannot deprive the heirs or legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workman.

14. In *Gwalior Rayons, Mavoor v. Labour Court*, (1978)2 L.L.J. 188 (Ker.), Chandrasekhara Menon, J. of the Kerala High Court sitting singly dealt with the question with utmost clarity and erudition. We quote hereunder, with approval, the reasoning of the learned Judge:

"The scope of adjudication by a Tribunal under the Industrial Disputes Act is much wider than determination of legal rights of the parties involved or redressing the grievances of an aggrieved workman in accordance with law. As Gajendragadkar, J., points out in *Cawnpore Tannery Limited v. S. Guha*, (1961)2 L.L.J. 110, 112: A.I.R. 1967 S.C. 667, the adjudication by the Industrial Disputes Act is only an alternative form of settlement of industrial disputes on a fair and just basis. The primary duty of

the Industrial Tribunal is to establish peace in the industry between employer and workmen. Any unfair action by the management even against an individual worker might cast its shadow on the general body of workers who might get perturbed by such action. A resolution of the dispute might then become necessary for industrial peace notwithstanding the death of the workman concerned pending proceeding. The personal relief to the workman concerned to a certain extent occupies a subsidiary place in the scheme of things. Not that it is not important. It is only a consequential result of the decision primarily arrived at securing industrial peace settling the apprehension of the workmen without losing sight of the interest of the industry. As Rajamannar, C.J. stated in *Sri Meenakshi Mills Limited v. Labour Appellate Tribunal*, (1953) 2 L.L.J. 326, the essential object of enacting the Industrial Disputes Act is to provide recourse to a given form of procedure for the settlement of disputes in the interest of maintenance of peaceful relations between the parties without apparent conflicts such as are likely to interrupt production and entail other damages. In the circumstances proceedings before the Labour Court or the Industrial Tribunal under the Industrial Disputes Act cannot be equated to a personal action in torts in a Civil Court which would come to an end with the death of the aggrieved party to the dispute. In the general set-up of an industry, in the nature of the relationship between the employer and the employees, a dispute between an employer and even an individual employee generally affects the entire community of workmen in the industry. They acquire an interest in the dispute. It ceases to be an individual dispute and becomes an industrial dispute affecting the interest of the entire body of workmen. Any decision of the Labour Court will affect the interest of the whole body of workmen and dispute, therefore, cannot die with the death of the individual workman. Before Sec.2-A of the Act was introduced the courts had said that an individual dispute should be taken up by the workmen as such before it can become an industrial dispute. Sec.2-A makes an individual dispute though not taken up by the collective body of workers, an industrial dispute."

The learned Judge further observed:

"Even in respect of ordinary judicial proceedings can it be said that the death of party to the proceedings will terminate the action in all cases? Even under the English Common Law before the Law Reform (Miscellaneous Provisions) Act, 1934 was passed to provide generally for the survival of causes of action in tort, death was considered as extinguishing liability only in respect of cause of action in tort. 'This was' Winfield says in his *Law of Tort*, 'due in part to the historical connection of the action of trespass, from which much of our law of tort is derived, with the criminal law and in part to the reference often made to the maxim *'actio personalis moritur cum persona'* which, though traceable to the fifteenth century, probably did no more originally than state in Latin a long-established principle concerning torts such as assault and battery, of which it was neither the historical cause nor the rational explanation. Actions in contract generally escaped the rule, and so too did those in which property had been appropriated by a deceased person and added to his own estate.'

*** * * * *

Therefore, I see no reason why the Labour Court should cease to exercise jurisdiction in considering the question whether the termination of the services of the two employees was justified or not merely because they died during the course of the proceedings. A decision on that is certainly in the interest of the other employees. And the benefits that would be due to the deceased employees on the finding of the Labour Court can be realised on behalf of their estate by their legal heirs under Sec.33-C(2) of the Act."

15. In *Bank of Baroda v. Workmen*, (1979) 2 L.L.J. 57 (Guj.), a Division Bench of the Gujarat High Court followed the reasoning of Chandrasekhara Menon, J. in *Gwalior Rayon's case*, (1978) 2 L.L.J. 188 (Ker.). B.J. Divan, C.J. speaking for the Bench quoted verbatim from *Gwalior Rayon's case*, and in addition observed as under:

"It may be pointed out that under Sec.306 of the Indian Succession Act, 'All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or

administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.' In this context, it must be pointed out that, so far as the granting of relief of reinstatement is concerned, it would be nugatory on the death of the workman concerned pending the reference before the Tribunal or the Labour Court, as the case may be. However, reinstatement involves the concept of backwages also and very often the Tribunal has to pass orders providing for the backwages from the date of wrongful termination of the services till the date of reinstatement. It is only under the Industrial Disputes Act that in the field of industrial relations, the Tribunal concerned can direct reinstatement of the workman. Under the ordinary civil law, it is not open to a civil court to direct reinstatement of a workman. The only thing that a civil court can do is to provide for damages for wrongful termination of service or wrongful dismissal. Again, the whole concept under the Industrial Disputes Act of the Tribunal ascertaining whether the termination of services was proper, legal and just, is unknown to the civil courts. So, in the case of a deceased workman where the reference is under Sec.2-A of the Industrial Disputes Act, the heirs and legal representatives can agitate the question, firstly, whether the termination of the deceased workman was just, legal and proper, and secondly, if it was wrongful and invalid, then, what compensation in terms of money could have been given to the workman from a particular date fixed by the Tribunal till the date of reinstatement and if reinstatement cannot be granted because of the death of the workman, till the date of his death. It is therefore in this context of Sec.306 of the Succession Act that the right to prosecute these special proceedings before the Industrial Tribunal survives to the administrators, executors, heirs and legal representatives of the deceased workman. It is only a cause of action for personal injury or in the case of defamation or assault or battery or malicious prosecution which cannot be said to survive after the death of person concerned."

16. We have quoted in extenso the reasoning of the Kerala High Court in *Gwalior Rayon's case*, (1978)2 L.L.J. 188 (Ker.) and of the Gujarat High Court in *Bank of Baroda's case*, (1979)2 L.L.J. 57 (Guj.). We agree with and approve the reasoning and the conclusions reached therein.

17. With respect to the learned Judges of the Assam, Patna, Delhi and Orissa High Courts, we are not inclined to agree with their reasoning and the conclusions to the effect that on the death of a workman his heirs and legal representatives cannot continue the reference or an application under Sec.33(2) of the Act before the Tribunal/Labour Court.

18. We, therefore, hold that on the death of the workman, even when the reference is of an individual dispute under Sec.2-A of the Act, the Tribunal does not become *functus officio* or the reference does not abate merely because, pending adjudication, the workman concerned dies. It is open to the heirs and legal representatives of the deceased workman to have the matter agitated and decided.

19. We allow the appeal, set aside the award of the Tribunal dated January 4, 1982 and send the case back to the Central Government Industrial Tribunal-cum-Labour Court No.3, Dhanbad, Bihar for decision on merits. The Tribunal shall finally dispose of the matter within six months of the receipt of this judgment. The appellant shall be entitled to his cost which we quantify as Rs.10,000.

B.S.

Appeal allowed.

IN THE SUPREME COURT OF INDIA.

Present: K.Ramaswamy and R.M.Sahai, JJ.

C.A.No.2692 of 1984 17th September, 1993.

Desh Bandhu Gupta ...Appellant
v.
N.L.Anand and another ...Respondents.

(A) *Civil Procedure Code (V of 1908), O.21, Rule 10 - Money decree - Decree executed against property of judgment-debtor - Property sold for amount exceeding pecuniary jurisdiction of executing court - Executing court, if had no jurisdiction to execute decree.* Under O.21, Rule 10, C.P.C., an application for execution should be made to the court which 'passed the decree'. Therefore, the fact that the value of the property sold at the execution is more than Rs.25,000 (pecuniary jurisdiction of executing court being Rs.25,000) does not take away the jurisdiction of the trial court. In *Banwar Lal v. Prem Lata*, (1990)1 S.C.C. 353: A.I.R. 1990 S.C. 623. this Court held that the value of the property sold in execution is not relevant to determine the jurisdiction of the execution court. [Para. 3]

(B) *Civil Procedure Code (V of 1908), O.21, Rules 1 and 23(2) - Money decree - Payment - Mode of - Judgment-debtor already deposited amount in Rent Control Court - Decree-holder having knowledge about in - Deposit made in eviction case, if can be considered to be deposit made under O.21, Rule 54(1)(a).*

By amending O.21, Rule 1 in 1976, a right has been given to the judgment-debtor to pay the decree-debt either by depositing it into the executing court or to send it by other modes of payment with intimation to the decree-holder in latter cases, so that the liability to pay interest ceases from that date. It is an enabling provision for the benefit of the judgment-debtor. Though by literal construction, the appellant should deposit decretal amount into the executing court for claiming the benefit of the discharge, but anterior to it, in the Rent Controller proceedings, the decree-holder had knowledge of undoubted deposit of the amount made by the appellant. The substance is that even before execution was laid, the amount was available towards satisfaction of the decree. The court should have directed its attachment and payment made or directed the appellant to withdraw that amount

instead of launching the tardy process of execution by sale of immovable property. When the factum of deposit was disputed, this Court called for a report and the Additional District Judge had in his report stated that the appellant deposited about Rs.13,000 and odd and it was lying in credit in the Rent Controller proceedings. The finding of the appellate court that the deposit was not to the credit of the suit is also not legal. In the court's considered view neither the stand of the first respondent nor the reasonings of the courts below are tenable. When the arrears of rent for which the decree was made was already in deposit to the knowledge of the first respondent in his eviction case and when the appellant objected to the execution, the executing court either should have directed the appellant to withdraw the money and credit the same to the suit account before the attachment was made or it should have passed an order under O.21, Rule 23(2). It is, therefore, the mandatory duty of the executing court to consider such objection and to make an order in that behalf. No such order has been made. It is, true that in the contempt application filed by the appellant against the first respondent, an order was passed rejecting the appellant's contention that he had already deposited the decretal amount. Objection should independently, be considered under O.21, Rule 23. The order in the contempt petition is not substitute to an order under O.21, Rule 23(2), C.P.C. The objections therefore, are still open to the appellant for being raised impugning the validity of the sale. The procedure is the handmaid to justice. The substance of the matter, in the given circumstances is that the deposit made in the eviction case be considered to be one made under O.21, Rule 1(1)(a) into the suit out of which the execution arose.

[Para. 3]
(C) *Civil Procedure Code (V of 1908), O.21, Rules 23(2) and 90(3) - Judgment-debtor filing objection to execution of decree - Court not considering objection - Order passed - If appealable.*

Had the court considered the objections and passed an order under O.21, Rule 23(2), it would be incumbent upon the appellant to carry the order in an appeal. The omission to consider the objections is not appealable. Had an order been made on the objections and was allowed to become final perhaps O.21, Rule 90(3) would operate against the judgment-debtors. So the objection would still be open to the appellant to reiterate in his petition.

after the sale under Sec.47 or O.21, Rule 90.

[Para. 4]

(D) Civil Procedure Code (V of 1908), Sec. 47, O.21, Rule 90 - Application to set aside sale - Property sold in court auction purchased by more than one person - One of them impleaded as party - Non-impleading of other auction purchasers if bars maintainability of application.

The application to set aside the execution sale is primarily against the decree-holder since he is a person at whose instance and benefit the proceedings were initiated and the sale was held to discharge his decree debt. Therefore, primarily he is the person entitled to be heard and since he is in charge of publishing the notice and to conduct the sale, it is he that lays before the court the steps taken or the procedure followed in service of notice or conducting the sale and to establish that they have been done properly, regularly and in accordance with the law. The auction-purchaser gets a right only on confirmation of sale and till then his right is nebulous and has only right to consideration for confirmation of sale. If the sale is set aside, apart from the auction-purchaser, the decree-holder is affected since the realisation of his decree-debt is put off and he would be obligated to initiate execution proceedings afresh to recover the decree debt. Therefore, in the proceedings under Sec.47 of O.21, Rule 90, the decree-holder is the affected necessary party. Though the auction-purchaser need to be impleaded *eo nomine* as respondent as the property was purchased jointly at the court sale, it is enough that one amongst them had been impleaded as a party. It is not necessary to implead all the joint purchasers.

[Para. 5]

(E) Civil Procedure Code (V of 1908), O.21, Rule 54 - Purpose of order of attachment under - No encumbrance created after attachment - Sale, if invalid because of non-service of copy of order of attachment.

The purpose of attachment under Rule 54 is to make the judgment-debtor aware that attachment has been effected and that he should not make any transfer or encumber the property thereafter. It is in the interest of the decree-holder to have the notice of attachment served personally on the judgment-debtor. Nevertheless, the sale is not void though the omission to serve the copy of the order of attachment is an irregularity. Since no encumbrance thereafter was created on the at-

tached property, non-service of the copy of the order of attachment on the judgment-debtor does not render the sale invalid.

[Para. 7]

(F) Civil Procedure Code (V of 1908), O.21, Rules 66, 67 and 68 - Sale proclamation under - Procedure for - Contents of - Notice to judgment-debtor - If obligatory - Non-issuance of notice to judgment-debtor - Effect of.

The proclamation of sale is an important part of the proceedings and the details should be ascertained and noted with care. It is not necessary to give at proclamation of sale the estimate of the value of the property. The proclamation when settled shall be signed by the Judge and got published in the manner prescribed by Rule 67. The court should authorise its officers to conduct the sale. Under Rule 68, the sale should be conducted at the 'place and time' specified or the time may be modified with the consent in writing of the judgment-debtor. The proclamation should include the estimate, if any, given by either judgment-debtor or decree-holder or both the parties. Service of notice on judgment-debtor under O.21, Rule 66(2) unless waived by appearance or remained *ex parte* is a fundamental steps in the procedure of the court in execution. Judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and as fairly as possible, so that the intending bidders are not misled or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. It has been held in *Gajadhar Prasad v. Babu Bhaktia Ratan*, (1973)2 S.C.C. 629: (1974)1 S.C.R. 372, that the court, when stating the estimated value of the property to be sold must not accept merely the *ipso dixit* of one side. It is certainly not necessary for it to state its own estimate. The court has only to decide what are all these material particulars in each case. The court thinks that this is an obligation imposed by Rule 66(2)(e). In discharging it, the court should normally state the valuation given by both the decree-holder as well as the judgment-debtor when they both have valued the property and it does not appear fantastic. It may usefully state other material facts such as the area of land, nature of rights in it, municipal assessment, actual rents realised which could reasonably and usefully be stated succinctly in a sale proclamation.

Inflexible rules are not desirable on such a question. It could also be angulated from another perspective. Sub-rule (1) of Rule 66 enjoins the court that the details enumerated in Sub-rule (2) shall be specified as fairly and accurately as possible. The duty to comply with it arises only after service of the notice on the judgment-debtor unless he voluntarily appears and is given opportunity in the settlement of the value of the property. The absence of notice causes irremediable injury to the judgment-debtor. Equally publication of the proclamation under Rule 67 and specifying the date and place of sale of the property under Rule 66(2) are intended that the prospective bidders would know the value so as to make up their mind to offer the price and to attend at sale of the property and to secure competitive bidders and fair price to the property sold. Absence of notice to the judgment-debtor disables him to offer his estimate of the value who better knows its value and to publicise on his part, canvassing and bringing the intending bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under O.21, divests right, title and interest of the judgment-debtor and confers those rights in favour of the purchaser. It, thereby, deals with the rights and disabilities either of the judgment-debtor or the decree-holder. A sale made, therefore, without notice to the judgment-debtor is a nullity since it divests the judgment-debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality. Exaggeration may at times be possible. Therefore notice under O.21, Rule 66(2) and service is mandatory. It is made manifest by O.21, Rule 54(1-A) brought on statute by 1976 Amendment Act with peremptory language that before settling the terms of the proclamation, the judgment-debtor shall be served with a notice. The omission thereof renders the

further action and the sale in pursuance thereof void unless the judgment-debtor appears without notice and thereby waives the service of notice.

[Paras. 9 & 10]

(G) *Civil Procedure Code (V of 1908), Sec.47 and O.21, Rule 90 - Relative scope - Absence of drawing up of sale proclamation and settlement of terms by application of mind, is covered by Sec.47 - Material irregularity caused by non-application of mind whether sale of a part of the property would satisfy decree-debt is covered by O.21, Rule 90.*

Under Sec.47 all questions relating to execution, discharge or satisfaction of the decree should be determined by the executing court alone. The pre-sale illegalities committed in the execution are amenable to the remedy under Sec.47. Post-sale illegalities or irregularities causing substantial injury to the judgment-debtor are covered under O.21, Rule 90. Sub-rule (1) thereof covers the field of material irregularities or fraud in publicity or conducting the sale. Sub-rule (2) enjoins proof thereof and the court should find that by reason thereof the applicant sustained substantial injury. The total absence of drawing up of the proclamation of sale and settlement of its term by judicial application of mind renders the sale a nullity being void. It is covered by Sec.47. The non-application of mind whether sale of a part of the property would satisfy the decree is a material irregularity doing substantial injury to the appellant attracting O.21, Rule 90. In either case, the sale is liable to be set aside. It is true that there is distinction between mere irregularity and material irregularities and the sale is not liable to be set aside on proof of mere irregularity. It must be material irregularity and the court must be satisfied that on account thereof, substantial injury was sustained by the appellant.

[Para. 17]

Cases referred to:

Banwar Lal v. Prem Lata, A.I.R. 1990 S.C. 623: (1990)1 S.C.C. 153. [Para. 3]

Gajadhar Prasad v. Babu Bhakta Ratan, (1973)2 S.C.C. 629: (1974)1 S.C.R. 372. [Para. 9]

Rajagopala Ayyar v. Ramachandra Ayyar, 46 M.L.J. 104: A.I.R. 1924 Mad. 431: I.L.R. 47 Mad. 288. [Para. 9]

Shalimar Cinema v. Bhasin Film Corporation, (1987)4 S.C.C. 717: A.I.R. 1987 S.C. 2081. [Para. 12]

Ambati Narasayya v. M. Subba Rao, (1989)2 S.C.C. (Supp.) 693: A.I.R. 1990 S.C. 119. [Para. 14]

Mangal Prasad v. Krishna Kumar Maheshwari, (1992)3 S.C.C. (Supp.) 31: A.I.R. 1992 S.C. 1857 [Para. 14]

Takaseela Peeda Subba Reddy v. Pujari Padma-vathamma, (1977)3 S.C.C. 337: (1977)3 S.C.R. 692 [Para. 14]

Kayjay Industries (P) Limited v. Asnew Drums (P) Limited, (1974)2 S.C.C. 213: (1974)3 S.C.R. 678. [Para. 15]

Janak Rai v. Gurdial Singh, (1967)2 S.C.R. 77: A.I.R. 1967 S.C. 608. [Para. 16]

Chinnammal v. P. Arumugham, (1990)1 S.C.C. 513. [Para. 16]

Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, A.I.R. 1964 S.C. 1300: (1964)6 S.C.R. 1001. [Para. 16]

Desh Bandhu Gupta, in person, for Appellant. *M.S. Gujral*, Senior Advocate (*S.K. Sabharwal*, Advocate with him), for Respondent No.1. *K. Madhava Reddy*, Senior Advocate (*Raju Ramachandra and Joseph Pookkatt* with him), for Respondent No.2.

The Judgment of the Court was delivered by *K. Ramaswamy, J.*: The appellant judgment-debtor, was a tenant of Smt. Shanti Devi, who applied on September 28, 1974 for eviction of him for committing default in paying the rent. On September 30, 1974 she sold it to the first respondent who got impleaded himself in the pending proceedings and also independently sought for eviction. Pending the proceedings the appellant deposited rent in the name of Shanti Devi which now is ultimately found to be Rs.13,440. The decree for eviction made against him was ultimately confirmed by this Court. The suit of the first respondent for the arrears of rent was decreed for a sum of Rs.6,419.98. Pending eviction proceedings, in the W.P.No.830 of 1978 of the appellant, the High Court of Delhi directed on September 6, 1979, after hearing both the parties, and without prejudice to the contentions of the respondent, that the amount deposited by him may be credited to the account of the respondent. The first respondent filed E.P.No.1974 of 1978 in the court of the Additional Sub-Judge, 1st Class for sale of the appellant's plot of land bearing plot No.31/35, Punjabi Bagh, New Delhi, a commercial area of an extent of 550 square yards to recover Rs.7,780.33 which includes costs. On November 4, 1978 warrant of its attachment was issued under O.21, Rule 54 in Form 24 of Appendix 'E' of the Schedule to C.P.C. On becoming

aware of that the appellant filed an objection petition contending that since he had already deposited in the rent control case Rs.13,440, more than the decretal amount, in the Rent Control Court, the decree stands satisfied and became inexecutable. He also pleaded that Execution Court is devoid of jurisdiction as its pecuniary jurisdiction is limited to Rs.25,000. Arguments were heard thereon. Ultimately on April 20, 1979, the court passed the order thus:

"Order dictated on this date. The decree-holder has moved an application under O.21, Rule 66, C.P.C. for warrant of proclamation of sale by public auction of the property of JD-I. Accordingly allow the application of the decree-holder for sale of the J.D. as per the following programmes:

Court door 3 May, 1979

Spot 17 May, 1979

Auction 6 July, 1979

Report 13 July, 1979."

(original records were called for and this was the only order found from the record).

2. Admittedly the appellant was neither given notice nor was he present, nor aware of passing of that order. On May 2, 1979 sale warrant under O.21, Rule 66, C.P.C. was issued. On July 6, 1979 auction was held in which Rajinder Singh and his wife Tavinder Kaur were joint highest bidders for a sum of Rs.1,05,000. On becoming aware of the sale on August 10, 1979 the appellant immediately filed a petition under O.21, Rule 90, C.P.C. raising objection to the validity of the sale. On inspection of the record he later on filed an application, which was allowed on payment of costs, to impugn the sale under Secs.47 and 151, C.P.C. He pleaded that the sale was collusive and fraudulent. The value of the site was Rs.3,50,000. It was sold for inadequate price. He was not served with any notice either under O.21, Rule 54 or under O.21, Rule 66. There is no sale proclamation. No notice was issued before settling the terms of the proclamation of sale. The sale proclamation neither specified the place or time at which the sale was to be conducted nor was it published in the locality. He reiterated his plea of his prior deposit of more than the E.P. amount, and the execution court's lack of pecuniary jurisdiction and that absence of wide publicity led to fetching of less price. The so called bidders were not genuine persons nor had the capacity to purchase the property. Only the

second respondent and his brother were the participants and the bid was, therefore, a collusive one. The execution court held that due procedure was followed in bringing the property to sale. In view of O.21, Rule 90(3) the objections raised to the validity of the sale cannot be gone into. The price fetched was an adequate one. The attachment order was served by affixing it on the site and there was no collusion. Accordingly the application was rejected and the sale confirmed. The appellate court, without going into all the contentions, considered the scope of O.21, Rule 90(3) and held that by its operation pre-sale illegalities or irregularities do not vitiate the sale and dismissed the appeal. The High Court dismissed the revision *in limine*. Thus this appeal by special leave.

3. Mr. Gupta, the appellant, an Advocate argued in person. The first respondent, the decree-holder, is also an Advocate, but appeared through Mr. Gujral, learned senior counsel. The auction-purchaser was represented by Mr. K. Madhava Reddy, the learned senior counsel. The contention of Mr. Gupta that the execution court having been conferred with pecuniary jurisdiction up to Rs.25,000, had no jurisdiction to execute the decree against the property whose value is Rs.3,50,000, is devoid of substance. Under O.21, Rule 10 of C.P.C. an application for execution should be made to the court "which passed the decree." Therefore, the value of the property sold at the execution is more than Rs.25,000 does not take away the jurisdiction of the trial court. In *Banwar Lal v. Prem Lata*, A.I.R. 1990 S.C. 623; (1990) 1 S.C.C. 153, this Court held that the value of the property sold in execution is not relevant to determine the jurisdiction of the execution court. Admittedly the decree in execution for Rs.7,780.33 is within the jurisdiction of the trial court, which passed the decree. Equally the contention of Shri Madhava Reddy that the mode of payment of money decree envisaged under O.21, Rule 1(1) must be by deposit of the decree amount into the court is equally devoid of force. Undoubtedly, literal reading of O.21, Rule 1(1) provides that the mode of paying decretal money is either by depositing in the executing court or sending to the court by postal order or through bank draft or out of court to the decree-holder by postal order or bank draft of any other mode where the payment is evidenced in writing or as the court which made the decree

otherwise directs. The other sub-rules are not relevant for the purpose of this case. By amending the Rule in 1976, a right has been given to the judgment-debtor to pay the decree debt either by depositing into the executing court or to send it by other modes of payment with intimation to the decree-holder in latter cases so that the liability to pay interest ceases from that date. It is an enabling provision for the benefit of judgment-debtor. Though by literal construction the appellant should deposit the decretal amount into the executing court for claiming the benefit of the discharge but anterior to it, in the rent controller proceedings, the decree-holder had knowledge of undoubted deposit of the amount made by the appellant. The liberty of "without prejudice" given to the respondent by the High Court in the writ petition was for the purpose of his defence, that the deposit in Shanti Devi's name was not payment to him, after knowledge of his purchase, for the purpose of default. But the parties being Advocates adopted legalistic stands. The substance is that even before execution was laid the amount was available towards satisfaction of the decree. The court should have directed its attachment and payment made or directed the appellant to withdraw that amount and deposit into the court, instead of launching the tardy process of execution by sale of immovable property. When the factum of deposit was disputed, this Court called for a report and the Additional District Judge, had in his report, stated that the appellant deposited about Rs.13,000 and odd and it was lying in credit in the rent controller proceedings. The further contention that there were other liabilities which the appellant had not discharged, bears no foundation. Even otherwise there was no order of attachment of that amount by any court. The finding of the appellate court that the deposit was not to the credit of the suit is also not legal. In our considered view neither the stand of the first respondent nor the reasoning of the courts below are tenable. When the arrears of rent for which the decree was made was already in deposit to the knowledge of Anand in his eviction case and when the appellant objected to the execution, the executing court either should have directed the appellant to withdraw the money and credit the same to the suit account before its attachment was made or it should have passed an order under O.21, Rule 23(2) which postulates thus: "Where such person offers any objection to

the execution of the decree, the court shall consider such objection and make such order as it thinks fit". It is, therefore, the mandatory duty of the executing court to consider such objection and to make an order in that behalf. No such order has been made. It is true that in the contempt application filed by the appellant against the first respondent, an order was passed rejecting the appellant's contention that he had already deposited the decretal amount. Objection should independently be considered under O.21, Rule 23. The order in the contempt petition is not a substitute to an order under O.21, Rule 23(2), C.P.C. The objection, therefore, are still open to the appellant for being raised impugning the validity of the sale. The procedure is the handmaid to justice. The substance of the matter, in the given circumstances is that the deposit made in the eviction case be considered to be one made under O.21, Rule 1(1)(a) into the suit out of which the execution arose.

4. The further contention of Shri Madhava Reddy that the appellant should have filed an appeal against an action of the execution court in not considering the objections is also devoid of substance. Had the Court considered the objections and passed an order under O.21, Rule 23(2), it would be incumbent upon the appellant to carry the order in an appeal. The omission to consider the objections is not appealable. Had an order been made on the objections and was allowed to become final, perhaps O.21, Rule 90(3) would operate against the object or. So the objection would still be open to the appellant to reiterate in his petition after the sale under Sec.47 or O.21, Rule 90.

5. The further contention of Shri Madhava Reddy that the objection petition and the appeal are not maintainable as the wife of Rajinder Singh, joint purchaser was not impleaded *eo nomine* as respondent, too is devoid of force. The application to set aside the execution sale is primarily against the decree-holder since he is a person at whose instance and benefit the execution proceedings were initiated and the sale was held to discharge his decree debt. Therefore, primarily he is the person entitled to be heard and since he is in charge of publishing the notices and to conduct the sale, it is he that lays before the court the steps taken or the procedure followed in service of notice or conducting the sale and to establish that they have

been done properly, regularly and in accordance with the law. The auction-purchaser gets a right only on confirmation of sale and till then his right is affected since the realisation of his decree debt is put off and he would be obligated to initiate execution proceedings afresh to recover the decree debt. Therefore, in the proceedings under Sec.47 or O.21, Rule 90, the decree-holder is the affected necessary party. Though the auction-purchasers need to be impleaded *eo nomine* as respondent as the property was purchased jointly at the court sale, it is enough that one among them had been impleaded as a party. It is not necessary to implead all the joint purchasers.

6. The contention of Mr. Gupta that as Form 29 of Appendix 'E' prescribes that when an auction-purchaser participated in the bid on behalf of a third party, he should file his power or authority to bid at the auction on behalf of the third party, and in its absence the sale itself is a nullity, is devoid of substance. The rigour of the need to obtain power or authority arises only when he acts as an agent but not when he had, per himself and other's behalf, participated in the bid. Prudence requires that the sale officer should satisfy himself whether the participant is a real or proxy bidder. It should exclude the proxy unless he places before him the authority that in the event of the sale being knocked down, he would be bound by the sale and terms thereof. The second respondent admittedly participated and purchased the property not only on his behalf but also on behalf of his wife. Therefore, the need to obtain such power from his wife to bid on her behalf also is obviated.

7. Mr. Gupta contended that under O.21, Rule 54 the appellant had not been served with the order of attachment. Either the appellant or the inmates of his house were always available at his residence. It was said to have been affixed at the site and his enquiries revealed that no such affixation at the site was made. It is an admitted position that no personal service on the appellant was effected but nonetheless evidence disclose that it was affixed at the site. The purpose of attachment under Rule 54 is to make the judgment-debtor aware that attachment has been effected and that he should not make any transfer or encumber the property thereafter. It is in the interest of the decree-holder to have the notice of attachment served personally on the judgment-debtor. Nevertheless the sale is not void, though the omission to serve the copy of

the order of attachment is an irregularity. Since no encumbrance thereafter was created on the attached property, non-service of the copy of the order of attachment on the judgment-debtor does not render the sale invalid.

8. It is further contended that the property was not fully described except for mentioning the plot number and the extent which is not consistent with the Form No.24 of Appendix 'E' which postulates that the property should be fully described. It is seen that in the execution petition a plan with full description was attached. The evidence is not clear whether the plan was attached to the order of attachment or a copy thereof was attached took it. It was for the benefit of the intending purchasers to inspect the property before deciding to participate in the auction. Nevertheless so long as the property is identifiable, the omission of full description of the plot also is only an irregularity. In any event the bidders were not misled.

9. However, there is considerable force in the contention of the appellant that the procedure prescribed under O.21, Rule 66 was flagrantly violated by the executing court. We have already noted the order of the court to conduct the sale. For judging its legality and validity, it would be desirable to have a bird's eye view of the procedure for sale of immovable property in execution. On an application for execution filed under O.21, Rule 5 the court shall ascertain the compliance of the prerequisites contemplated under Rule 17 and on finding the application in order, it should be admitted and so to make an order, thereon to issue notice under Rule 22, subject to the conditions specified therein. If a notice was served on the judgment-debtor as enjoined under O.5, but he did not appear or had not shown cause to the satisfaction of the court, under Rule 23 the court "shall order the decree to be executed." If an objection is raised to the execution of the decree, by operation of Sub-rule (2) thereof, 'the court shall consider such objections and make such order as it thinks fit.' Thereafter in the case of a decree for execution against immovable property an attachment under Rule 54 should be made by an order prohibiting the judgment-debtor from transferring or creating encumbrances on the property. Under Rule 64 the court may order sale of the said property. Under Rule 66(2) proclamation of sale by public auction shall be drawn up in the language of the court and it should be done

after notice to the decree-holder and the judgment-debtor and should state "the time and place of sale" and "specify as fairly and accurately as possible" the details specified in Clauses (a) to (d) of Sub-rule (2) thereof. The Civil Rules of Practice in Part L in the Chapter 12 framed by the High Court of Delhi 'Sale of Property and Delivery to the Purchaser' Rule 2 provides that whenever a court makes an order for the sale of any attached property under O.21, Rule 64, it shall fix a convenient date not being distant more than 15 days, for ascertaining the particulars specified in O.21, Rule 66(2) and settling the proclamation of sale. Notice of the date so fixed shall be given to the parties or their pleaders. In Rule 4 captioned 'Settlement of Proclamation of Sale, Estimate of Value' it is stated that on the day so fixed, the court shall, after perusing the documents, if any, and the report referred to in the preceding paragraph, after examining the decree-holder and judgment-debtor, if present, and after making such further enquiry as it may consider necessary, settle the proclamation of sale specifying as clearly and accurately as possible the matters required by O.21, Rule 66(2) of the Code. The specifications have been enumerated in the rule itself. The proclamation for sale is an important part of the proceedings and the details should be ascertained and noted with care. This will remove the basis for many a belated objections to the sale at a later date. It is not necessary to give at proclamation of sale the estimate of the value of the property. The proclamation when settled shall be signed by the judge and got published in the manner prescribed by Rule 67. The court should authorise its officers to conduct the sale. Under Rule 68 the sale should be conducted at "the place and time" specified or the time may be modified with the consent in writing of the judgment-debtor. The proclamation should include the estimate, if any, given by either judgment-debtor or decree-holder or both the parties. Service of notice on judgment-debtor under O.21, Rule 66(2), unless waived by appearance or remained *ex parte*, is a fundamental step in the procedure of the court in execution. Judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly as possible so that the intending bidders are not misled or to prevent them from offering

inadequate price of to enable them to make a decision in offering adequate price. In *Gajadhar Prasad v. Babu Bhakta Ratan*, (1973) 2 S.C.C. 629: (1974) 1 S.C.R. 372, this Court, after noticing the conflict of judicial opinion among the High Courts, held that a review of the authorities as well as the amendments to Rule 66(2)(e) make it abundantly clear that the court, when stating the estimated value of the property to be sold, must not accept merely the *ipso dixit* of one side. It is certainly not necessary for it to state its own estimate. If this was required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation, which may confuse bidders. It may also be quite misleading if the court's estimate is erroneous. Moreover, Rule 66(2)(e) requires the court to state only nature of the property so that the purchaser should be left to judge the value for himself. But, the essential facts which have a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, *i.e.* the value of the property, that is, after all, the whole object of O.21, Rule 66(2)(e), C.P.C. The court has only to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66(2)(e). In discharging it, the court should normally state the valuation given by both the decree-holder as well as the judgment-debtor where they both have valued the property, and it does not appear fantastic. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably and usefully be stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not desirable on such a question. It could also be angulated from another perspective. Sub-rule (1) of Rule 66 enjoins the court that the details enumerated in sub-rule (2) shall be specified as fairly and accurately as possible. The duty to comply with it arises only after service of the notice on the judgment-debtor unless he voluntarily appears and is given opportunity in the settlement of the value of the property. The absence of notice causes irremedial injury to the judgment-debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66(2) are intended that the

prospective bidders would know the value so as to make up their mind to offer the price and to attend at sale of the property and to secure competitive bidders and fair price to the property sold. Absence of notice to the judgment-debtor disables him to offer his estimate of the value who better knows its value and to publicise on his part, canvassing and bringing the intending bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under O.21 divests right, title and interest of the judgment-debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment-debtor or the decree-holder. A sale made, therefore, without notice to the judgment-debtor is a nullity since it divests the judgment-debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration may at time be possible. In *Rajagopala Ayyar v. Ramachandra Ayyar*, 46 M.L.J. 104: A.I.R. 1924 Mad. 431: I.L.R. 47 Mad. 288, the Full Bench held that a sale without notice under O.21, Rule 22 is a nullity and is void and that it has not got to be set aside. If an application to set aside such a void sale is made it would fall under Sec.47.

10. Above discussion indicates a discernible rule that service of notice on the judgment-debtor is a fundamental part of the procedure touching upon the jurisdiction of the execution court to take further steps to sell his immovable property. Therefore, notice under O.21 Rule 66(2), unless proviso is applied (if not already issued under O.21, Rule 22), and service is mandatory. It is made manifest by O.21, Rule 54(1-A) brought on statute by 1976 Amendment Act with peremptory language that before setting the terms of the proclamation the judgment-debtor shall be served with a notice. The omission thereof renders the further action and the sale in pursuance thereof void

unless the judgment-debtor appears without notice and thereby waives the service of notice.

11. In the case before us, the execution court had completely overlooked compliance of the mandatory procedure, procedure, accepted *ipso dixit* of the decree-holder even without calling Amin's report. The decree-holder in a complaint given to the Income Tax Department got the site valued with an approved valuer at Rs.3,33,333 but he valued in the E.P. at Rs.1,00,000. The court accepted it without indicating grounds for this preference and had given a programme of sale. It did not bother even to consider the objections of the judgment-debtor raised at the earliest of the need to proceed with the execution when sufficient amount to meet the decree debt was already in deposit. It is a case of non-application of judicial mind and abdication of judicial duty. Though the insertion of an order judicially passed need not be made in the sale proclamation but it had applied its mind to the need for determining all the essential particulars, which would reasonably be looked for by an intending purchaser. The relevant and material particulars should be inserted in the sale proclamation as accurately and precisely as possible. The order should show that is considered, as the case may be. It should not merely accept unhesitatingly the *ipso dixit* of one or either side or both.

12. The contentions of S/Shri Madhava Reddy and Gujral that the appellant had not given his valuation and that, therefore, it is not open to him to raise the objections after the sale is unacceptable. Since the court had not given any notice to the appellant which is mandatory, the need to submit his valuation did not arise. O.21, Rule 54, Sub-rule (1-A) brought in by 1976 Amendment Act mandates that the court should require the judgment-debtor to attend the court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale. Form 24 of Appendix 'E' second para and the court rules also envisage the mandate. It is a reminder to the court that it has a statutory duty to issue notice to the judgment-debtor before settlement of the terms of proclamation of sale. Then only the proviso to Rule 66(2) comes into play dispensing with multiplicity of notices and not dispensation of mandatory compliance of notice to the judgment-debtor. Had it been a case where notice was served and the appellant lay by, without objecting to the valu-

ation given by the decree-holder, certainly that would be put against the appellant to impugn the irregularities after the sale or the undervaluation settled by the court in the proclamation of sale. The further contentions of both the counsel that merely because there is no order under O.21, Rule 66(2). It cannot be construed that the execution court had not applied its mind in settling the terms of the proclamation of sale, is one of desperation. Except giving a schedule of dates for conducting the sale the execution court totally abdicated its duty to scrupulously comply with the mandatory procedure and did not apply its mind to the mandatory duty cast on it by O.21, Rule 66 to settle the terms of proclamation of sale, and proper publication under Rule 67. After April 20, 1979, the court had merely ensured its publication on the court notice board and on the site at the respective dates and on further. This Court in *Shalimar Cinema v. Bhasin Film Corporation*, (1987)4 S.C.C. 717: ALR 1987 S.C. 2081, held that the court has a duty to see that the requirements of O.21, Rule 66 are properly complied with. It is incumbent on the court to be scrupulous in the extreme. No action of the court or its officer should be such as to give rise to the criticism that it was done in a casual way. Therefore, a proclamation of sale drawn casually without compliance of the mandatory requirement and a sale held in furtherance thereof is not a sale in the eye of law. We are of the considered view that the procedure adopted by the court in non-compliance of O.21, Rules 66 and 67 is in flagrant breach of the mandatory provision. It is nullity *ab initio*.

13. Yet another contention of Mr. Gupta is that the sale of the plot of 550 sq. yds. is in excess of the execution and the order to sell it is the result of non-application of mind touching the jurisdiction of the court rendering the sale void or manifestly illegal. Therefore, the need to invoke O.21, Rule 90 does not arise and it can be set aside under Sec.47, C.P.C.

14. Proviso to Sub-rule(4) or Rule 17 of O.21 provides the procedure to receive the application for execution of the decree. In the case of a decree for payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree. Rule 64 of O.21 charges the executing court that it may order attaching of any property to the extent that "such portion thereof as may seem necessary to satisfy

the decree would be sold." It is also enjoined under Sub-rule (2) (a) of Rule 66 of O.21 that where a part of the property would be sufficient to satisfy the decree the same be sold by public auction. Form 27 of Appendix E of the schedule also directs the court-auctioneer to sell so much of the said property as shall realise the sum in the said decree and costs. The Code, therefore, has taken special care charging the duty on the executing court and it has a salutary duty and a legislative mandate to apply its mind before setting the terms of proclamation and satisfy that if part of such property as seems necessary to satisfy the decree should be sold if the sale proceeds or portion thereof is sufficient for payment to the decree-holder or the person entitled under the decree to receive the amount and so much of that property alone should be ordered to be sold in execution. In *Ambati Narasayya v. M. Subba Rao*, (1989) 2 S.C.C. (Supp.) 693: A.I.R. 1990 S.C. 119, this Court held that it is the duty cast upon the court under O.21, Rule 64 to sell only such property or a portion thereof as may be necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored. Therein for execution of a decree of a sum of Rs.2,000 and costs, the appellant's 10 acres land was brought to sale which was purchased for a sum of Rs.17,000 subject to discharge of a prior mortgage of Rs.2,000. This Court held that without the court's examining whether a portion of the property could be sold, the sale held was not in conformity with the requirement of O.21, Rule 64 and it was held to be illegal and without jurisdiction. The sale was set aside and the court was directed to put the judgment-debtor in possession of the land and to refund the sale amount to the auction-purchaser. Further direction was given to execute the decree in accordance with law. In *Mangal Prasad v. Krishna Kumar Maheshwari*, (1992) 3 S.C.C. (Supp.) 31: A.I.R. 1992 S.C. 1857, a shop was sold to realise a decree debt of about Rs.29,000 and the sale price at the auction was Rs.one lakh and odd. This Court finding that it is excessive execution, set aside the sale and directed return of the sale amount to the auction-purchaser with interest at 12%. In *Takaseela Peeda Subba Reddy v. Pujari Padmavathamma*, (1977) 3 S.C.C. 337: (1977) 3 S.C.R. 692, to recover the decree debt in two decrees, the properties situated in two different villages were brought to sale. In the first instance the property in 'D' village fetched a sum of Rs.16,880,

which was sufficient to satisfy the decretal amount. The property in 'G' village was also sold which fetched a sum of Rs.12,000. This Court set aside the sale of 'G' village. Admittedly the site in sale is to the extent of 550 sq. yds., situated in a commercial area around which the petroleum installations are established. Though, as contended by Shri Madhava Reddy, that there may be building regulation for division of the property into portions, but the court made an attempt to sell portion of the property, may be 100 yards or 150 yards out of it, or whether undivided portion thereof would have satisfied the decree debt. It could be legitimately concluded that the court did not apply its mind at all to this aspect as well.

15: To get over the difficulty, Shri Madhava Reddy has fallen back on O.21, Rule 90(3) of the Code, which provides that "on application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date of which the proclamation of sale was drawn up." Undoubtedly, this special rule was brought on statute by 1976 Amendment Act. It is like a "caveat emptor" that the judgment-debtor be vigilant and watchful to vindicate pre-sale illegalities or material irregularities. He should not stand by to procrastinate the execution proceedings. If he so does, Rule 90(3) forewarns him that the court should be strict to comply with the procedural part under Rule 54(1-A) before depriving the judgment-debtor of the remedy under O.21, Rule 90, C.P.C. If he had notice from court and acquiesced by taking on action before the date of sale, he would be precluded to assail its legality or correctness thereafter. It is seen that the appellant had not been served with or given notice at the time of drawing up the proclamation of sale and as a fact on proclamation of sale was drawn up by the Executing Court except accepting the *ipso dixit* of the decree-holder. The procedure adopted by the executing court bristles with several irregularities touching the jurisdiction of the court. They are not only material irregularities causing substantial injustice but are in violation of the mandatory requirements of the rules. In *Kayjay Industries (P) Limited v. Asnew Drums (P) Limited*, (1974) 2 S.C.C. 213: (1974) 3 S.C.R. 678, the sale proclamation was settled after notice to the parties and after several adjournments. The respondent adopted dilatory tactics to obstruct the sale. Therefore, the valuation in the report submitted in that behalf

was accepted and the properties were sold. This Court held that if there was any material irregularities in the conduct of sale and if it causes sufficient injury to the judgment-debtor the same could be set aside where the court mechanically conducts the sale not bothering to see that the offer is too low and the better price could have been obtained. If, in fact, the price is substantially inadequate there is both material irregularity and injury. At the same time the court should not go on adjourning the sale till a good price is got as otherwise the decree-holder would never get the property of the judgment-debtor sold. This Court further held that there is always considerable difference between the court sale price and the market price. The court sale is a forced sale and notwithstanding the competitive element of a public auction, the best price is not always forthcoming. The valuer's report though good as a basis, is not as good as an actual offer and there are bound to be variations within limits between such an estimate, however careful, and the real bids by the seasoned businessman. Mere inadequacy of price cannot demolish a court sale. Further, if the court sales are too frequently adjourned with a view to obtaining a still higher price, prospective bidders will lose faith in the actual sale taking place and may not attend the auction. What is expected of the court is to make a realistic appraisal of the factors in a pragmatic way and if satisfied that in the given circumstances the bid is acceptable it should considerations while accepting the final bid, it is not necessary to give a speaking order nor can its order be examined meticulously. In that case the judgment-debtor himself was adopting dilatory tactics and the property was sold after considerable delay and postponements. The sale was upheld.

16. In *Janak Rai v. Gurdial Singh*, (1967) 2 S.C.R. 77: A.I.R. 1967 S.C. 608, relied on by Shri Madhava Reddy, in execution of *ex parte* decree for a sum of Rs.519, the property of the judgment-debtor was brought to sale and was sold for a sum of Rs.5,100. Thereafter the judgment-debtor made an application to set aside the *ex parte* decree. An objection was raised to the sale on the ground that the value of the house was Rs.25,000 and it was auctioned for a sum of Rs.5,000. The *ex parte* decree was set aside. On application made by the auction-purchaser, the sale was confirmed. It was contended that since the *ex parte* decree was set aside the confirmation of sale need to be set aside, which

was negatived by all the courts. In that background it was held that confirmation of the sale was not illegal and the inadequacy of the price was not a ground to set aside the sale. The ratio therein has to be considered in the light of its own scenario. The facts in this case are entirely different. The case of *Chinnammal v. P.Arumugham*, (1990) 1 S.C.C. 513, also does not help the auction-purchaser. Therein it was found that pending appeal the money decree was executed and the properties were brought to sale. The High Court allowed the appeal and set aside the decree. Thereafter the executing court was moved to set aside the sale on diverse grounds including the plea of inadequacy of price. The learned single judge set aside the sale, but the Division Bench reversed the decision. On appeal, this Court held that the auction-purchaser was not a *bona fide* purchaser. The auction-sale in his favour was set aside and the restitution ordered. The court cannot lend assistance to a person to retain the property of the judgment-debtor who has since got rid of the decree. In that context it was held that the stranger auction purchaser who is not a party to the decree is protected against the vicissitudes or fortunes of the litigation and remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The rights of *bona fide* purchaser who purchased the property in ignorance of the litigation should be protected. The ratio in that case would indicate that the purchaser must be a *bona fide* purchaser for adequate price without knowledge of the pending litigation. If it is otherwise, it is liable to be set aside. In that context it was held that the true question is whether the stranger auction purchaser had knowledge of the pending litigation about the decree under execution. If it is shown by evidence that he was aware of the pending appeal against the decree, when he purchased for giving him protection against restitution. His knowledge about the pending litigation would make all the difference in case. Though he may be stranger to the suit, but he must be held to have taken a calculated risk in purchasing the property. Far from helping the auction-purchaser this goes against him Mr. Gupta contended that Rajinder Singh is not a *bona fide* purchaser. His brother is the adjacent owner of the site in question. The second respondent and this brother only made the bids and participated in the sale. Rest of the people had on capacity to purchase the

property. The sale, therefore, is only a fraudulent and collusive one. Though we find some substance in what Mr. Gupta contends, we need not to go into that there is a distinction between irregularity and material irregularity in conducting the sale and it must be established that by reasons of illegalities or irregularities in conducting the sale, the judgment-debtor has sustained substantial injury. In *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh*, A.I.R. 1964 S.C. 1300; (1964) 6 S.C.R. 1001, this Court held that non-compliance of Sec. 35 of the Bengal Money Lenders Act does not render the sale void. It is only an irregularity. The judgment-debtor having had the knowledge did not file any objection. He did not attend the court for drawing up of the proclamation of the sale. On those circumstances the sale was held not liable to be set aside.

17. Under Sec. 47 all questions relating to execution, discharge or satisfaction of the decree should be determined by the Executing Court alone. The pre-sale illegalities committed in the execution are amenable to the remedy under Sec. 47. Post-sale illegalities or irregularities causing substantial injury to the judgment-debtor are covered under O. 21, Rule 90, Sub-rule (1) thereof covers the field of material irregularities or fraud in publicity or conducting the sale. Sub-rule (2) enjoins proof thereof and the court should find that by reason thereof the applicant sustained substantial injury. The total absence of drawing up of the proclamation of sale and settlement of its term by judicial application of mind renders the sale a nullity being void. It is covered by Sec. 47. The non-

application of mind whether sale of a part of the property would satisfy the decree debt is a material irregularity doing substantial injury to the appellant attracting O. 21, Rule 90. In either case the sale is liable to be set aside. It is true that there is distinction between mere irregularity and material irregularities and the sale is not liable to be set aside on proof of mere irregularity. It must be material irregularity and the court must be satisfied that on account thereof substantial injury was sustained by the appellant. The sale of 550 sq. yds. for recovery of a poultry sum of Rs. 7,780.33 without selling a portion thereof, caused substantial injury to the appellant.

18. The sale is set aside. The confirmation of sale is also set aside. The appellant is directed to withdraw the sum of Rs. 7,780.33 paise within six weeks from today from the court of the Rent Controller and deposit it towards decree amount. The Rent Controller should order payment. The subordinate judge on deposit, should thereon record full satisfaction and pay over the same to the first respondent. The appellant is free to withdraw the balance amount from the court of the Rent Controller. The auction-purchaser Rajinder Singh is free to withdraw his Rs. 1,05,000 and interest accrued thereon from the bank deposit as ordered by the court. The Registry should take such steps as are necessary to enable him to withdraw the said amount. The appeal is allowed, but with costs, as the appellant argued in person.

B.S.

Appeal allowed.

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vexatious and frivolous litigations. One such rule is prescribed for rejecting a plaint where it does not disclose a cause of action and where the suit appears from the statement in the plaint to be barred by law [See Rule 11 of O.7 of the Code of Civil Procedure]. When, however, a plaint for the reason of the suppression of any material fact has escaped rejection under this rule and the defendant is called upon to file the written statement another set of rules providing for ascertaining whether allegations in pleadings are admitted or denied, interrogatories, etc., and settlement of issues and determination of suit on issues of law or on issues agreed upon. Rule 2 of O.14 of the Code of Civil Procedure is significant in the sense that it says that a court should ordinarily pronounce judgment on all issues, but where issues both of law and of fact arise in the same suit and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first it relates to, [1] the jurisdiction of the court; or [2] a bar to the suit created by any law for the time being in force, and for that purpose, may postpone the settlement of other issues until that issue has been determined.

9. Although in the Code of Procedural law, a substantive rule of law is enshrined, which is generally called the principle or doctrine of *res judicata* under Sec.11 of the Code, which says as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

Explanation I: The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II: For the purpose of this section the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.

Explanation III: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted,

expressly or impliedly by the other.

Explanation IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V: Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI: Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VII: The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this sec. to any suit, issue or former suit shall be construed as references, respectively to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII: An issue heard and finally decided by a court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

10. There is the other rule of procedure as well as of substance in O.2 of the Code of Civil Procedure, which says that a person entitled to more than one relief in respect of the same cause of action, may sue for all or any of such reliefs, but if he omits, except with the leave of the court to sue for all such reliefs, he shall not afterwards sue for any relief so omitted for, if a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished. In other words, every suit must include the whole of the claim, which the plaintiff is entitled to make in respect of the cause of action.

11. The entire story of repeated trial of the issue as to the title of the petitioners herein and the validity of the sale deed under which they have been claiming title and continued litigation for the relief of a decree to avoid the transfer of the

property in favour of the petitioners herein by a set of the members of same family of the plaintiffs, leave no manner of doubt as to the intention of the plaintiffs that they have by all means tried to continue their attach upon the title of the petitioners herein in respect of a property which they are not ready to give up, even if this attempt requires to ignore the decrees of the court or to suppress material facts, and have started a fresh round of litigation and obtain some sort of interim order.

12. It was in this background that one can take notice of the endorsement of the plaintiff/respondent that if leave is granted to sue afresh on the same cause of action, she shall have no objection to the rejection of the plaint. The learned Subordinate Judge was duty bound before granting such a permission to see that O.23, Rule 1 of the Code of Civil Procedure gives a discretion to the plaintiff to abandon the whole or any part of his claim.

But if he seeks permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim, the court is required to be satisfied that the [1] suit must fail by reason of some formal defect or [2] that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. The learned Subordinate Judge has completely ignored the above rule and committed a serious error of jurisdiction in this regard. It is only on account of the casual approach of the court, that an astute litigant has successfully devised proceedings after proceedings. Unless care is taken by the courts, the chances of the abuse of the process always exist. It is not difficult to smell something foul in the plaintiff's conduct of repeated litigations for the same cause of action and to notice contrivance in the suit where either the name of the party is added or the spelling of any name is changed and besides a relief which has already been denied, another relief is introduced and thus a new look is given to the suit, which is substantially the same as old one. It is always better to be cautious and vigilant than careless and indifferent. There shall be no loss of time of the court if the plaints are carefully examined at the threshold and compliance of the procedural as well as the substantial requirements of law is insisted upon because an admission of a plaint, which should not be admitted, consumes many

working days of the court and in addition thereof, brings discredit to the institution of law itself.

13. For the reasons aforesaid, I am satisfied that the civil revision petition in C.R.P.No.3481 of 1992 has become infructuous and it is accordingly dismissed. C.R.P.No.1240 of 1993, however, is allowed to the extent that rejection of the plaint is final and without any leave to the plaintiff/respondent to sue afresh on the same cause of action. There shall, however, be no order as to costs in both the civil revision petitions.

R.S. --- C.R.P.No. 3481 of 1992 dismissed
C.R.P.No. 1240 of 1993 allowed

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Thangamani, J.

S.A.Nos.880, 881 of 1981 and W.P.4896 of 1983
8th January, 1993.

Arappa Gounder ...Appellant
v.
Chithan and others ...Respondents.

(A) Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act (X of 1969), Secs.16-A and 3(2) - Suits instituted prior to 27.11.1972 - Applicability of Sec.16-A - Jurisdiction of civil court to what extent barred.

In view of the decision of the Full Bench in *Periathambi Goundan v. District Revenue Officer, Coimbatore*, A.I.R. 1980 Mad. 180 (F.B.), it is evident that Sec.16-A of the Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act (X of 1969) was not intended to affect any suit instituted prior to its introduction on 27.11.1972, where the controversy is as to whether a particular piece of land has been let for cultivation by a tenant or not is one constituting the jurisdictional issue which has to be decided before the Record Officer can determine other matters under the Act and that if such a controversy arises, that controversy cannot be said to be within the exclusive jurisdiction of the authorities functioning under the Act. The determination of that controversy by the

authorities according to the Full Bench can be said to be incidental to the assumption of jurisdiction by the authorities under the Act and subject to that qualification when once as Record Officer has come to the conclusion that the land has been let for cultivation, the matters provided for in Sec.3(2) of the Act have to be determined by the Record Officer or the authority functioning under the Act and to that extent, the jurisdiction of the civil court is barred under Sec.16-A of the Act

[Para. 14]

(B) *Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act (X of 1969), Sec.16-A - Authorities functioning under Act - Judgment of civil court binding nature - Two Civil Suits instituted one prior to coming into force of Act and the other after the Act - Subject-matter of earlier suit 3/4 share of certain property and that of the later suit 1/4 share - Sub-court holding that appellant was not cultivating tenant - Decision confirmed in appeal - Decision held binding on Record Officer in respect of entire property.*

There is no dispute that of the two present suits which have given rise to S.A.Nos.880 and 881 of 1981, the earlier one O.S.No.484 of 1971 was instituted prior to the advent of Sec.16-A of the Act X of 1969. While Sec.16-A came into force on 27.11.1972, the other suit O.S.No.108 of 1975 and filed subsequently on 14.6.1975. The subject matter of the first action covers 3/4 of the suit property while that in the next suit is in respect of the remaining 1/4 share. Learned Subordinate Judge has held in O.S.No.484 of 1971 that the present appellant was not a cultivating tenant and negated his claim for injunction. And the District Court has confirmed the said judgment in A.S.No.81 of 1978 anterior to the order of the Record Officer in P.R.No.57 of 1976. Since the civil court has rendered its finding on the question as to the status of a tenant claimed by the appellant in his favour and as that is not without jurisdiction, on the authority of the Full Bench *Periathambi Goundan v. District Revenue Officer, Coimbatore, A.I.R. 1980 Mad. 180 (F.B.)* and the Division Bench in *Balasubramaniam v. Shamsin Thalree, (1985)2 M.L.J. 168* certainly, it will bind the Record Officer and it will not be proper for him to ignore the same. The claim of the appellant is that he is a cultivating tenant of the entire property. Since the Revisional authority has negated the claim of the appellant and it cannot be assailed in respect

of the 3/4 share of the property in view of the earlier decision of the civil court, the order has to be affirmed in entirety [Para. 19]

(C) *Constitution of India (1950), Art.226 - Jurisdiction under Exercise of - Appellate and revisional authorities under Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act, 1969 passing well-considered orders - Finding on question of fact - Orders not vitiated by any error apparent on face of the record - High Court, if can interfere with orders.* The appellate and revisional authorities have passed well-considered orders taking into account the relevant materials on record. The verdicts of these authorities are essentially a finding on a question of fact. In the absence of any clinching documentary evidence which would have the effect of rendering perverse the finding of fact given by the appellate and revisional authorities it is not possible to invoke the jurisdiction conferred on this Court under Art.226 of the Constitution of India to interfere with the order passed by the appellate and revisional authorities. The impugned orders of these authorities are not vitiated by any error apparent on the face of the record. They have not been shown to be vitiated in any manner warranting interference by this Court in exercise of the powers under Art.226 of the Constitution of India.

[Para. 20]

Cases referred to:

Periathambi Goundan v. District Revenue Officer, Coimbatore, A.I.R. 1980 Mad. 180 (F.B.) [Para. 11]

Ammayappan v. The Additional Collector, (1988)1 L.W. 196. [Para. 15]

Ramalingam v. District Revenue Officer, Thanjavur, (1990)2 L.W. 114. [Para. 16]

S.Balasubramaniam v. Shamsu Thalree, (1985)2 M.L.J. 168. [Para. 17]

Ponnusamy v. District Revenue Officer, North Arcot, 95 L.W. 647. [Para. 18]

Swaminathan Ambalam v. Rangaraja Pillai, (1972)2 M.L.J. 166. [Para. 22]

Shankar v. Gairabai, (1977)1 S.C.W.R. 88. [Para. 22]

Girja Nandini v. Bijendra Narayin, (1967)1 S.C.R. 93. [Para. 22]

Appeal against the decree of the District Court, Coimbatore (East) Erode, dated 23.6.1979 and passed in A.S.Nos.82 and 81 of 1978 preferred against the decree of the Court of the Additional

Subordinate Judge, Erode in O.S.Nos.108 of 1975 and 484 of 1971 respectively etc.

K.Chandramouli, Senior Counsel, for *M/s.R.Muthukumaraswamy and R.Thangavelu*, for Appellant.

V.Narayanaswami, for *S.Radhakrishnan*, for Respondent No.2.

The Court made the following

JUDGMENT: One Arappa Gounder, the appellant in both the second appeals and the petitioner in W.P.No.4896 of 1983 is the plaintiff in O.S.No.484 of 1971 and O.S.No.108 of 1975 on the file of learned Subordinate Judge of Erode. While the subject matter of dispute in the earlier suit is the southern A.C.3.02 1/2 in S.F.No.268 and the southern A.C.6 12 1/2 in S.F.No.269, the disputed property in the next action is an extent of A.C.3.04 1/2 in the northern most part of S.F.Nos.268 and 269 of Sankarapalayam village, Bhavani Taluk. The entire extent which is stated to be of A.C.12.19 1/2 originally belonged to four brothers viz. Maran, Raman, Lakshmanan and Chinna Maran who are the sons of one Kuppan. There was no partition of this property among the brothers but each one was enjoying a specific portion for the sake of convenience. Kuppan died in the year 1963. On the basis of a promissory note executed by him, one Thandavan filed O.S.No.114 of 1966 on the file of learned Subordinate Judge, Erode and obtained a decree on 15.4.1967 against the three sons Maran, Raman and Chinna Maran and the legal representatives of the last son Lakshmanan, who was dead by then. In execution of the said decree, Thandavan attached the entire properties in E.P.No.7 of 1968 and brought them for sale in court auction. The second respondent in S.A.No.880 of 1981, the sole respondent in S.A.No.881 of 1981 and first respondent in W.P.No.4896 of 1983 Jayakrishnan purchased them in court auction held on 22.1.1970. The sale was confirmed on 21.3.1970.

2. In the meanwhile, on 9.6.1967 Raman executed Ex.A-9 sale deed in favour of Chithan, the first respondent in S.A.No.880 of 1981 in respect of his one-fourth share in the suit items. The appellant Arappa Gounder claims that he is in enjoyment of this one-fourth share of Chithan as his lessee. He further alleges that on 14.4.1967, he took on lease for one year the other three shares of Maran, Lakshmanan and Chinnamaram under Ex.A-1 unregistered lease deed. He continues to be in possession of the property as a cultivating tenant

by renewing the lease every year. Exs.A-2, A-3, and A-26 are the subsequent unregistered lease deeds dated 14.4.1968, 14.4.1969 and 14.9.1970 respectively. The appellant adds that he has been recorded as a tenant of the entire suit properties under Tamil Nadu Agricultural Lands (Records of Tenancy Regulations) Act, 1969. Alleging that his enjoyment of the properties was sought to be disturbed by respondents 1 and 2 the appellant instituted the two suits for a declaration that he is a cultivating tenant with a right to be in possession of the suit properties and for consequential permanent injunction restraining the respondents from interfering with his peaceful enjoyment of the lands so long as he continued as a cultivating tenant. In the alternative, he claimed for recovery of possession also.

3. The respondent/auction purchaser resisted the actions contending that the appellant never took the suit properties on lease either from the first respondent Chithan the vendee under Ex.A-9 or from the descendants of Kuppan. The vendee Chithan is colluding with the appellant. This respondent did not receive any notice from the Tenancy Record Officer and the orders passed under the Record of Tenancy Rights Act are not binding on him. The suits have been engineered only for the purpose of defeating the genuine rights of the court auction purchaser. After purchase, he obtained symbolical possession in respect of the undivided half share in S.F.No.268 on 26.9.1970 as evidenced by Ex.B-1 the possession receipt. He took actual possession of the remaining extent of A.C.8.17 through court as per Ex.B-2 on 1.10.1971 in E.A.No.798 of 1971. Thereafter the appellant filed E.A.No.881 of 1971 on 23.10.1971 praying the court not to record delivery stating that he was in possession of the properties as a lessee. On 9.11.1975 this E.A. was dismissed and delivery was recorded without prejudice to the suit. While Ex.A-32 is the certified copy of the counter of the respondent, Ex.A-33 is the certified copy of the fair order in E.A.No.881 of 1971.

4. While the property involved in O.S.No.484 of 1971 represents the three-fourth shares of Maran, Chinnamaram and Lakshmanan, that covered by O.S.No.108 of 1975 is the one-fourth share of Raman. Holding that the lease in favour of the appellant on the strength of Exs.A-1, A-2, A-3 and A-26 has not been established, that these lease

deeds have been created by the appellant solely for the purpose of claiming tenancy right over the suit properties after coming to know of the court auction purchase by the second respondent Jayakrishnan and that there is practically no evidence to prove the lease in respect of the remaining one-fourth share of Raman on 22.11.1977 the trial court dismissed both the suits with cost of the second respondent. It also held that Ex.A-11 the certified copy of Record of Tenancy Rights Register in which the appellant is shown as a cultivating tenant in respect of S.F.Nos.269 and 268 also cannot come to his rescue since by the time the appellant came to be recorded as a tenant in respect of the suit lands, the ownership had changed hands consequent to the court auction sale in favour of the second respondent. The defeated plaintiff took up the matter on appeal in A.S.Nos.81 and 82 of 1978 on the file of learned District Judge of Coimbatore East at Erode. The lower appellate court concerned with the finding of the trial Judge that Exs.A-1 to A-3 and A-26 lease deeds were got up for the occasion and Raman could not have conferred valid title under Ex.A-9 sale deed to first respondent Chithan since it was brought into existence purposely to steal a march over the execution proceedings already commenced in O.S.No.114 of 1966 and the appellant is bound by the delivery of possession recorded by the court as per Ex.B-1 and Ex.B-2. Since proceedings before the Record of Tenancy Authorities were pending by that time, the status of the appellant as a cultivating tenant in possession could not be upheld. Accordingly it dismissed both the appeals on 23.6.1979. Hence these Second Appeals came to be filed on 30.1.1980.

5. In the meantime, the second respondent/auction purchaser filed an application in Form No.5 under Sec.7(2) of Tamil Nadu Agricultural Lands (Record of Tenancy Regulations) Act, 1969 before the Tahsildar, Bhavani in T.R.No.56 of 1976 for the deletion of the name of the appellant from the record of Tenancy Rights Register in respect of the suit properties in Sankarapalayam village. He pleaded before the Revenue Authorities that he purchased the entire extent in court auction on 22.1.1970, and the sale was duly confirmed on 21.3.1970. By virtue of the said purchase, he has become the absolute owner of the property. The landlords in the Tenancy Records Register have been described as Kuppen and

Chithan but the said persons were not the owners on the date of preparation of the Tenancy Record. Besides, he did not receive any notice about the preparation of the Record of Tenancy. The Karnam of the village appears to have colluded with the petitioner and arranged to get the name of the appellant recorded as a tenant.

6. The present appellant resisted the said application contending that his name was recorded as a tenant only after due enquiry in accordance with the law and that the final Record of Tenancy Rights has also been published long ago. There was no provision in the Act to delete the name of the tenant from the Record of Tenancy Rights and as such the petition was not maintainable. He claimed that he was presently cultivating the one-fourth share of Raman ever since the date of Ex.A-9 which came into existence long ago prior to the court auction sale. He took the remaining three-fourth shares of property on lease from the other three sons on 14.6.1967. The Record Officer Tahsildar Bhavani dismissed the petition on 25.2.1980 holding that the present appellant alone was in actual possession of the property as a cultivating tenant for 12 years prior to that petition. Aggrieved by the said order, the second respondent filed an appeal before the R.D.O., Gobichettipalayam in A.P.No.2 of 1980. On 28.9.1981 the R.D.O. allowed the appeal and deleted the name of the present appellant from the Approved Record of Tenancy. Thereupon, the appellant preferred a revision before the D.R.O., Erode in R.P.No.8 of 1982. But he could not succeed there also. The Revision was dismissed on 7.7.1982. So the tenant has come forward with W.P.No.4996 of 1983 under Art.226 of the Constitution of India for the issue of writ of *certiorari* calling for the records in T.R.No.56 of 1976 on the file of the Tahsildar, Bhavani and quash the order made in A.P.No.3 of 1980 dated 28.9.1981 on the file of the R.D.O., Gobichettipalayam which was confirmed in R.P.No.8 of 1982 dated 7.7.1982 on the file of the court of District Revenue Officer. Jayakrishnan the second respondent in the S.A.No.880 of 1981, the Record Officer and Tahsildar Bhavani, R.D.O. Gobichettipalayam and D.R.O. Erode have been impleaded as respondents 1 to 4 in the writ petition filed by Arappa Gounder, the appellant in both the second appeals.

7. At the outset, let us consider the various contentions raised by both parties in the writ petition.

In T.R.No.56/76 when the second respondent herein sought to delete the name of the appellant Arappa Gounder who was shown as a tenant in respect of the suit properties in the Record of Tenancy Rights Register, the Record Officer rejected his evidence as P.W.1 that the appellant trespassed into the properties 20 days after the former took possession through court pursuant to his court auction purchase on the ground of the admission of P.W.1 in cross-examination that the appellant was in possession till that date and that the second respondent did not take any steps to evict the appellant from the property by giving police complaint for the alleged trespass. The Record Officer also relied on Exs.A-1 and A-2 the unregistered lease deeds in holding that the appellant was a tenant of the property. The plea of the second respondent that he did not know anything about the recording of the tenancy rights did not find favour with the Record Officer since in his view wide publicity was made about the implementation of the Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act, 1969 and reasonable particulars were given to the interested persons to put forth their rights in the lands. When the order of the Record Officer came to be pronounced on 25.2.1980, the District Judge had already dismissed A.S.Nos.81 and 82 of 1978 preferred against the judgment and O.S.No.484 of 1971 and O.S.No.108 of 1975 on the file of the Subordinate Judge at Erode. The plea of the present appellant that he was a cultivating tenant in possession of the properties was negated by the civil courts in the abovesaid proceedings. The Record Officer held that the judgment of the civil court in favour of the second respondent was not binding on him and accordingly he refused to drop the name of the present appellant as tenant in respect of the suit items from the Record of Tenancy Rights Register.

8. The second respondent preferred an appeal before the Revenue Divisional Officer, Gobichettipalayam in A.P.No.2 of 1980 under Sec.6 of Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act, 1969 against the order of the Record Officer and the Tahsildar. It was contended before the appellate authority by the present second respondent that as per the decision in *A.I.R. 1977 Mad. 407*, the jurisdiction of the civil court in Tenancy matters was not ousted and Sec.16-A of the Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act 1969 was not

retrospective in effect. Sec.16-A of the Act came into force on 27.1.1972, whereas the second respondent took possession of the property through court on 1.10.1971. It was also brought to the notice of the appellate authority that the civil courts had rejected Exs.A-1 and A-2 the lease deeds relied on by the Record Officer. The appellate authority held that under Sec.5 of the Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act, 1969, the deletion of the name of the tenant could be done in the following circumstances:

(1) Death, (2) Transfer of interest, (3) Any subsequent change in circumstances, (4) Transaction by means of sale deed and by means of possession under the orders of the civil court.

Since the appellant Arappa Gounder ceased to be in possession with effect from 1.10.1971 in view of the auction purchaser taking possession through court, his subsequent enjoyment of the property could only be illegal. In this view of the matter, the appellate authority allowed the appeal and ordered deletion of the name of the appellant from the Approved Record of Tenancy.

9. Against the said order the appellant preferred a revision before the D.R.O., Erode in R.P.No.8 of 1982. The revisional authority ordered that since the civil court had held against the present appellant and that he is seeking his remedies through this second appeal, no action need be taken under the civil revision petition. As and when he succeeds in his second appeal, he could apply to the Tenancy Record Officer for recording his name as a tenant by establishing his claim. So the revision petition was dismissed on 7.7.1982.

10. Mr.K.Chandramouli, learned senior counsel for the writ petitioner submitted that the revisional authority has confirmed the order of deletion only on the basis that the present second respondent has succeeded before the civil court. But the question whether the appellant is a tenant or not has to be decided by the Revenue Court only and the civil court has no jurisdiction to decide the same as per Sec.16-A of Tamil Nadu Act 10 of 1969. The Record Officer has found that the appellant alone is in actual possession of the property for 12 years prior to the proceedings as a cultivating tenant. The deletion of the name of the tenant is permissible under Sec.5(1) of the Act only on three grounds namely death, transfer of interest and any subsequent change of circumstances. None of these

causes is available in this case. Both parties are alive, no transfer of interest was effected after the recording of the appellant as a tenant in the Tenancy Record Register and there is also no change of circumstances. The revisional authority has simply relied on the finding of the District Judge that the appellant was not in possession as the cultivating tenant and negated the claim of the appellant. Both the appellate authority as well as the revisional authority had failed to note that the judgment of the civil court would not bind the authorities functioning under the Tamil Nadu Act 10 of 1969. Even assuming that the verdict of the civil court would bind the revenue authorities, inasmuch as the civil litigation is pending in S.A.Nos.880 and 881 of 1981 on the file of this court, the appellate and revisional authorities ought to have given an independent finding uninfluenced by the decision of the District Judge. Both the appellate and revisional authorities without going into the merits of the application under Sec.5(2) of Act 10 of 1969 and without applying their mind allowed themselves simply to be carried away by the result of the civil suit. The revisional authority cannot abdicate his duty to determine the status of the appellant since the conclusion arrived at by the civil court can have no effect on it. So the orders of the appellate and revisional authorities have to be quashed. In any event since the orders are perverse, the matter has to be remanded to the revisional authority to decide afresh whether the appellant is a cultivating tenant or not.

11. Sec.16-A of the Tamil Nadu Act 10 of 1969 reads as follows:

"No civil court shall have jurisdiction in respect of any matter which the Record Officer, the District Collector or other Officer or authority, empowered by or under this Act has to determine and no injunction shall be granted by any court in respect of any action taken or to be taken by such Officer or authority in pursuance of any power conferred by or under this Act".

The scope of this section came to be considered by a Full Bench of this court in *Periathambi Goundan v. District Revenue Officer, Coimbatore, A.I.R. 1980 Mad. 180*. The petitioner in that writ petition applied under the provisions of Act 10 of 1969 to the Record Officer for registration of his name as a tenant. The Record Officer recorded the name

of the petitioner on 10.4.1972 as a tenant and the draft record was published on 27.4.1972. In June, 1972 respondents 4 and 5 therein preferred applications under Sec.3(6) of Act 10 of 1969 seeking the deletion of the petitioner's name from the draft record. On 27.12.1972 the Record Officer rejected the applications and confirmed the entry of the petitioner as a tenant in respect of the lands in question. Respondents 4 and 5 preferred an appeal to the appellate authority under the Act. Since some fresh evidence was tendered before the appellate authority, the matter was remanded. The Record Officer enquired into the matter afresh and deleted the name of the petitioner and directed the substitution of the name of the 5th respondent as the tenant. Against this order the petitioner preferred an appeal to the appellate authority who allowed the appeal and registered the name of the petitioner as tenant. The 5th respondent preferred a revision petition and the revisional authority allowed the revision petition, deleted the name of the petitioner and registered the name of the 5th respondent as tenant in the register. In the meantime, on 15.4.1972 the 4th respondent/landlord instituted O.S.No.250 of 1972 on the file of the District Munsif at Udumalpet, for a permanent injunction to protect his possession. The suit was dismissed on 4.11.1975 and the dismissal order became final. The 5th respondent instituted O.S.No.296 of 1972 on 3.5.1972 for a permanent injunction and it was also dismissed and the order became final. The petitioner in the writ petition also filed a suit for permanent injunction claiming himself to be in possession of the land as a cultivating tenant under the landlord 4th respondent. The *ex parte* decree granted in favour of the writ petitioner also became final.

12. It was contended before the Full Bench that the authorities functioning under Act 10 of 1969 have no jurisdiction to decide as to who is the tenant of the lands in question as between two rival claimants, and that Sec.16-A of the Act does not bar a civil court from deciding that controversy. But after considering the scheme of the Act, the Full Bench has held that

"Sec.16-A did not in any way affect the jurisdiction of the civil court in respect of suits or proceedings validly instituted before the coming into force of the said section and pending on the date when the said section came into force, whether in the original court or in the

appellate or revisional court. Sec.16-A was not intended to and could not affect any suit instituted prior to its introduction, even when the suit was in respect of a matter covered by Sec.16-A. A suit which has been instituted prior to the coming into force of Sec.16-A of the Act will have to run its natural and normal course prescribed by law without in any way being affected by the provisions contained in Sec.16-A, because there is nothing in Sec.16-A expressly or by necessary implication taking away the jurisdiction of the civil court validly and competently assumed at the first instance. Consequently even if a decree had not been passed in a suit at the time when Sec.16-A came into force, the fact that Sec.16-A came into force during the pendency of the suit will not prevent the court from exercising its jurisdiction lawfully and validly invoked and the same principle will apply to the further course of the suit in the form of appeal or revision". The Full Bench went on to point out that "two things are clear from the language of Sec.16-A. One is, the interdict is on the jurisdiction of the matters which by or under the Act have to be determined by the Record Officer, the District Collector or other officer or authority empowered by the Act. The section itself does not enumerate as to what those matters are. The second is, the interdict is not on any particular proceeding in the civil court, but only on the exercise of the jurisdiction in respect of matters. Controversies that come before a court or a tribunal cannot be either pigeon-holed or put in strait-jackets. They may be of different varieties as well as different standards. For the purpose of deciding the main controversy, the court or the tribunal may have incidentally to decide a number of subsidiary questions of controversies. Therefore, when the section itself does not enumerate the matters in respect of which the jurisdiction of the civil court is ousted, one will have to ascertain the said matters, with reference to the other provisions of the Act conferring power or jurisdiction on the authorities functioning under the Act. Similarly, a suit or proceeding in a civil court may involve the determination of several matters, some of which may be within the jurisdiction of the authorities functioning under the Act and some others outside the jurisdiction. In such a

case, the suit or proceeding as such cannot fail unless it is of such a nature that it can be terminated solely on the determination of the matter falling within the jurisdiction of the authorities functioning under the Act."

13. The matters which are within the exclusive jurisdiction of the authorities constituted under the Act are limited by the provisions contained in Sec.3(2) of the Act, because those were the particulars which are directed to be included in the approved record to be prepared under the Act. The object of the Act as well as the Provisions contained in Sec.3(2) make it clear that the Record Officer or the appellate or revisional authority has to determine the following matters: (1) the survey number or sub-division number, extent and local name, if any, of the land let for cultivation by a tenant; (2) the name and address of the land owner; (3) the name and address of the intermediary, if any; and (4) the name and address of the tenant cultivating the land. It may be *prima facie* stated that these are the four matters which are required to be determined by the Record Officer or the appellate or revisional authority under the provisions of the Act. However, the necessity to determine these questions may occur in the context of different controversy and not purely on a specific dispute with respect to these particulars alone. Even the determination of the particulars enumerated in Sec.3(2) cannot be in isolation in respect of any one particular matter but can only be in the context of preparing the approved record showing the particulars in respect of the land and who is the tenant and who is the land owner. Once the Record Officer or any other authority functioning under the Act has come to the conclusion that the land has been let for cultivation by a tenant, the matters provided for in Sec.3(2) have to be determined by the Record Officer, or other authority functioning under the Act, and to that extent the jurisdiction of the civil court is barred under Sec.16-A.

14. In view of the decision of the Full Bench, it is evident that Sec.16-A of Act 10 of 1969 was not intended to affect any suit instituted prior to its introduction on 27.11.1972. Where the controversy is as to whether a particular piece of land has been let for cultivation by a tenant or not is one constituting the jurisdictional issue which has to be decided before the Record Officer can determine other matters under the Act and that if such

a controversy arises, that controversy cannot be said to be within the exclusive jurisdiction of the authorities functioning under the Act. The determination of that controversy by the authorities according to the Full Bench can be said to be incidental to the assumption of jurisdiction by the authorities under the Act and subject to that qualification, when once a Record Officer has come to the conclusion that the land has been let for cultivation, the matters provided for in Sec.3(2) of the Act have to be determined by the Record Officer or the authority functioning under the Act and to that extent, the jurisdiction of the civil court is barred under Sec.16-A of the Act.

15. In *Ammayappan v. The Additional Collector*, (1988)1 L.W. 196, cited by Mr. V. Narayanasamy, learned counsel for the respondent, in proceedings under Act 10 of 1969 the Record Officer-Tahsildar of the Village concerned disallowed the claim of the petitioner that he continued to be in possession of the lands as the son of the original lessee after his death as cultivating tenant and must be recorded as such under the Act. Earlier, the petitioner moved the civil court wherein his suit was decreed after contest and the question as to whether he was in possession as a cultivating tenant was incidentally gone into and the answer thereto was given in his favour. In the appeal preferred by the petitioner before the R.D.O., copies of the proceedings in the civil court were admitted in evidence. The R.D.O. set aside the order of the Record Officer and directed that the name of the petitioner should be recorded as a tenant under the Act. There was a revision before the Additional Collector who expressed the view that the decision in the civil suit cannot be conclusive proof of the tenancy status and the tenancy status for the purpose of the Act should be determined only by the authorities under the Act. So he set aside the order of the R.D.O. and restored the order of the Record Officer. In the writ petition, the order of the Additional Collector was put in issue. Meanwhile, the decree in the suit was taken on appeal and second appeal was affirmed. Nainar Sundaram, J. as His Lordship then was has held that the view of the Additional Collector that the decision in the civil suit cannot be taken note of is unsustainable, in view of the pronouncements of this Court. Since anterior to the decision of the Record Officer, the civil court has rendered a finding on the question as to the status of a tenant

claimed by the petitioner in his favour, and as that is not without jurisdiction, certainly that will bind the authorities under Act 10 of 1969 and it will not be proper for them to ignore the same. Accordingly, the writ petition was allowed and the order of the Additional Collector was quashed. The facts referred to above are more or less similar to these in the present action.

16. The scope and binding nature of the judgment of the civil court on the authorities functioning under Act 10 of 1969 again came to be considered by a Division Bench of this Court comprising of Dr. A.S. Anand C.J. and Raju, J. in *Ramalingam v. District Revenue Officer, Thanjavur*, (1990)2 L.W. 114. In that case the Record Officer ordered to register the name of the appellant as a cultivating tenant. The appellate authority set aside the order and remitted the matter back to the Record Officer for enquiry and disposal. In the meantime, the landlord filed O.S.No.325 of 1974 on the file of the District Munsif, Kumbakonam against the appellant for permanent injunction contending that the appellant was merely a 'Pannai agent'. The appellant contested the suit and ultimately by a decree dated 25.1.1975 the trial court held that the appellant was not a cultivating tenant. The judgment of the trial court was also confirmed by the Sub Court, Kumbakonam on 2.3.1977. The said proceedings became final between parties since they were not challenged further. While matters stood thus, when the Record Officer took up the remanded proceedings for consideration, the judgments of the civil court were pressed into service by the landlord to contend that the appellant was merely a pannai agent. The Record Officer holding that the judgment of the civil court was not binding on him came to the conclusion that the appellant was the actual cultivator and directed his name to be recorded as a cultivating tenant. On appeal the appellate authority without referring to the judgment of the civil court rejected the appeal in a summary order. The landlord took up the matter in revision before the D.R.O., Thanjavur who dealt with the matter in considerable detail taking into account the judgments of the civil court as well as the other materials made available by the appellant before the authorities. Ultimately the D.R.O. set aside the orders of the authorities below holding that the appellant was merely a pannai agent. In the writ petition learned single Judge declined to interfere

with the order of the revisional authority. In the appeal before the Division Bench it was contended that the orders of the civil court are not binding upon the authorities functioning under the Act and that the authorities have exclusive jurisdiction to decide about the rights of parties claimed under the Act and that in any event the judgment of the civil court having been rendered subsequent to the proceedings, the same cannot be given any credence in adjudicating the rights of parties under the provisions of the Act. The Division Bench rejected this contention and held that it cannot be disputed that the competent civil court in a suit for permanent injunction between the parties, after trial and consideration came to a finding that the appellant was merely a pannai agent and it was really the landlord who was in possession of the property. No independent material has been produced by the appellant to substantiate his plea that he was a cultivating tenant. Though the proceedings under the Act in question have been initiated in 1974, it could not be legitimately contended that there was an earlier and final adjudication by the competent authority exercising jurisdiction under the Act prior to the judgments of the civil court. Thus, the findings rendered by the civil court in proceedings between the parties have been rightly referred to and relied upon by the revisional authority to reject the plea of the appellant that he was a cultivating tenant.

17. The decision of another Division Bench in *S. Balasubramaniam v. Shamsu Thalreerz*, (1985) 2 M.L.J. 168, has laid down that when the authority constituted under Act 10 of 1969 has decided the ultimate question under the Act within his jurisdiction and competency and which he is enjoined to decide in the proceedings under the Act, it is not open to the civil court in a subsequent suit to sit in judgment over the same, as if it is an appellate authority and render a different decision.

18. In *Ponnusamy v. District Revenue Officer, North Arcot*, 95 L.W. 647, cited by learned counsel for writ petitioner the suit was filed for a declaration that the plaintiff is a cultivating tenant and for an injunction restraining the defendants from disturbing his possession. Padmanabhan, J. has held that the case falls within the principles laid down by Ismail, J. in 93 L.W. 169. If the cultivating tenant files a suit for declaration that he is the cultivating tenant of the land in question and as a consequential relief prays for recovery of

possession from the land owner-defendant or for an injunction, the primary relief being one of declaration of his status as a cultivating tenant, the other reliefs being consequential, the civil court may not have jurisdiction to decide the controversy with reference to which the primary relief is prayed for. The suit is, therefore, not maintainable.

19. There is no dispute that of the two present suits which have given rise to S.A.Nos.880 and 881 of 1981 the earlier one O.S.No.484 of 1971 was instituted prior to the advent of Sec.16-A of Act 10 of 1969. While Sec.16-A came into force on 27.11.1972, the other suit O.S.No.108 of 1975 was filed subsequently on 14.6.1973. The subject matter of the first action covers 3/4 of the suit property while that in the next suit is in respect of the remaining 1/4 share. Learned Subordinate Judge had held in O.S.No.484 of 1971 that the present appellant was not a cultivating tenant and negatived his claim for injunction. And the District Court has confirmed the said judgment in A.S.No.81 of 1978 anterior to the order of the Record Officer in T.R.No.56 of 1976. Since the civil court has rendered its finding on the question as to the status of a tenant claimed by the appellant in his favour and as that is not without jurisdiction, on the authority of the F.B. and D.B. referred to above certainly it will bind the Record Officer and it will not be proper for him to ignore the same. The claim of the appellant is that he is a cultivating tenant of the entire property. Since the revisional authority has negatived the claim of the appellant and it cannot be assailed in respect of 3/4 share of the property in view of the earlier decision of the civil court, the order has to be affirmed in entirety.

20. The appellant has claimed tenancy right on the basis of Exs.A-1 to A-3 and A-26 the unregistered lease deeds dated 14.4.1967, 14.4.1968, 14.4.1969 and 14.4.1970. The Record Officer has chosen to act on the same and upheld the claim of the writ petitioner mainly on the ground that admittedly the landlord had not given any police complaint about the alleged trespass committed by the writ petitioner 20 days after the second respondent took possession through court and the further admission of the second respondent that the writ petitioner continued to be in possession of the property till that date. However, after an elaborate trial learned Subordinate Judge has found that these documents were created solely for the

purpose of claiming false right of tenancy over the suit properties on coming to know of the court auction sale in favour of the second respondent. Learned Subordinate Judge also took the view that there was absolutely no evidence available to show that the appellant had taken the suit properties on lease. The entries made in the Adangal Extracts Exs.A-4 to A-6 are not based on facts and they were admittedly made on the basis of information, said to have been furnished by Siddhan and Maran. The District Court has affirmed the findings of the trial court in the appeal. The appellate authority concurred with the reasoning of the civil court and also found that the appellant had not adduced any convincing evidence that he was in possession of the property as a cultivating tenant. The appellate and revisional authorities have passed well-considered orders taking into account the relevant materials on record. The verdicts of these authorities are essentially a finding on a question of fact. In the absence of any clinching documentary evidence which would have the effect of rendering perverse, the finding of fact given by the appellate and revisional authorities it is not possible to invoke the jurisdiction conferred on this Court under Art.226 of the Constitution of India to interfere with the order passed by the appellate and revisional authorities. The impugned orders of these authorities are not vitiated by any error apparent on the face of the record. They have not been shown to be vitiated in any manner warranting interference by this Court in exercise of its powers under Art.226 of the Constitution. The writ petition, therefore fails and has to be dismissed.

21. Regarding the two second appeals both the courts below have concurrently found as a matter of fact that the appellant did not take the property on lease either from the erstwhile owners or from the court auction purchaser and he has made only a futile attempt to uphold his status as a cultivating tenant by creating false documents and entries in cultivation accounts. And the correctness of this finding rendered on facts cannot be canvassed in second appeal. The question of law formulated at the time of admission of the second appeals is whether the judgments of the courts below are sustainable in view of the law laid down by the Full Bench in *Periathambi Goundan v. District Revenue Officer, Coimbatore*, A.I.R. 1980 Mad. 180 (F.B.). The scope of the said decision has already been

discussed.

22. However, Mr.Chandramouli, learned senior counsel for the appellant in the second appeals chose to assail the judgment and decrees of the lower appellate court mainly on the ground that learned District Judge has dealt with the matter in a perfunctory manner and has not chosen to discuss the issues in detail. In this case, there was no independent evaluation of evidence by the District Court. So he argued that the cases have to be remitted back to the lower appellate court for the purpose of passing a verdict as per law. In support of his contention he cited the decision in *Swaminathan Ambalam v. Nagaraja Pillai*, (1972)2 M.L.J. 166. In first appeal in that case, learned Judge without framing the point for determination as required by O.20, Rule 4, Sub-clause (2) of the Civil Procedure Code and without discussing the evidence gave a judgment. Held it cannot be said to be a judgment at all because it is vitiated by failure to comply with the requirements of O.20, Rule 4(2), C.P.C. In *Shankar v. Gangabai*, (1977)1 S.C.W.R. 88, the Apex Court deprecated passing of the unspeaking order "dismissed" by the High Court. Held: In matters involving construction of written instruments where rival interpretations have more than mere plausibility, the High Court ought to have given a brief statement of reasons while dismissing the appeal summarily. Whereas learned counsel for the respondents cited the decision of the Supreme Court in *Girja Nandini v. Bijendra Narayin*, (1967)1 S.C.R. 93 and argued that there was no infirmity in the judgment of the lower appellate court and there is no reason to remand the matter. The decision relied on is to the effect that it is not the duty of the appellate court when it agrees with the view of the trial court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the trial court. Expression of general agreement with reasons given by the court decision of which is under appeal would ordinarily suffice.

23. On a scrutiny of the judgment of learned District Judge we find that he has stated in extenso the pleadings in the first instance. Thereafter, he has formulated the points for consideration also. The first two points are in respect of the status of the appellant as a cultivating tenant and the binding nature of Ex.A-9 sale deed. No doubt during the course of the discussion he observes that he has also gone through the entire evidence

let in by the appellant and he fully agrees with the findings of the trial court that Exs.A-1 to A-3, A-26 and A-8 have been brought up to suit the convenience of the appellant. Learned counsel for the appellant presses this observation of the lower appellate court in support of his contention that the District Court has not independently evaluated the evidence and instead it has simply upheld the judgment of the trial court without applying its mind. But the judgment of the first appellate court reveals that besides accepting the finding of the trial court that these documents have been got up for the occasion learned District Judge has taken into account other factors such as non-production of receipt for payment of rent to Chithan, the non-examination of lessor Chithan, the inconsistency in the evidence of plaintiff as P.W.1 regarding possession to disbelieve the case of the appellant. We also find that learned District Judge discussed all aspects of the case in his own way, considered the decision cited and came to his own conclusion as per evidence on record. His approach was certainly original. So, there is no substance in the grievance of the appellant regarding the judgment of the lower appellate court regarding the judgment of the lower appellate court and his request to remit the case to the District Court again to come to a conclusion afresh is clearly untenable.

24. In the result, both the second appeals and writ petition are dismissed with cost (one set of advocate fee).

B.S. — Appeals and writ petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Thangamani, JJ.

App.No.766 of 1983 and Memo of Cross objections

8th July, 1993.

Sonnappa Iyer ..Appellant
v.

K.R.Ramuthaiammal and others ...Respondents.

(A) *Specific Relief Act (XLVII of 1963), Sec.10 - Specific performance of contract - Plaintiff's duty to prove claim for - Non-production of best evidence - Court, if can draw adverse inference.*

When the burden is on the plaintiff to prove clearly in order to get the equitable relief of specific performance, he ought to have produced the best evidence available with him and his failure to do so would enjoin the court to draw an adverse inference against him. [Para. 14]

(B) *Evidence Act (I of 1872), Sec.3 - Appreciation of evidence - Acceptance of evidence of witness by trial court after seeing his demeanour in court - High Court, if prevented from appreciating it and holding that it is not believable.*

The mere fact that the trial Court had seen the witnesses in the box and watched their demeanour and chosen to accept their evidence will not prevent the High Court from appreciating the evidence and holding that their evidence is not believable particularly when all the circumstances relevant are available on record. [Para. 15]

(C) *Hindu Law - Hindu undivided family - Evidence showing that manager of Hindu undivided family had ancestral properties and was running ancestral business - Also showing no other source of income - Property acquired by him, if to be presumed to be joint family property.*

The evidence on record conclusively shows that the first defendant had ancestral properties comprising of houses and was running a business which was also ancestral. He had no other source of income with which he could have purchased properties of his own. When there is no evidence as to his independent source of income and when he admittedly was the manager of the undivided family consisting of himself and his sons, the presumption under Hindu Law has to be drawn and the property should be presumed to be joint family property. [Para. 18]

Cases referred to:

Gopal Krishnaji Keikar v. Mohammed Haji Latif, A.I.R. 1968 S.C. 1413. [Para. 14]

Mallappa Girmallappa Betgeri v. Yellappagouda Patil, A.I.R. 1959 S.C. 906. [Para. 18]

Mallappa Bandeppa Desai v. Desai Mallappa, A.I.R. 1961 S.C. 1268. [Para. 18]

Balmukand v. Kamala Wati, (1965)1 M.L.J. (S.C.) 6: (1965)1 An.W.R. (S.C.) 6: A.I.R. 1964 S.C. 1385: (1964)1 S.C.W.R. 494: (1965)1 S.C.J. 212.

[Para. 19]

Appeal and memo of cross objection against the decree of the court of the Subordinate Judge, Salem, dated 3.9.1982 in O.S.No.280 of 1978.

The Judgment of the Court was delivered by *Srinivasan, J.*: The plaintiff is the appellant. The defendants have filed a memorandum of cross-objections. The suit is one for specific performance of an agreement for sale. The case of the plaintiff is as follows:

On 9.3.1977, the first defendant, who is the owner of the property entered into an agreement with the plaintiff for sale of the suit property for a total consideration of Rs.1,10,000 and received an advance of Rs.25,000. It was agreed that the sale should be completed within a period of one year. Ultimately, a term was introduced by agreement that before the month of 'Thai' in the next year, possession will be handed over and the sale deed will be executed. The defendant was in need of money in order to perform his sons' marriages. He was also in debts and as a manager of the joint family consisting of himself and his sons, he had to meet the needs of the family. There was legal necessity for selling the property and that was the reason for the defendant agreeing to sell the same. Though the property was the self-acquired property of the first defendant, he agreed to get the signatures of his sons in the said deed. When the plaintiff called upon the defendant to execute the sale deed in January 1978, the first defendant wrote a letter containing false allegations and concocted a new story that he intended to execute only a mortgage and there was an agreement only for that purpose. The case of the defendant is false and the plaintiff having parted with a sum of Rs.25,000 was entitled to get a sale deed from the defendant on payment of balance. The plaintiff is prepared to deposit the balance into court.

2. The first defendant filed a written statement contesting the genuineness of the agreement. According to the first defendant, he was in need of money for having an operation for cataract in his eye and he approached the plaintiff therefor. He wanted a loan of Rs.40,000 and agreed to execute a mortgage in favour of the plaintiff over the suit property. For the purpose of preparing an agreement to execute a mortgage, he signed certain papers at the places shown by the plaintiff and at that time he could not see due to cataract, he signed as directed by the plaintiff, without seeing what exactly the papers on which he had signed.

He received a sum of Rs.15,000 only from the plaintiff and got himself admitted in the General Hospital at Madras. After his discharge he got a letter from the plaintiff and when he wrote to the plaintiff to prepare the mortgage deed, the plaintiff came forward with a case that there was an agreement for sale. The agreement for sale is a fabricated one and the plaintiff is not entitled to have a decree for specific performance. The property is joint family property and there was no legal necessity and it is not binding on the sons of the defendant.

3. The first defendant died soon after the filing of the suit and his legal representatives were brought on record as defendants 2 to 8. The second defendant is the widow and defendants 3 to 5 are the sons while defendants 6 to 8 are the daughters. The legal representatives filed a formal written statement adopting the written statement already filed by their father and adding that they were not aware of the suit agreement and the first defendant had no right to enter into an agreement in respect of the entire property. They also contended that the first defendant was in affluent circumstances and had no necessity whatever to borrow any money.

4. The trial court framed six issues and one additional issue. The trial court held that the suit agreement is true and the first defendant intended to sell his property to the plaintiff. It also held that the first defendant had received a sum of Rs.25,000 and his case that he received only Rs.15,000 was not true. The trial court held that the property was a joint family property and there was no evidence as to the application of the money for necessary purposes. Consequently, the trial court passed a decree in favour of the plaintiff for specific performance of the contract with respect to undivided 1/4th share of the first defendant. The trial court directed the plaintiff to deposit a sum of Rs.25,000 towards the balance of sale price thereby reducing the consideration to 1/4th of what was agreed. Obviously, the trial court took the view that the decree being for specific performance of 1/4th share, the consideration should also be only for 1/4th thereof. There can be no doubt that the said decree is erroneous and if at all the trial court could have directed sale of 1/4th share for the full consideration of Rs.1,10,000 and not for 1/4th thereof.

5. In the appeal, the plaintiff's counsel contends

that the trial court had taken an erroneous view inasmuch as it held that there is no proof of the application of money for necessary purpose. Counsel argues that the property is the self-acquired property of the first defendant and the finding of the court below is erroneous on that aspect also. It is contended that the agreement is supported by legal necessity and it is binding on all the sons of the first defendant.

6. *Per contra*, learned counsel for the respondents contends that the agreement itself is not true and the finding of the court below on that question is unsustainable. According to him, what was agreed to by the first defendant was only an agreement for mortgage and not an agreement for sale. He submits that the evidence makes out that the plaintiff has not come to court with a true case and if at all the first defendant had received only a sum of Rs.15,000 by way of loan. He contends that there should be no decree for specific performance of any part of the contract.

7. We take up for consideration the question as to whether Ex.A-2 is genuine and there was an agreement for sale as contended by the plaintiff. Several circumstances have been pointed out by learned counsel for the respondents which create a grave suspicion as to the genuineness of the agreement. Ex.A-2 comprises of six stamp papers, five of them being for 50 paise each and one 25 paise. The fifty paise stamp papers have been purchased from one R.K.Nagaraja Rao, stamp vendor, Karur. The name of the person who purchased the stamps has not been mentioned in the stamp paper. We, however, find the name of one Subramanian in rubber stamp at the top of each stamp paper. It is not clear whether it is the name of the purchaser or name of somebody else. It is quite likely that Subramanian was the purchaser and instead of writing his name in ink, his rubber stamp was utilised and his name was engrossed on the stamp paper with the aid of the rubber stamp. The sixth stamp paper is purchased from one P.Kumar, stamp vendor in Dharmapuri and the name of the purchaser is one Rajendran of Dharmapuri. That was purchased on 7.2.1977, while all the other stamp papers were purchased on 2.3.1977. There is no explanation in the evidence as to why the stamp papers were purchased in Karur and Dharmapuri on some earlier dates. The evidence of P.W.2 who is admittedly a broker and who according to P.W.1 bought the stamp papers and got the document typed, is to

the effect that he purchased the stamp papers on 9.3.1977, the date which the document bears. According to him, he was sent for by the first defendant to his house on 9.3.1977 at 9 a.m. and when he went there he saw P.W.1 and the first defendant sitting together. He was told that the first defendant agreed for selling the house to the plaintiff and they wanted an agreement to be prepared. Exs.A-24 and A-25 were handed over to him and he was asked to prepare a draft of the document. He went to his house, prepared a draft and brought it back after getting it typed. There is no explanation in his evidence as to how the stamp papers were purchased such earlier and in different places other than Salem, where the parties were living. P.W.1 has been cross-examined on these aspects of the matter in extenso. According to his evidence, there were talks about a week prior to Ex.A-2 and they were concluded on that day. Nobody was present at the time of the talks. on 9.3.1977 stamp papers were purchased by P.W.2 and they were purchased in the office of the Sub Registrar at Shevvapattai, Salem. According to him, they were purchased at about 12 noon on that date and he did not know who typed the document. Thus, his evidence also does not explain as to how the stamp papers were purchased in Karur and Dharmapuri long prior to the date of Ex.A-2.

8. The next circumstance is the absence of any witnesses to the document as such. In the last page, there is a provision for the signature of the witnesses and it is typed as " ". Below that, nobody has signed his sign. There is a blank space. At the bottom of the page, P.W.2 has signed after writing "attested by". He has not explained as to why he has not signed below the word " ". Nor is there any explanation on his part as to why the signature of any other person was not obtained at that time. According to P.W.1 and P.W.2, all the sons of the first defendant were present at that time. Yet, nobody's signature was taken on the document atleast as a witness. It is the case of P.W.1 that the first defendant agreed to get the signature of his sons at the time of the sale deed. If that is true he would have certainly obtained the signature of his sons, atleast as witnesses in Ex.A-2.

9. The next circumstance is, in page 2 of the document, a line is written in ink representing the correction made in that page just above the signature. That line is touching the signature of the first

defendant. That shows that the signature of the first defendant must have been put before the correction was entered. According to P.W.2 the corrections were made before the parties signed the document. It is apparent from page 2 that the said version cannot be true. The case of the first defendant that he signed blank papers at the places shown by the plaintiff without seeing what the papers were, appears to be probable. His case that he was suffering from cataract at that time is also proved by Ex.B-20. It shows that he was admitted in the General Hospital, Madras, on 31.3.1977 and discharged on 14.4.1977. This document has been rejected by the learned Judge on the ground that it does not bear the seal of the hospital. Obviously, the learned Judge is not aware that the Government Hospitals do not affix their seals in the out-patient cards given to the patients. The document appears to be quite genuine. It is signed by a Doctor on 14.4.1977. It mentions the treatment given to the patient and also the illness of the patient. It is clearly stated that the patient was suffering from cataract in the right eye. The blood-pressure of the patient is noted. It is seen that his urine has been tested for sugar and the result is negative. There is no reason to suspect the genuineness of the document. It has been produced by D.W.1, the son of the first defendant, who is the fifth defendant in the court below. We accept the case of the first defendant that he was suffering from cataract and it is quite probable that he was not in a position to read any document.

10. The document, Ex.A-2, contains corrections in pages 2 and 6. None of the corrections has been attested or initialled by any person. Usually, a document would show as to who typed it or who made the corrections. But Ex.A-2 is silent on that aspect. P.W.1 has deposed that P.W.2 told him that there was no necessity for any person to witness the document. But as pointed out already, there is a provision for witnesses. There is no explanation as to why such a provision was made when P.W.2 who got the document prepared and typed was of the opinion that no witness was necessary. Neither P.W.1 nor P.W.2 has even given the name of the person who typed the document. The chief examination of P.W.2 reads as if he typed it himself. In the cross-examination he admits that he knows to type in Tamil. He says that the document was typed by somebody else without giving out his name. According to him, the name

of the typist was not mentioned in the document because he dictated the contents and it was typed by another person. The explanation is hardly acceptable.

11. According to P.W.1 and P.W.2, two copies were prepared on stamp papers. The original was retained with P.W.1 after both parties signed and the copy was handed over to the first defendant. There is a recital to that effect in the document itself. But, P.W.1 admits in his cross-examination that he has got whether another original of the document with him. Obviously, he means that both copies were with him. There is no explanation as to how both copies are with him. But, the learned trial Judge has chosen to brush aside this admission on the part of P.W.1 with a remark that it was an inadvertent statement on his part. We are not prepared to hold that there was any inadvertence on the part of P.W.1, who is not an illiterate and who is admittedly a worldly-wise man. He would not have made any inadvertent statement in the court at the time of evidence. There is no attempt made in the re-examination to explain that it was made by inadvertence. Hence, the admission of P.W.1 stands and there is no explanation for his having both the copies of the documents. That also belies the recital in Ex.A.2.

12. The corrections made in Ex.A-2 relate to the material terms of the documents. In page 2 it was typed originally that if the plaintiff failed to complete the transaction, he should issue a sum of Rs.5,000 out of the advance paid and the first defendant shall give back the sum of Rs.20,000 to him. Later, the figure '5,000' was corrected as '25,000' and the provision for returning a sum of Rs.20,000 has been struck off. In page 6, a new clause is added that the first defendant shall give possession of the property before the end of the month 'Thai' in the next year (Pingala year) and after handing over the key, he should execute the sale deed. In the document as typed originally the provision is to the effect that the transaction should be completed within a period of one year. That could be sufficient to cover the period mentioned in the last clause which is newly added. There is no explanation as to why the last clause was added at the end of the document.

13. The above suspicious circumstances not having been explained by P.W.1 and P.W.2, the case of the defendants gets probabilised. The agreement is said to have taken place on 9.3.1977 as per

Ex.A-1. The next document which has come into existence is Ex.A-1 dated 27.1.1978 a letter written by the plaintiff to the first defendant. In between there is no correspondence between the two parties. In that letter, the plaintiff has merely stated that there has been a long lapse of time after the agreement relating to the house. The letter does not say clearly that it was a sale agreement. The other details of the agreement are also not mentioned. Of course, by itself the letter may not create any suspicion. But, taking along with the other circumstances already referred to the contention of learned counsel for the respondents is well founded in that the plaintiff would have certainly given the details of the agreement in that letter which is written nearly ten months after the date of Ex.A-2. The reaction of the first defendant was immediate. It should be noted that Ex.A-1 was sent by registered post. There was no occasion for the plaintiff to send a registered letter to the first defendant when there is nothing on record to show that the relationship between the parties had become strained between 9.3.1977 and 27.1.1978. If everything was normal, one would expect the plaintiff to approach the first defendant orally or send a letter by ordinary post. Both are residing in the same street, viz. Bangala Street. While the plaintiff was residing in Door No.35, the first defendant was residing in Door No.22. There is nothing in the evidence of P.W.1 to explain the necessity for sending the letter by registered post on 27.1.1978. In that context, the immediate reaction of the first defendant in sending a reply under Ex.A-19, dated 31.1.1978 acquires much significance. In that letter, the first defendant had stated very clearly that the plaintiff had agreed to take a mortgage and prepare an agreement for such a mortgage. The first defendant has also stated that in spite of several attempts made by him, he could not meet the plaintiff and he had already signed all the papers in the places shown by the plaintiff. He has also referred to the receipt of Rs.18,000 by way of advance and the handing over of all the title deeds to the plaintiff at that time. He has called upon the plaintiff to send the draft document for mortgage immediately. In reply thereto, the plaintiff sent a lawyer's notice in Ex.A-16, dated 20.2.1978. No doubt in that notice he has stated his own case and that is denied in Ex.A-17, dated 4.3.1978. Then followed the present suit.

14. Thus, the case of the first defendant has been

throughout that he signed blank papers at the instance of the plaintiff and he never intended to sell the property or enter into an agreement for that purpose. The first defendant has admitted the receipt of Rs.15,000. The plaintiff's case is that he has paid a sum of Rs.25,000 as advance. The plaintiff having come to court with a prayer for specific performance, is bound to prove that he paid Rs.25,000 by way of advance. In spite of that, there is only his oral evidence and there is no documentary evidence to substantiate that case. Reliance is placed on the recital in Ex.A-2, but that is a disputed document. We have already pointed out the several suspicious circumstances surrounding the document Ex.A-2. In those circumstances, the plaintiff ought to have taken steps to prove the payment of Rs.25,000 which will go a long way to prove his case. Admittedly, he is an income-tax assessee and he is maintaining accounts. It is also his case in the evidence that he has entered the payment of Rs.25,000 to the first defendant in his accounts; but he has not chosen to produce the accounts. Learned counsel for the plaintiff contends that no notice was issued to the plaintiff to produce the accounts and no adverse inference shall be drawn against him. We are unable to accept that contention. When the burden is on the plaintiff to prove clearly in order to get the equitable relief of specific performance, he ought to have produced the best evidence available with him and his failure to do so would enjoin the court to draw an adverse inference against him. Even if the burden was not on him, he ought to have produced the best evidence available with him. *Vide: Gopal Krishnaji Keikar v. Mohammed Haji Latif, A.I.R. 1968 S.C. 1413.*

15. A perusal of the evidence of P.W.1 and P.W.2 in the light of the circumstances set out earlier will show that neither of them has spoken the truth. The mere fact that the trial Court had seen the witnesses in the box and watched their demeanour and chosen to accept their evidence will not prevent this Court from appreciating the evidence and holding that their evidence is not believable particularly when all the circumstances relevant are available on record. In fact, the trial court has not chosen to accept the evidence of P.Ws.1 and 2 as entirely true. The trial court has refused to believe the evidence of P.Ws.1 and 2 as regards their explanation for not obtaining the signatures of defendants 3 to 5 at the time of the execution of

Ex.A-2 even though they were present according to them.

16. All the circumstances referred to by us have been placed before the trial court and the arguments advanced by learned counsel for the defendants have been noted in the judgment in paragraph 10. But, after setting out those arguments, the learned Judge has not chosen to consider them and arrive at a conclusion with regard to the same. He has simply ignored them and proceeded to consider the other points.

17. In the circumstances, we hold that the plaintiff has not established the genuineness of Ex.A-2 or that the first defendant intended to execute an agreement for sale of his property. Nor the plaintiff has proved the payment of Rs.25,000 as claimed by him by way of advance. Because the first defendant has admitted receipt of Rs.15,000 we hold that the plaintiff had paid only a sum of Rs.15,000 and that too by way of loan to the first defendant when he was in need of the same.

18. In view of our above findings, the other questions do not arise. But, for the sake of completion, we think it better to refer to those matters also and give our findings. As regards the character of the property, learned counsel for the plaintiff relies strongly on the recital found in Ex.A-2 that the property is self-acquired. As we have held that Ex.A-2 is not a genuine document, that recital will be of no use to the plaintiff. Reliance is placed upon a recital in Ex.A-24, a mortgage deed dated 30.5.1966 executed by the first defendant in favour of Salem Urban Co-operative Bank Limited. That document has been executed not only by the first defendant but also his son Jayapal, who is the third defendant in this suit. It is stated therein that the property was purchased by the first defendant under a sale deed dated 19.1.1985 and belongs to him. No doubt the recital is helpful to the plaintiff in his contention that the property is a self-acquired property. But, that is the only circumstance which is in support of the plaintiff in this case. All the other evidences indicate against the plaintiff in so far as the character of the property is concerned. Ex.B-1 is a partition deed dated 19.12.1949 under which the first defendant got several properties which belonged to his joint family consisting of himself and his brothers. It is seen therefrom that the joint family had been running a business of money lending. Some of the outstandings due under that business have been

allotted to the first defendant. It is also in evidence that the first defendant was continuing the business of money lending. P.W.3 who claims to be a neighbour of the first defendant has admitted that the first defendant's father was doing money lending business on a large scale and the first defendant is continuing the same. There is no evidence on record that the first defendant had any other source of income. Thus, the evidence on record conclusively shows that the first defendant had ancestral properties comprising of houses and was running a business which was also ancestral. He had no other source of income with which he could have purchased properties of his own. When there is no evidence as to his independent source of income and when he admittedly was the manager of the undivided family consisting of himself and his sons, the presumption under the Hindu Law has to be drawn and the property should be presumed to be joint family property. The rulings in *Mallappa Girmallappa Beigeri v. Yellappagouda Patil*, A.I.R. 1959 S.C. 906 and *Mallappa Bandeppa Desai v. Desai Mallappa*, A.I.R. 1961 S.C. 1268, will apply on all fours to this case. It has been held that where the manager of a joint Hindu family acquired certain properties in his own name and there was sufficient nucleus of joint family property out of which those properties might have been acquired and spent from those properties and the manager had no other source of income, the presumption arises that the newly acquired properties were the properties of the joint family and unless that presumption was rebutted, it must prevail. In the present case, the first defendant had no other source of income and what all he had was the joint family property. In the circumstances, the recital in Ex.A-24 will not be sufficient to rebut the presumption under the Hindu Law that the property is a joint family property.

19. The only other contention that remains to be considered is whether the agreement for sale, if true, is supported by necessity. The evidence let in by the plaintiff is to the effect that the first defendant was in need of money for the purpose of performing the marriages of his two sons. It is stated in the plaint that the first defendant had been arranging to celebrate the marriages of his two sons and also intending to purchase properties in the names of his children. He had also to discharge the joint family debts for which he required money. Even the document Ex.A-2 does

not recite any purpose for the sale. No doubt some evidence has been produced before court by the plaintiff to show that the first defendant was indebted to others and there were also decrees obtained by strangers as against the first defendant. But, that would not by itself prove that the sale of the suit property was necessitated. The case of the plaintiff that the first defendant required money for celebrating the marriages of his sons is falsified by the fact that the marriages of one son had already taken place and the marriage of his another son took place only a year later. Taking into account the fact that the first defendant was suffering from cataract and was in need of money for his operation, the case of the plaintiff that he required money for other purposes cannot be accepted. The case of the first defendant as set out in the written statement is that he wanted only a sum of Rs.40,000. For getting that such amount, he need not have sold the house worth Rs.1,18,000 even according to Ex.A-2. It is not established in evidence that all the other properties of the first defendant had already been sold. Hence, it cannot be said that the agreement of sale in favour of the plaintiff was supported by legal necessity. In *Balmukand v. Kamala Wati*, (1965)1 M.L.J. (S.C.) 6: (1965)1 An.W.R. (S.C.) 6: A.I.R. 1964 S.C. 1385: (1964)1 S.C.W.R. 494: (1965)1 S.C.J. 212, the Supreme Court held that where adult members are in existence, the decision to sell the property is to be not that of the Manager of the family alone but that of all the adult members of the family, including the manager. There was no evidence in that case that the other adult members of the family had agreed to the transaction or that they consented for it or even about it. In fact it was found that the adult members of the family resisted the claim for specific performance. The court observed as follows:

“(1) Thus, as we have already stated, that for a transaction to be regarded as of benefit to the family it need not be of defensive character so as to be binding on the family. In each case the court must be satisfied from the material before it that it was in fact such as conferred or was reasonably expected to confer benefit on the family at the time it was entered into. We have pointed out that there is not even an allegation in the plaint that the transaction was such as was regarded as beneficial to the family when it was entered into by him with

Pindidas. Apart from that we have the fact that here the adult members of the family have stoutly resisted the plaintiff's claim for specific performance and we have no doubt that they would not have done as if they were satisfied that the transaction was of benefit to the family. It may be possible that the land which was intended to be sold had risen in value by the time the present suit was instituted and that is why the other members of the family are contesting the plaintiff's claim. Apart from that the adult members of the family are well within their rights in saying that no part of the family property could be parted with or agreed to be parted with by the Manager on the ground of alleged benefit to the family without consulting them. Here, as already stated, there is no allegation of any such consultation.

10. In these circumstances, we must hold that the courts below were right in dismissing the suit for specific performance, we may add that granting specific performance is always in the discretion of the court and in our view in a case of this kind the court would be exercising its discretion right by refusing specific performance.”

20. In this case, no doubt the evidence of P.Ws.1 and 2 is to the effect that defendants 3 to 5 viz sons of the first defendant, were present at the time of Ex.A-2 and they did not object to the transaction. Even if Ex.A-2 can be accepted to be true, this version that defendants 3 to 5 were present at that time cannot be accepted. As pointed out already, the trial court itself has refused to accept that version. If defendants 3 to 5 were present at that time, their signatures would certainly have been obtained by the plaintiff and he would have taken some steps to get a record of their consent to the transaction. There is no evidence excepting the *ipso dixit* of P.W.1 and P.W.2 that the sons of the first defendant, were consulted or that they consented to the transaction. In these circumstances, the equitable relief of specific performance cannot be granted in favour of the plaintiff even in Ex.A-2 is found to be true. We would have refused to exercise our discretion in favour of the plaintiff on the facts and circumstances of this case.

21. In the result, the appeal fails and it is dismissed. The memorandum of cross-objections is allowed. The suit is dismissed. The plaintiff will pay the costs of the defendants in the trial court as well as

this Court.

B.S. ---- Appeal dismissed and Memo of cross-objections allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Thangamani, JJ.

S.A.No.838 of 1993 5th August, 1993.

Dayanandammal alias Dayalammal and another
v. Appellants

St.Thomas Tamil Church represented by its Pastor and another
...Respondents.

Civil Procedure Code (V of 1908), O.20, Rule 12 - Decree for mesne profits - It can be passed without holding an enquiry - Specific averments as to mesne profits in plaint - Not denied in written statement - Court, if can proceed on the footing that amount claimed was reasonable.

There can be no doubt whatever that, in law, the court is entitled to pass a decree for mesne profits without holding an enquiry under O.20, Rule 12, C.P.C. In fact, the language of the rule is very clear. The Rule provides that the court may pass a decree for mesne profits or direct an enquiry as to such mesne profits. See: Clause (ba) of Rule 1. Thus two alternatives are provided and it is always open to the court to straightaway pass a decree for mesne profits. In the present case, the specific averments in the plaint not having been denied in the written statement of the defendant, the court was entitled to proceed on the footing that the amount claimed by the plaintiff was reasonable and just and it could be granted. Since the defendants did not join issue on that question, the court was justified in passing a decree. [Para. 9]

Cases referred to:

Harry Kempson Gray v. Bhagu Mian, 58 M.L.J. 215: A.I.R. 1930 P.C. 82. [Para. 2]

J.Jeevanandam v. The Correspondent, The American Advent Mission School, (1985)1 M.L.J. 133. [Para. 5]

Gangaram v. Beharilal, A.I.R. 1952 Bhopal 89. [Para. 6]

Veeran Chetti v. Veeran Chetti, (1938)1 M.L.J. 750: 182 I.C. 14: I.L.R. 1938 Mad. 1050: A.I.R. 1938 Mad. 727: 1938 M.W.N. 286. [Para. 8]

Kantheswaram Ekanathalingaswami Koil, In re., 71 M.L.J. 677. [Para. 8]

A.P.Bagchi v. Mrs.F.Morgen, A.I.R. 1937 All. 36. [Para. 8]

Dwarka Prasad v. Jahuri Sah, A.I.R. 1963 Pat. 158. [Para. 8]

Ganeshi Lal Sharma v. Sm.Snehlata Darsi, A.I.R. 1947 Cal. 68. [Para. 8]

Kalidas Rakshit v. Saraswati Dasi, A.I.R. 1943 Cal. 1. [Para. 8]

T.V.Ramanujam, for Appellants.

R.P.Rathinadurai, for Respondents.

The Judgment of the Court was delivered by Srinivasan, J.: When this second appeal came up for admission on 29.7.1993 we passed an order that only one question of law required for consideration by us viz. whether the judgment and decree of the courts below are vitiated by granting future mesne profits at the rate of Rs.1,000 per mensem without any evidence as at present on record and without enquiry under O.20, Rule 12, Code of Civil Procedure. The respondents had taken notice at that time and both counsel expressed their willingness to argue the appeal this week. Hence, we posted the second appeal to this date.

2. Learned counsel on both sides argued the appeal. It is the contention of learned counsel for the appellants that without an enquiry under O.20, Rule 12, C.P.C., the court cannot pass a decree for future mesne profits. It is submitted that under Rule 12(c) of O.20 the Court has to direct an enquiry into rent or mesne profits from the institution of the suit. Learned counsel draws our attention to the definition of mesne profits in Sec.2(12), C.P.C. according to which, mesne profits are those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits but not including profits due to improvements made by the person in wrongful possession. It is contended that that the courts below have proceeded on the footing that there is no denial in the written statement of the claim for mesne profits made by the plaintiff in the plaint and that

approach is erroneous. According to learned counsel, what is claimed in the plaint is only a particular rate of mesne profits with an averment that it would fetch not less than that amount. Learned counsel submits that it is not mentioned as a fact but it is only a basis for the claim of the plaintiff. He submitted that the plaintiff ought to have pleaded in the plaint that the defendant would have obtained with ordinary diligence from the property the profits which he claims. In the absence of such a plea it cannot be said that there is a pleading as to mesne profits and there is no necessity in such a case for the defendant to make a denial of the same. It is also submitted that there is no evidence on record to prove the amount which the defendant would have received with due diligence from the property by way of profits. Reliance is placed upon the judgment of the Privy Council in *Harry Kempson Gray v. Bhagti Mian*, 58 M.L.J. 215; A.I.R. 1930 P.C. 82. The Privy Council held that the test set by the statutory definition of mesne profits is clearly not that a person has lost by his exclusion, but what the trespasser has or might reasonably have made by his wrongful possession. Learned counsel submits that the test laid down by the Privy Council is not satisfied in the present case by the materials on record.

3. *Per contra*, learned counsel for the respondents draws our attention to the following materials, Ex.A-15 is a notice issued by the respondents to the appellant on 6.8.1980. It is clearly stated therein that the appellants were liable to pay damages at the rate of Rs.500 per mensem from April, 1977 for unauthorised use and occupation of the suit property. Again in Ex.A-17 dated 10.3.1984 the respondents have claimed that the tenancy premises will normally get a rental of not less than Rs.1,000 per mensem and that a suit for recovery of possession with a claim for damages for use and occupation at the rate of Rs.1,000 per mensem with effect from 1.5.1984 would be instituted by the respondents. In reply to the said notice, appellants sent Ex.A-18, dated 17.3.1984. The only averment in the said reply reads thus:

"...Your client has claimed damages for occupation at Rs.1,000 per month. The rent is already too high and the fabulous amount claimed by your client as damages could not be granted to him".

4. It is only thereafter the suit was filed in July, 1984. Para.8 of the plaint is in the following terms:

"Further, the suit property is situate on R.K.Mutt Road, Mandavelly, Madras-28, an important locality in the City of Madras. The suit property has got all locational amenities like Market, Schools, bus routes, hospitals, etc. In the normal course, the suit property will fetch a fair rent not less than Rs.1,000 per month. The plaintiffs therefore called upon the defendants to pay damages for use and occupation of the suit property after 1.5.1984, the termination of tenancy. The damages payable for the period from 1.5.1984 to 30.6.1984 has fallen due. The defendants are liable to pay damages every month at the rate of Rs.1,000 from 1.5.1984 till the delivery of vacant possession of the suit property."

In the written statement there is absolutely no whisper about para.8 of the plaint. There is no reference whatever to the profits which would arise by way of mesne profits from the property. Learned counsel for the appellants submits that the denial in para.2 of the written statement is sufficient to meet the situation. Para.2 of the written statement contains the general denial in the following terms:

"These defendants deny the various allegations set out in the plaint excepting those which are specifically admitted in this written statement and the plaintiffs are put to strict proof of all the other allegations".

This is not sufficient in the eye of law. The defendant is bound to make a specific denial of every allegation in the plaint. O.8, Rule 3, C.P.C., reads that it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

5. A question arose before this Court as to whether in the case of mesne profits a general denial would be sufficient in view of the wording of O.8, Rule 3, referred to above. It was answered in the negative by this Court in *J.Jeevanandam v. The Correspondent, The American Advent Mission School*, (1985)1 M.L.J. 133. The relevant part of the judgment reads thus:

"The immediate question is what is the damage to which the plaintiff is entitled. In the plaint, the appellant had claimed a sum of Rs.10,000 towards damages. In the written

statement, there is excessive, no plea that the amount claimed is excessive. In the result, no issue did arise out of the pleadings with reference to the quantum of damages claimed by the appellant. As a matter of fact, no issue was framed by the trial court. When the court was not called upon to decide a particular point, it is unnecessary that any evidence need be placed before court for the claim which was not specifically disputed in the written statement. The learned counsel for the respondent however referred to O.8, Rule 3, C.P.C., and contended that notwithstanding any specific denial in the written statement, it was the duty of the appellant to adduce evidence to sustain the quantum claimed by him. A fair reading of O.8, Rule 3, C.P.C., will show that the said argument can hardly be countenanced. In the instant case, the respondent-management was so sure about the defence regarding the appellant's entitlement relating to the declaration sought for by the appellant. The result was that the respondent did not specifically challenge the quantum claimed by the appellant. According to me, that is contemplated under O.8, Rule 3, C.P.C., is that so far as the damages are concerned the defendant need not specifically deal with each allegation which was averred in the plaint to support the claim of damages. But I am unable to read O.8, Rule 3 as suggesting that there was no duty on the defendant to challenge the quantum of damages, and that even without such a specific denial, he can still call upon the plaintiff to prove the damages. It may not be out of place to point out that in a case where damages or mesne profits are claimed the defendant shall specifically allege that the quantum is either excessive or arbitrary so as to raise an issue and to render the court to give its finding. In this case, there is no specific denial relating to the claim for damages. Therefore, as pointed out by me earlier, there was no occasion for the court of frame and determine that issue."

6. A similar view is expressed by a Judicial Commissioner in *Gangaram v. Beharilal*, A.I.R. 1952 *Bhopal* 89. It is said:

"Going over to the next ground, viz. regarding the award of mesne profits in the absence of evidence in support of the quantum, an important rule seems to have been forgotten by the

applicant in this behalf. A perusal of the plaint shows that the plaintiff claimed profits at the rate of Rs.65 per year. In answer to this, the defendant-applicant merely stated that he denied his liability for the profits. There was no specific denial of the quantum of the profits with the result that that portion could be deemed to be admitted. This would be perfectly clear from para.4 of the additional pleadings in the written statement of the defendant. A perusal of para.8 of the judgment in the second appeal clearly indicate that firstly this contention was not even sought to be made while arguments were heard in the appeal and secondly it was, though briefly, still considered and as I have already observed the contention could not be raised by the petition for review. In the circumstances, I am clear that no petition for review of the judgment and decree is tenable on the grounds raised in the petition."

7. The trial court has in para.10 of its judgment referred to the fact that in the locality in which the suit property is situate it would easily fetch a rent of more than Rs.1,000 per month and accordingly granted the amount prayed for by the plaintiff. In the appellate court arguments were advanced that the court ought to have directed an enquiry under O.20, Rule 12, C.P.C., and ought not to have straightaway passed a decree for mesne profits. Rejecting that argument the appellate court that when the matter was not in issue there was no necessity to direct an enquiry under O.20, Rule 12. The appellate court pointed out that the written statement did not contain any denial of the plaint allegation that the income from the property would be not less than Rs.1,000 per mensem.

8. A Division Bench of this Court in *Veeran Chetti v. Veeran Chetti*, (1938)1 M.L.J. 750: 182 I.C. 14: I.L.R. 1938 *Mad.* 1050: 1938 *M.W.N.* 286: A.I.R. 1938 *Mad.* 727, has held that it is not necessary for a court to direct always an enquiry into mesne profits under O.20, Rule 12, C.P.C., and that a court could straightaway pass a decree for mesne profits if sufficient materials were available on record. Rejecting a similar contention as raised in this case, the Division Bench observed:

"But it is contended that it is not competent to a court to pass a final decree for mesne profits without an enquiry and the only decree it can pass is a preliminary decree under O.20, Rule 12, C.P.C., and Sec.11(i) contemplates cases

only where past profits were claimed on it is only in respect thereof the amount can be claimed and court-fee is payable, having regard, to Sec.7, Court fees Act and O.7, Rule 2, C.P.C. Reliance was placed on a number of cases in support of this contention, some of which we propose to deal with. Mr.Narasimharaju laid emphasis on the observations of Venkatasubba Rao, Officiating C.J. as he then was in *Kantheswaram Ekanathalingaswami Koil, In re.*, 71 M.L.J. 677 at 680,

“As regards future mesne profits, the court has no such option but is bound in the first instance to pass a preliminary decree.

With due respect to the learned Judge, we are not able to appreciate the force of the express, ‘is bound’”.

“As he himself says, the court is not bound to pass a decree for future mesne profits, the passing of the decree being in the discretion of the court (p.682), but if it chooses to pass a decree should it only be a preliminary decree? When the section says is that in regard to future profits the court may direct an inquiry and in case an inquiry is directed, it shall pass a decree in accordance with the result of that inquiry. One thing is plain; jurisdiction is conferred on the court trying the suit to pass a decree finally determining the amount of profits payable consequent to the institution of the suit. The determination of the said profits is an essential part of the decree in the suit and must be done by the court which passed the decree and not by the court which executes it. If this is the principle underlying the section is there anything to preclude the court from passing the decree without directing an enquiry if the parties agree or do not object? The section does not say that no final decree should be passed unless there had been a previous inquiry and the court must pass a preliminary decree whether an inquiry is necessary or not. In cases where an inquiry is unnecessary, it seems to pass such a decree. As pointed out by Sulaiman, C.J. in *A.P.Bagchi v. Mrs.F.Morgen*, A.I.R. 1937 All. 36.

A preliminary decree becomes necessary where the exact amount has to be ascertained after examination of fresh evidence. In that case the learned Judge observed:

When the plaintiff made it clear that she confined her relief to the recovery of the fixed rents which had been agreed upon between the parties, the amount was definitely ascertained and there was no occasion for framing a preliminary decree so that there may be another ascertainment of the amount due to the plaintiff,

the court was not bound to pass a preliminary decree in the first instance. It is therefore, perfectly competent to the court, without directing an enquiry to pass a decree finally determining the amount of profits payable subsequent to the institution of the suit if it is made out that it is not necessary to make such an enquiry and it cannot be said that such a decree is not final or incapable of execution, nor would it be in contravention of the provisions of O.20, Rule 12, C.P.C.”

In *Dwarka Prasad v. Jahuri Sah*, A.I.R. 1963 Pat. 158, a similar view was expressed by a Division Bench of that Court. It has said:

“The omission to make an order contemplated by O.20, Rule 12(1)(c) of the Code of Civil Procedure was an accidental slip and it ought to be corrected by the court. Reference may be made to a decision of the Calcutta High Court in the case of *Kalidas Rakshit v. Saraswati Dasi*, A.I.R. 1943 Cal. 1. The question now, is whether it is necessary to direct an enquiry mentioned by O.20, Rule 12 of the Code of Civil Procedure, or whether we should pass a decree at the rate of Rs.200 per month from the date of institution of the suit until delivery of possession to the plaintiffs or expiration of three years from the date of decree, whichever event first occurs. Reference in this connection may again be made to a decision of the Calcutta High Court in the case of *Ganeshi Lal Sharma v. Sm.Snehlata Dasi*, A.I.R. 1947 Cal. 68. Upon a review of the case law on the subject, it was held in *Ganeshi Lal Sharma's case*, A.I.R. 1947 Cal. 68, that a court would be quite within its rights if it passed a decree for mesne profits payable subsequently to the suit if, in the circumstances of the case, an enquiry is unnecessary. In our opinion, the same position prevails in the instant case”.

9. Thus, there can be no doubt whatever that, in law, the court is entitled to pass a decree for mesne profits without holding an enquiry under O.20,

Rule 12, C.P.C. In fact, the language of the rule is very clear. The Rule provides that the court may pass a decree for mesne profits or direct an enquiry as to such mesne profits. See: Clauses (ba) of Rule 1. Thus two alternatives are provided and it is always open to the court to straightaway pass a decree for mesne profits. In the present case, the specific averments in the plaint not having been denied in the written statement of the defendants, the court was entitled to proceed on the footing that the amount claimed by the plaintiff was reasonable and just and it could be granted. Since the defendants did not join issue on that question, the court was justified in passing a decree.

10. In the result, we agree with the view taken by the courts below and dismiss the second appeal. No costs.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Abdul Hadi, J.

C.R.P.No.675 of 1987 18th August, 1993.

Basil Products by Partners ...Petitioner
v.
Mathuram Perumal and others. ...Respondents.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec. 23(1)(b) - Civil Procedure Code (V of 1908), O.9, Rule 13 - Conditional order passed on 20.3.1986 directing petitioner to pay Rs. 25 before 2.4.1986 failing which petition will be dismissed - Amount not paid - Petition dismissed on 3.4.1986 - Appeal against order dated 3.4.1986 if maintainable - Appeal dismissed - Revision if lies. In a rent control original petition, petitioner 'B' was set *ex parte* by order dated 25.2.1986. He filed a petition to set aside the order. The court passed an order on 20.3.1986 directing that the petition would be allowed payment of Rs.25 on or before 2.4.1986 and stipulating that failing payment, the petition would be dismissed. The petition was called on 3.4.1986. The amount had not been paid. It was dismissed. 'B' filed an appeal against the

order dated 3.4.1986. It was dismissed. He filed a revision.

Held: So far as what is contained in Sec.23(1)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act, though the term 'an order' is used therein, in the light of the Division Bench judgment of this Court in *Ramayya v. Lakshmayya*, (1944)1 M.L.J. 381, the order dated 3.4.1986 is not actually an order in law. The Division Bench says that the first order was the only order in the case and the second order was nothing more than recording the local position which had arisen from the non-fulfilment of the condition precedent by the petitioner and the second order was not any further order, because no further order was required in the case. The same principle would apply even in the present case, which no doubt, arises under the Act. The principle being something fundamental, it would also equally apply to similar 'second' orders passed under the Act also. In the present case, the order dated 3.4.1986 does not make any new inroad into the rights and liabilities of the parties. It is only a formal order following automatically from the earlier order. Actually, it is only the earlier order dated 22.3.1986 which affects the rights and liabilities of the parties. No doubt, the said order allows M.P.No.245 of 1986 on condition. If that condition is not fulfilled, then automatically, the miscellaneous petition gets dismissed and in such a situation an appeal could be against the conditional order dated 20.3.1986 only. Therefore, it is clear that the abovesaid rent control appeal itself is not maintainable. The rights of the petitioner are affected only by order dated 20.3.1986 and no further inroad into his right has been made anew by the latter order dated 3.4.1986. If that is so, the present civil revision petition is also not maintainable. [Paras. 10 & 11]

Cases referred to:

Ramayya v. Lakshmayya, (1944)1 M.L.J. 381: A.I.R. 1944 Mad. 383; I.L.R. 1945 Mad. 203; 57 L.W. 292; 1944 M.W.N. 296. [Paras. 8, 10]
Balarama Reddy v. Subbarama Reddy, (1953)1 M.L.J. 40: A.I.R. 1953 Mad. 360; 8 D.L.R. (Mad.) 199; 1952 M.W.N. 953. [Para. 8]
Central Bank of India v. Gokal Chand, A.I.R. 1967 S.C. 799; (1967)1 S.C.W.R. 316; (1967)1 S.C.R. 310; (1967)2 S.C.J. 826. [Paras. 9, 11]
Appulu v. Fatima Zohra, (1982)2 M.L.J. 340. [Para. 9]
Venkatachary v. Parthasarathy, (1980)2 M.L.J. 243.

[Para. 9]

Hyath Basha v. Tajan Bi, (1983)1 M.L.J. 277: A.I.R. 1983 Mad. 328: 96 L.W. 85: (1983)1 Rent.L.R. 594: (1983)1 Rent.C.R. 577: (1983) Ren.C.J. 338.

[Para. 9]

P.K.Sivasubramaniam, for Petitioner.

N.S.Manoharan, for Respondents.

The Court made the following

ORDER: The tenant under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (hereinafter referred to as 'the Act'), who is respondent in R.C.O.P.No.3598 of 1985 filed by the 1st respondent-Original landlord for eviction is the revision petitioner. Respondents 2 and 3 herein are subsequent purchasers of the same building from the 1st respondent.

2. In the abovesaid rent control original petition, the petitioner herein was set *ex parte* by order dated 25.2.1986 and so he filed M.P.No.245 of 1986 to set aside the said order. No doubt in the said miscellaneous petition, an endorsement was made by the learned counsel for the 1st respondent on 28.3.1986 as follows:

"The respondent Mathuram Perumal is not filing any counter. Petition may be allowed and the main RCOP may be posted in the list, as the arrears of rent accumulates further".

3. However, the Rent Controller has allowed the said miscellaneous petition only on condition that the 1st respondent pays a sum of Rs.25 on or before 2.4.1986. The said conditional order was passed on 20.3.1986 and the order runs as follows:

"In view of the endorsement of the other side counsel the petition will be allowed on payment of Rs.25 on or before 2.4.1986 failing which the petition will be dismissed. Call on 3.4.1986".

Thus, even here it may be noted that even though as per the endorsement the petition may be allowed without stipulating anything regarding payment of costs, the learned Rent Controller has only passed a conditional order stipulating that Rs.25 has to be paid before the stipulated date as condition for allowing the said petition.

4. Then on 3.4.1986 the miscellaneous petition was called and since the said sum of Rs.25 was not paid by then, the consequential order of dismissal of the said petition was passed.

5. The petitioner has subsequently filed R.C.A.No.498 of 1986 as against the abovesaid dismissal order dated 3.4.1986 only, and not against

the initial conditional order dated 20.3.1986. The said rent control appeal was dismissed and so the petitioner has filed this revision petition.

6. Now, the learned counsel for the respondents contends that the civil revision petition itself is not maintainable since the abovesaid rent control appeal itself is not maintainable against the order dated 3.4.1986, since, if at all a rent control appeal could be filed only against the order dated 20.3.1986. But, the learned counsel for the petitioner contends that pursuant to Sec.23 of the Act, every order is appealable and the order dated 3.4.1986 also affects the rights of the petitioner and hence it is appealable. No doubt he also points out on the merits of the case that the Appellate Authority wrongly stated that the abovesaid endorsement was made with a stipulation regarding payment of cost, though actually it is not so. No doubt this latter contention of the said counsel on merits, is correct the endorsement does not at all stipulate payment of cost.

7. But only if the abovesaid rent control appeal and, consequently, the present civil revision petition are maintainable, the petitioner could go into the merits of this civil revision petition. So, the first point to be considered is whether the rent control appeal and the civil revision petition are maintainable at all. If the rent control appeal is not maintainable, consequently, the civil revision petition is also not maintainable.

8. So, let me now see whether the rent control appeal is maintainable. In *Ramayya v. Lakshmayya*, (1944)1 M.L.J. 381: A.I.R. 1944 Mad. 383: I.L.R. 1945 Mad. 203: 57 L.W. 292: 1944 M.W.N. 296, a Division Bench of this Court has held in the context of O.9, Rule 13, C.P.C., that where a conditional order allowing the application for setting aside the *ex parte* decree is passed on a particular date and on the applicant's failure to fulfil the condition, consequently, an order later on, is passed dismissing the application, actually there is only one order in law, though the court might have chosen to pass a formal consequential order after the non-fulfilment of the condition stipulated in the original conditional order. Therefore, the Division Bench held that only the original order is appealable. In this connection, the relevant observation of the Division Bench is as follows:

"But in my view, no further order was passed at all and the reason, as I have indicated it that no

further order was required”.

This decision has also been followed in *Balarama Reddy v. Subbarama Reddi*, (1953)1 M.L.J. 40: A.I.R. 1953 Mad. 360: 8 D.L.R. (Mad.) 199: 1952 M.W.N. 953 and I have also followed the abovesaid decision in my judgment dated 23.7.1993 in *Nachiar Theatre, Thirupattur by Sakunthalai Rajan v. M/s. Sheik Iron Centre, Madurai by partner A. Sadhakkathullah*, C.M.A.No.596 of 1993.

9. But the learned counsel for the petitioner strongly contends that those decisions arose under O.9, Rule 13, C.P.C. and they would not apply to the present proceeding under the Act. In this connection, he draws my attention to Sec.23(1)(b) of the Act, which provides for appeal to the Appellate Authority under the said Act. It no doubt says “any person aggrieved by an order passed by the Controller may....prefer an appeal.... to the appellate authority having jurisdiction. He lays emphasis on the words “an order” and contends that even the abovesaid order dated 3.4.1986 is an order and hence an appeal would lie against the said order also. In this connection, the learned counsel also relies on *Central Bank of India v. Gokal Chand*, A.I.R. 1967 S.C. 799: (1967)1 S.C.W.R. 316: (1967)1 S.C.R. 310: (1967)2 S.C.J. 826, which also arose under the corresponding Rent Control Act of Delhi. Further, he also relies on *Appulu v. Fatima Zohra*, (1982)2 M.L.J. 340, to contend that if any party's right is affected by any order, it is appealable. He also relies on the decisions in *Venkat-achary v. Parthasarathy*, (1980)2 M.L.J. 243 and *Hyath Basha v. Tajan Bi*, (1983)1 M.L.J. 277: A.I.R. 1983 Mad. 328: 96 L.W. 85: (1983)1 Rent.L.R. 594: (1983)1 Rent.C.R. 577: (1983) Rent.C.J. 338.

10. Now, so far as what is contained in Sec.23(1)(b) of the Act, though the term ‘an order’ is used therein, in the light of the Division Bench judgment of this Court in *Ramayya v. Lakshmayya*, (1944)1 M.L.J. 381, the order dated 3.4.1986 is not actually an order in law. As already pointed out, the Division Bench says that the first order was the only order in the case and the second order was nothing more than recording of the legal position which had arisen from the non-fulfilment of the condition precedent by the petitioners and that the second order was not any further order, because no further order was required in the case. The same principle would apply even in the present case, which no doubt, arises under the Act. The principle being something fundamental, it would

also equally apply to similar ‘second’ orders passed under the Act also.

11. In *Central Bank of India v. Gokal Chand*, A.I.R. 1967 S.C. 799: (1967)1 S.C.W.R. 316: (1967)1 S.C.R. 310: (1967)2 S.C.J. 826, the facts were different. There, the question was whether an order of the Rent Controller refusing to set aside an *ex parte* order is subject to appeal to the Rent Control Tribunal. Thus, the facts are different in that case. There was no first conditional order and a second consequential order, there, as in the present case. That apart, the Supreme Court, in the said case, has made the following observation:

“In the context of Sec.38(1) (the above referred to Delhi Rent Control Act) the words ‘every order of the Controller made under this Act’ though very wide, do not include interlocutory orders, which are merely procedural and do not affect the rights or liabilities of the parties”.

In the present case, the order dated 3.4.1986 does not make any new inroad into the rights and liabilities of the parties. It is only a formal order flowing automatically from the earlier order. Actually, it is only the earlier order dated 22.3.1986 which affects the rights and liabilities of the parties. No doubt, the said order allows M.P.No.245 of 1986 on condition. If that condition is not fulfilled, then automatically, the miscellaneous petition gets dismissed and in such a situation an appeal could lie against the conditional order dated 20.3.1986 only. Therefore, it is clear that the abovesaid rent control appeal itself is not maintainable. Even in *Appulu v. Fatima Zohra*, (1982)2 M.L.J. 340, it has only been held that if one's right is affected by any order, then it is an appealable order. Here, the rights of the petitioner are affected only by order dated 20.3.1986 and no further inroad into his right has been made anew by the latter order dated 3.4.1986. If that is so, the present civil revision petition is also not maintainable.

12. In the result, the civil revision petition is dismissed. In the circumstances of the case, there will be no order as to costs. The learned counsel for the petitioner requests time to vacate. Three months' time is granted to the petitioner provided the petitioner files an affidavit within a week from to-day, undertaking to vacate the building positively within three months.

B.S.

Revision dismissed.

**IN THE HIGH COURT OF JUDICATURE AT
MADRAS.**

[Special Original Jurisdiction]

Present: Janarthanam, J.

W.P.Nos.12479 of 1984, 4593 and 11824 of 1985,
8790 of 1986 and 16209 of 1989 8th April, 1993.

**Anna Nagar Western Plot Owners' Association,
Regd.No.256/84 by its President Nallappan and
others** ...*Petitioners*
v.

**The Tamilnadu Housing Board represented by its
Chairman and another** ...*Respondents.*

Constitution of India (1950), Art.226 - Allottees of sites by Housing Board executing lease-cum-sale agreements - Agreeing to final determination of price of site in certain circumstances - Escalation of cost held to be arbitrary in respect of some allottees in a suit and writ petitions - Other allottees served with notice for increased cost of sites - It can be held to be discriminated as against the prior allottees.

The clause relating to fixation of final price as contained in the lease-cum-sale agreement contains certain parameter for revision of the cost of the house sites. According to such clause, it is legitimately permissible for the Housing Board to revise the final cost when there is an increase in the cost of development charges and provisions of amenities etc., and this sort of a revision has to be done within a period of five years from the date of allotment excepting in the case of acquisition proceedings pending in civil courts. Neither the particulars furnished by the Housing Board as a consequence of the demand from the members of the petitioner-Association nor the counter filed by the Housing Board did disclose anything to explain that the revision of cost of the house sites has been impelled to be done by the parameters fixed in the clause relating to the revision of final cost of the house sites. In such circumstances, the petitioner-Association herein cannot be stated to be not right in contending that its members listed in the *annexure* appended to the respective writ petitions had been discriminated against the claimants in C.S.No.385 of 1985 and in petitioners in W.P.Nos.3793 of 1991, etc., batch of cases on this Court.

[Para. 10]

Petitions under Art.226 of the Constitution of

India, praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *mandamus* directing the respondents in all the petitions to forbear from demanding or recovering from the allottees and the members of the respective petitioner's Association any amount in excess of the original price fixed and paid by the allottees whose names are included in the annexure pursuant to the respondents resolution No.20, dated 29.5.1984 and the respondent letter in reference ANN.1/6433/84, dated 23.8.1984.

R.Krishnanurthy, Senior Counsel, for *M/s.B.Kumar and R.Loganathan*, for Petitioners.

S.Doraisamy, for Respondents.

The Court made the following

ORDER: The petitioner and the respondents in all these writ petitions are one and the same. This apart, the facts covering the issues for decision are almost identical. Consequently, these petitions are taken and grouped together for convenient disposal.

2. The petitioner in all these petitions is the association going by the name, 'Anna Nagar Western (or Westend) Plots Owners Association' and the respondents 1 and 2 are respectively the Tamilnadu Housing Board represented by its Chairman, Nandanam, Madras-35 and the Executive Engineer and Administrative Officer, Special Division-I, Anna Nagar Western Extension, Tamilnadu Housing Board, Madras-101.

3. The petitioner-Association, it is said, had been formed for the welfare of the plot owners under the Tamilnadu Housing Board Scheme known as 'Arignar Anna Nagar Western Extension Scheme' and its members are the allottees of the plots in the said scheme.

4. The Tamilnadu Housing Board, it is said, had been constituted for the avowed object of acquiring lands and allotting the same on equitable basis. The Board is to function on a non-profit oriented organisation. The various allottees under the scheme were required to execute lease-cum-sale agreement. The allotments in favour of various allottees had been made during the period between 1972 and 1982.

5. At the time of allotment, the allottees were required to execute another document called 'House Site for Hire Purchase-conditions for Allotment of Building Sites'. There was a crucial clause in the lease-cum-sale agreement for fixation of final

price, which is reflected as follows:

"The final price of the site due to the increased cost of development charges and provisions of amenities etc., shall be determined within a period of five years from the date of allotment excepting in the acquisition proceedings pending in Civil Courts. Such fixation of price by the Lessor/Vendor is conclusive and final".

The tentative price fixed for allotment of house sites depended upon the year of allotment and it ranged from Rs.7,500 to Rs.40,000. Most of the allottees, it is said, had effected payments towards the tentative cost of house sites in instalments. The Housing Board, in the meantime by Resolution No.20, dated 29.5.1984 determined the final cost quantified in a specified sum depending upon the year of allotment and the final cost so fixed varied from Rs.15,600 to Rs.40,000. Based on the said resolution, the Housing Board despatched letters in Ref.No.ANW-1/C433/84, dated 23.8.1984, to various allottees demanding payment of revised cost price, without disclosing the rationale or basis for such revised cost price of the house sites. 6. The petitioner-Association issued a notice to the Housing Board requiring it to disclose the basis for such a revision of cost price. The Housing Board, in turn, furnished particulars, which did not at all disclose anything impelling the Board to revise the cost of the plots due to increase in development charges or provision of amenities or payment of enhanced compensation amount to the erstwhile owners, from whom the lands were acquired for the purpose of allotment of house sites.

7. This apart, the said resolution, it is said, had been held to be invalid and unenforceable and consequently, the fixation of final cost was held to be arbitrary and incorrect in a decision of this Court. In *Anna Nagar Western Extension Association represented by its Secretary K.Chandrasekaran v. The Tamil Nadu Housing Board represented by its Chairman and another*, C.S.No.385 of 1985, dated 1.7.1991, rendered by Maruthamuthu, J.

8. Besides this Court allowed a batch of writ petitions, namely, *The Artisons Residents Welfare Association represented by its President v. The Tamil Nadu Housing Board represented by its Chairman*, W.P.Nos.3993 of 1991, etc. dated 16.3.1992, by directing the Tamilnadu Housing Board to execute sale deeds in favour of the respective allottees therein without demanding any sum in excess of

the original cost fixed in the lease-cum-sale agreement.

9. Contending that the impugned demands on the members of the petitioner-Association as detailed in the list annexed to the respective writ petitions are discriminatory in nature. In the light of the aforesaid decisions of this Court, the present actions have been resorted to for issue of writs of *mandamus* directing the respondents to forbear from demanding or recovering from them any amount in excess of the original price fixed and paid by them.

10. The clause relatable to fixation of final price as contained in the lease-cum-sale agreement, which had been extracted earlier, contains certain parameters for revision of the cost of the house sites. According to such clause, it is legitimately permissible for the Housing Board to revise the final cost when there is an increase in the cost of development charges and provisions of amenities etc., and this sort of a revision has to be done within a period of five years from the date of allotment excepting in the case of acquisition proceedings pending in civil courts. Neither the particulars furnished by the Housing Board as a consequence of the demand from the members of the petitioner. Association nor the counter filed by the Housing Board did disclose anything to explain that the revision of cost of the house sites had been impelled to be done by the parameters fixed in the clause relatable to the revision of final cost of the house sites. In such circumstances, the petitioner-Association herein cannot be stated to be not right in contending that its members listed in the *annexure* appended to the respective writ petitions had been discriminated against the claimants in C.S.No.385 of 1985 and in petitioners in W.P.Nos.3793 of 1991, etc., batches of cases on this Court.

11. In this view of the matter, there is no other go except to allow all these writ petitions as prayed for and accordingly, they are allowed. *Rule nisi* earlier issued are made absolute. There shall, however, be no order as to costs in all these writ petitions.

B.S.

Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *AR. Lakshmanan, J.*

A.A.O.Nos.994 and 1139 of 1992

30th September, 1993.

A. Sahadevan Pillai and others ...Appellants
v.

T. Vasanthakumari and another ...Respondents.

Hindu Minority and Guardianship Act (XXXII of 1956) - Sec.4(1) - Guardian - Definition of Minor girl - Both the parents died in short interval - Petition for appointment of guardian of person and property - Claim by maternal grand parents and also by paternal grand parents of the minor - Maternal grand mother appointed guardian by the District Court - Order confirmed on appeal - Welfare of the minor - Dominant factor for consideration of the court.

Held: Sec.4(1) of the Hindu Minority and Guardianship Act (hereinafter referred to as the Act) defines the 'guardian' as 'a person having the care of the person of a minor or of his property or both of his person and property and as including: (1) a natural guardian, (2) a guardian appointed by a Will of the minor's father or mother; (3) the guardian appointed or declared by court; and (4) a person empowered to act as such by or under any enactment relating to any court of Wards'. Sub-clause (c) of Sec.4 of the Act defines 'natural guardian' as meaning 'any of the guardians mentioned in Sec.6 of the said Act'. Sec.6 of the Act, *inter alia*, provides that the natural guardian of a Hindu minor in respect of minor's person as well as property, is the father and after him, the mother, in the case of a boy or of an unmarried girl. Sec.2 of the Act provides that the provisions thereof shall be in addition to and not in derogation of the Guardian and Wards Act, 1890. It will be seen from the above that this Act does not specifically provide as to who shall be the guardian in the event of both the parents being dead. [Para 4] In Mayne's Hindu Law, 12th Edition, para.24 at page 461 regarding guardianship it has been stated thus:

"The Hindu Law vests the guardianship of the minor in the sovereign, a *paterfamilias*. Necessarily, this duty is delegated to the child's

relations. Of these, the father and next the mother is its natural guardian, unless the father has already appointed anybody else as guardian. In default of the mother, or if she is unfit to exercise the trust, the nearest male kinsman should be appointed, the paternal kindred having preference over the maternal".

In support of this, the decision of the Bombay High Court reported in *In re Gulbai and Leelabai*, I.L.R. 32 Bom. 50, has been cited.

In Mulla's Hindu Law, 16th Edition, para.518 at page 536 relating to guardianship of a person and in support of a minor, it has been stated as follows:

"(1) The father is the natural guardian of the person and of the separate property of his minor children and next to him, the mother, unless the father has, by his will, appointed any person as the guardian of the person of his children.

(2) No relation, except the parents, is entitled as of right to be the guardian of a minor. Failing the father and mother, the court may appoint a nearest male paternal kinsman and failing paternal kinsman nearest male maternal kinsman as guardian of the minor, but the court is not bound to do so. It may appoint a maternal relation in preference to a paternal relation or it may even appoint a stranger if the welfare of the minors requires it".

Here also, the decision of the Bombay High Court reported in *In re Gulbai and Leelabai*, I.L.R. 32 Bom. 50, has been cited. [Paras. 5 and 6]

Guardians are of four kinds and they are: (1) Natural guardian; (2) Testamentary guardian; (3) Court guardians; and (4) *De facto* guardians. It is useful to reproduce para.184 from that book:

"The natural guardian is the one who, by virtue of his or her relationship to the child has a claim to be his/her guardian. The father's right to be the guardian of the person and property of the minor is paramount and comes first. Under the Hindu Law nobody else other than the father and the mother of the minor is entitled as a matter of natural right to be and to act as the guardian of a minor's person and property. Where there is no such natural person alive, recourse must be had to the court, as representing the rights of the king for the appointment of a guardian".

At page 1025 of the same book it has been stated that a Hindu child is looked upon not only as

belonging to the parents but as belonging also to the family of which the parents are members.

It will be seen from the above that in the case of a minor, whose parents are both dead, the court has to appoint a guardian and in such a situation, the paternal relations are to be preferred to the maternal relations. While in the Bombay case, paternal relations were the paternal aunt of the minors and the paternal grand uncle of the minors, in this case, the paternal relation who wants to be appointed as guardian is the paternal grand-father himself. [Paras. 7 and 9]

Power is conferred on the court to appoint a guardian under Sec.7 of the Guardian and Wards Act, 1890. Sec.17(1) of the said Act provides that in appointing or declaring the guardian of the minor, the court shall be guided by what appears in the circumstances of the case to be for the welfare of the minor consistently with the law to which the minor is the subject. Thus, the court is mandated to take into consideration the provisions of the personal law applicable to the minor in the matter of appointed guardians. [Para. 10]

The sole consideration both in the case of guardianship and custody of the minor should be the welfare of the minor and the court is bound to take into consideration all the facts and circumstances of the case bearing in mind that the pivotal factor is the benefit and well being of the minor. That the dominant factor for consideration of the court is the welfare of the child, has found statutory footing both in Sec.17(1) of Act 8 of 1890 and Sec.13 of Act 32 of 1956. Both the provisions emphasise that the powers of the court are to be exercised for the welfare of the minor, which should be the paramount consideration. [Para. 36]

The learned District Judge, in my view, has not erred in appointing the 1st respondent herein as the guardian of the person and property of the minor. In my opinion, there is no justification on the part of the 1st appellant to ask for the custody of the minor child. [Para. 38]

Cases referred to:

In re. Gulbai and Leelabai, I.L.R. 32 Bom. 50. [Paras. 5, 6, 8]

Rajaiah v. Dhanapal, (1985)1 M.L.J. 97. [Paras. 10, 36]

Narasayya v. Venkatappa, A.I.R. 1923 Mad. 359. [Paras. 32, 37]

Dr. Veena Kapoor v. Varinder Kumar Kapoor, (1981)3 S.C.C. 92. [Para. 37]

R.Santhakumari v. S.Natarajan, (1973)2 M.L.J. 286. [Para. 37]

Suresh Babu v. Madhu alias Kanchan, (1984)1 M.L.J. 381:

A.I.R. 1984 Mad. 186: 97 L.W. 464: (1984) Writ L.R. 280. [Para. 37]

S.P.Subramanian and S.Jayaraman, for Appellants. *K.Alagiriswami*, Senior Advocate, for *M/s.K.N.Thampi and P.Sivathanu*, for Respondents. The Court delivered the following

JUDGMENT: A.A.O.No.994 of 1992 is against the order of the District Judge of Kanyakumari, dated 13.10.1992 in O.P.No.26 of 1991. The respondents in O.P.No.26 of 1991 are the appellants in this appeal. A.A.O.No.1139 of 1992 is preferred against the order of the District Judge of Kanyakumari, dated 13.10.1992 in O.P.No.66 of 1991. The sole petitioner in O.P.No.66 of 1991 is the appellant in the second appeal. The 1st appellant A.Sahadevan Pillai is the husband of the 2nd appellant Bhagavathi Ammal and father of the 3rd appellant Krishna Kumar. The 1st respondent is the wife of the 2nd respondent. The respondents herein are the petitioners in O.P.No.26 of 1991 and respondents in O.P.No.66 of 1991. Both the petitions have been disposed of by the learned District Judge by a common order dated 13. 10.1992, evidence having been recorded in O.P.No.26 of 1991. the parties are referred to herein as they are arrayed in A.A.O.No.994 of 1992.

2. The short point that arises for consideration in these two appeals is, as to who is entitled to and who is the fit and proper person to be appointed as the guardian for the person and property of minor Aiswarya, who unfortunately lost both the parents in a short interval of about two weeks. The respondents are the maternal grand - parents of the minor Aiswarya, who is the daughter of Padmakumar (son of the appellants 1 and 2) and Indumathi (daughter of the respondents). The maternal grandparents filed O.P.No.26 of 1991 for appointing themselves as the guardian of the person and properties of the minor. The paternal grandfather/1st appellant filed O.P.No.66 of 1991 for the same relief. In the petition filed by the maternal grand-parents in O.P.No.26 of 1991, both the paternal grand-parents and one paternal uncle were made as party respondents besides two banks. The learned District Judge passed a common order on 13.10.1992 allowing O.P.No.26 of 1991 filed by the maternal grand-parents and dismissing

O.P.No.66 of 1991 filed by the paternal grand-father. By the impugned order, the learned District Judge has appointed the maternal grandmother/1st respondent herein as the guardian of the person and property of the minor inclusive of her share in the joint family properties. Hence these two appeals by the paternal grand-parents and paternal uncle of the minor.

3. The findings of the learned District Judge are as follows:

(i) The petitioners in O.P.No.26 of 1991/respondents herein have 'Vasathi'.

(ii) The question as to in whose custody the child was between 2.2. 1991 and 17.2.1991 is not germane.

(iii) There was cordial relationship between the parents of the minor on the one hand and the respondents herein on the other.

(iv) Doubt arises as to whether the 1st appellant has financial capacity to maintain the minor.

(v) The 1st appellant is aged 67 and hence his version that he would be able to maintain, educate and get the minor married is not acceptable.

(vi) Since the 1st appellant had given monies from out of the land compensation amount to the 3rd appellant and his daughters, his version that he would look after the welfare of the minor is not believable.

(vii) The 1st appellant resides with the 3rd appellant at Nagercoil in a rented house. Hence, he is not fit to be the guardian.

(viii) Gift deed Ex.B-1 was executed on the morning of 16.2.1991, on which date Padmakumar (father of the minor) died. Hence, it has been executed with an oblique motive.

In view of these findings, the learned District Judge has appointed the 1st respondent herein as the guardian and has rejected the claim of the paternal grand-father/1st appellant.

4. Before considering the evidence, it is necessary to set out the law on the point. Sec.4(1) of the Hindu Minority and Guardianship Act (hereinafter referred to as the Act) defines the 'guardian' as 'a person having the care of the person of a minor or of his property or both of his person and property and as including, (1) a natural guardian, (2) a guardian appointed by a Will of the minor's father or mother; (3) the guardian appointed or declared by court; and (4) a person empowered to act as such by or under any enactment relating to any

court of Wards.' Sub-clause (c) of Sec.4 of the Act defines 'natural guardian' as meaning "any of the guardians mentioned in Sec.6 of the said Act." Sec.6 of the Act, *inter alia*, provides that the natural guardian of a Hindu minor in respect of minor's person as well as property, is the father and after him, the mother, in the case of a boy or of an unmarried girl. Sec.2 of the Act provides that the provisions thereof shall be in addition to and not in derogation of the Guardian and Wards Act, 1890. It will be seen from the above that this Act does not specifically provide as to who shall be the guardian in the event of both the parents being dead.

5. The position before the commencement of the Act was as follows:

In Mayne's Hindu Law, 12th Edition, paragraph 24 at page 461, regarding guardianship it has been stated thus:

"The Hindu Law vests the guardianship of the minor in the Sovereign, a *parens patriae*. Necessarily, this duty is delegated to the child's relations. Of these, the father and next the mother is its natural guardian, unless the father has already appointed anybody else as guardian. In default of the mother, or if she is unfit to exercise the trust, the nearest male kinsman should be appointed, the paternal kindred having preference over the maternal."

In support of this, the decision of the Bombay High Court reported in *In re Gulbai and Leelabai*, *I.L.R. 32 Bom. 50*, has been cited.

6. In Mulla's Hindu Law, 16th Edition, paragraph 518 at page 536 relating to guardianship of a person and in support of a minor, it has been stated as follows:

"(1) The father is the natural guardian of the person and of the separate property of his minor children and next to him, the mother, unless the father has, by his Will, appointed any person as the guardian of the person of his children.

(2) No relation, except the parents, is entitled, as of right, to be the guardian of minor. Failing the father and mother, the court may appoint a nearest male paternal kinsman and failing paternal kinsman nearest male maternal kinsman as guardian of the minor, but the court is not bound to do so. It may appoint a maternal relation in preference to a paternal relation or it may even appoint a stranger if the

welfare of the minor requires it."

Here also, the decision of the Bombay High Court reported in *In re. Gulbai and Leelabai*, I.L.R. 32 Bom. 50, has been cited.

7. In N.R. Raghavachari's Hindu Law, 8th Edition, para. 183 at page 157 it has been stated that guardians are of four kinds and they are (1) Natural guardian; (2) Testamentary guardian; (3) Court guardians; and (4) *De facto* guardians. It is useful to reproduce paragraph 184 from that book:

"The natural guardian is the one who, by virtue of his or her relationship to the child has a claim to be his/her guardian. The father's right to be the guardian of the person and property of the minor is paramount and comes first. Under the Hindu Law nobody else other than the father and the mother of the minor is entitled as a matter of natural right to be and to act as the guardian of a minor's person and property. Where there is no such natural person alive, recourse must be had to the court, as representing the rights of the King for the appointment of a guardian."

At page 1025 of the same book it has been stated that a Hindu child is looked upon not only as belonging to the parents but as belonging also to the family of which the parents are members.

8. In the decision reported in *In re. Gulbai and Leelabai*, I.L.R. 32 Bom. 50, both the parents of the two minor girls had died. The contest was between the maternal grand-mother on the one hand and the paternal uncle of the father of the minors and paternal aunt (father's sister) on the other. The son of the maternal grand-mother was an Accountant General. The court appointed the paternal relations as the guardian. In doing so, the court observed as follows:

"The minors are Hindus and according to Hindu Law in the case of minors who have lost both the parents, the nearest male kinsman should be appointed, the paternal kinsman having the preference over the maternal (See Mayne's Hindu Law, 7th Edition, page 273, Sec. 211)."

This decision was rendered on 25.7.1907 and reliance has been placed upon the passage occurring in Mayne's Hindu Law, 7th Edition, which was much earlier.

9. It will be seen from the above that in the case of a minor, whose parents are both dead, the court has to appoint a guardian and in such a situation, the paternal relations are to be preferred to the

maternal relations. While in the Bombay case, paternal relations were the paternal aunt of the minors and the paternal grand-uncle of the minors, in this case, the paternal relation who wants to be appointed as guardian is the paternal grandfather himself.

10. In the decision reported in *Rajaiah v. Dhana-pal and another*, (1985) 1 M.L.J. 97, it has been pointed out at page 100 as follows:

"Sec. 6 of Act 32 of 1956 (Hindu Minority and Guardianship Act) does not make any substantial alteration in the law on the subject and gives legislative sanction to the principle well established already."

Power is conferred on the court to appoint a guardian under Sec. 7 of the Guardian and Wards Act, 1890. Sec. 17(1) of the said Act provides that in appointing or declaring the guardian of the minor, the court shall be guided by what appears in the circumstances of the case to be for the welfare of the minor consistently with the law to which the minor is the subject. Thus, the court is mandated to take into consideration the provisions of the personal law applicable to the minor in the matter of appointing guardians.

11. It is submitted on behalf of the appellants by Mr. S.P. Subramaniam, that the personal law provides, as stated above, that in the absence of both the parents, the court has to appoint a guardian, preference being given to paternal relations. Hence, unless paternal relations are found to be disqualified and unfit to be appointed as guardians, either of the person or of the property of the minor, their undoubted preferential right cannot and should not be denied. Therefore, Mr. S.P. Subramaniam, would submit that unless it is shown in the instant case that the 1st appellant is unfit to be the guardian, his preferential right to be the guardian of his son's daughter in preference to the maternal grand-mother/1st respondent cannot at all be denied. According to Mr. S.P. Subramaniam, the learned District Judge has not considered this aspect all. He has repeated a number of times that the paramount consideration is the welfare of the minor, which is no doubt true. But then, unless it is established that such paramount consideration of the welfare of the minor shows that the 1st appellant could not be appointed as guardian, his preferential right should not have been rejected. This is the gist of the arguments of Mr. S.P. Subramaniam, learned counsel for the appellants.

12. Mr.K.Alagiriswami, learned Senior Counsel appearing for the respondents/maternal grand-parents would submit that it is settled law that in deciding the question of guardianship of a minor, the paramount consideration would be the welfare of the minor. The legal right alone is not the criterion. No straight jacket formula could be adopted for deciding the issue. The court will have to take into consideration the over-all circumstances appearing in evidence, the financial status of the parents, their educational qualification, the position held by them, interest evinced by them in the welfare of the minor, the place of their residence, the proximity to good educational institutions, the willingness of their spouse and family members for bringing up the child and other such relevant circumstances conducive for the physical and mental development of the child and proper up-bringing.

13. According to Mr.K.Alagiriswami, the court below after taking into consideration all the facts and circumstances of the case, has rightly come to the conclusion that the maternal grand-mother/1st respondent is the fit and proper person to be appointed as guardian of the person and the property of the minor. According to the learned Senior Counsel, it is clear from the evidence that the maternal grand-father/2nd respondent is an educated man and had held the post of Tahsildar. Similarly, the maternal grand-mother/1st respondent, who has studied upto M.A., M.Ed., is a Headmistress in the Govt. High School of the locality. They are in affluent circumstances and have evinced keen interest in the welfare of the minor. They live in Thuckalay where there are a number of educational institutions for educating the minor. Thuckalay is the headquarters of Kalkulam Taluk. The maternal grand-mother/1st respondent in her evidence has clearly stated that she would be in a position to educate the minor child being in the teaching line herself. It would be conducive to the mental development of the child and proper education of the child if the child is left in the custody of the maternal grand-parents, since they are educated and are in affluent circumstances.

14. Mr.K.A.Alagiriswami, learned Senior Counsel would then submit that both the maternal grand-parents have been examined in court and they have clearly stated that they are anxious to have the custody of the child since the minor

happens to be the only child of their only daughter. It is a common knowledge that the maternal grand-parents exhibit more affection and bestow more attention to the up-bringing of the minor than the paternal grand-parents. Besides, the maternal grand-parents, two maternal uncles have also been examined in the court below and they have given evidence supporting the petition. In other words, according to the learned Senior Counsel, not only the maternal grand-mother but also the maternal grand-father and two of the maternal uncles had been examined in this case and they have supported the case of the maternal grand-mother. From the evidence it appears that the minor had developed love and affection for one of the maternal uncles. At the time when the maternal uncle was studying in Bangalore R.V. College of Engineering, the parents of the minor were staying with him and at that time, he had close contact with the minor and the minor had also developed affection towards him. It is also stated in evidence that whenever the minor's parents visit their home town, they leave the minor in the custody of the maternal grand-parents.

15. It is also clear from the evidence on record that after the death of the mother of the minor at Bangalore, the father of the minor brought the child and left her in the custody of the 1st respondent herein requesting her to take care of the child. Though this was denied by the appellants, clinching documents have been filed to prove that the respondents had the custody of the minor between 2.2.1991 and 17.2.1991, on which day the minor was taken to the 1st appellant's place under the pretext of offering floral tribute to the mortal remains of the deceased father of the minor, promising to send back the minor to the custody of the respondents/maternal grand-parents. On the contrary, only the 1st appellant had filed a petition seeking to be appointed as guardian of the minor. The 2nd appellant/paternal grand-mother has not been examined to show that she is also willing to assist her husband in bringing up the minor. None of the sons of the 1st appellant has been examined. It would be clearly seen from the evidence of the 1st appellant that he has no interest in bringing up the minor with the assistance of his wife, but he intends to hand over the custody of the child to one of his sons who is issueless. Neither his son nor his son's wife had been examined nor have they filed any affidavit before court expressing their

willingness to bring up the child.

16. Mr.S.P.Subramaniam, learned counsel for the appellants, invited my attention to the findings of the court below to state that the 1st appellant is not disqualified to be appointed as guardian. According to the learned counsel, there is no attack of the 1st appellant's character in O.P.No.26 of 1991 filed by the respondents herein or in the counter in O.P.No.66 of 1991, nor is it stated therein that the minor was not treated properly by the 1st appellant and the members of his family or that they are not affectionate towards her. He also invited my attention to the findings of the learned District Judge on the aspect of the alleged indebtedness of the 1st appellant, which, according to the learned counsel for the appellants, is very vague and bereft of details. It has also been categorically denied in the counter affidavit in O.P.No.26 of 1991 (filed by the 1st appellant). Thus, according to the learned counsel, the pleading in respect of this matter is not definite and firm but only vague and bereft of details.

17. Mr.S.P.Subramaniam, learned counsel, then refers to another allegation viz., that the father of P.W.2 had given the 1st appellant Rs.91,000 at the time of marriage of Indu with Padmakumar, with a direction to invest the same in Indu's name but he did not do so. This allegation is found in the pleadings in O.P.No.26 of 1991, which has been denied in the counter by the 1st appellant. It is mentioned there that only Rs.10,000 was given as per the custom of the community for meeting the expenses for bridegroom's dress and the said amount was utilised for that purpose. He also refers to the evidence of P.W.2 and R.W.1 in this regard. In this state of evidence, the learned counsel for the appellants would submit that the allegation that Rs.91,000 was given to the 1st appellant at the time of marriage of Indu with Padmakumar for the purpose of investing it in the name of Indu but the 1st appellant failed to do so is absolutely incorrect.

18. Next, Mr.S.P.Subramaniam refers to the disbursement of land acquisition compensation amount. According to him, the lands had been registered in the name of Padmakumar. Hence, the compensation amount cheque had been drawn in his name. He deposited it in the State Bank of India, Thuckalay on 11.2.1991. On 12.2.1991, a cheque for Rs.60,000 was issued in favour of the 3rd appellant and another cheque for Rs.1,05,000 was issued in favour of the 1st appellant by

Padmakumar, which were duly encashed. It is seen from the averments in para.9 of O.P.No.26 of 1991, that the lands belong to Padmakumar and he was stripped of all his assets and that the said amount is due to the minor. He also refers to the evidence of P.Ws.1 and 2 in this connection.

19. C.M.P.No.18063 of 1992 has now been filed under O.41, Rule 27, C.P.C., read with O.43, Rule 2, C.P.C., by the appellants for receiving the registration copies of the two sale deeds relating to the lands acquired as additional evidence. One sale deed is dated 21.9.1974 under which 25 cents of land bearing S.No.110/16 in Manavalakurichi village was purchased for Rs.5,250 from one Donakias Bakthidas. In this, Padmakumar, the Vendee, is described as minor aged 17. Another sale deed is dated 8.6.1981 by and under which 82 1/2 cents in S.No.110/6 in Manavalakurichi Village was purchased for Rs.10,000 from one Sashikala. In this, the age of Padmakumar, the vendee, is given as 24 and he is described as agriculturist. In the affidavit sworn to by the 1st appellant in support of this petition, he has categorically stated that the above mentioned lands were purchased by him with his funds and the lands belonged to the joint family and that the original sale deeds were handed over to P.W.2, that registration copies had been obtained in July, 1991, but had been misplaced and hence were not produced in the trial court.

20. Mr.S.P.Subramaniam would submit that from the above documents it is plain that Padmakumar could not have purchased these lands with his funds. He was a minor aged 17 at the time of purchase under the sale deed dated 21.9.1974 and was aged 24 and unemployed at the time of purchase under the sale deed dated 8.6.1981 and described as agriculturist. According to the learned counsel, it is not the case of the respondents that Padmakumar had other funds of his own. Therefore, he would submit, that the evidence is clear that these lands belonged to the family, though the purchase had been made in the name of Padmakumar. Similarly, the 1st appellant had also purchased lands in the name of his other sons 3rd appellant and one Vivekanandan. He has stated so in his evidence. Therefore, the learned counsel for the appellants would submit that the compensation amount also belonged only to the joint family. The 1st appellant, the father and Kartha, had the right to make distribution of this amount

in an equitable manner amongst his sons and daughters. Padmakumar could not have questioned this and did not, in fact, question this. It is, therefore, submitted that it is incorrect to say that by reason of this, appellants 1 and 3 have become indebted to the minor and therefore, they are not qualified to be the guardians of the minor.

21. Mr.S.P.Subramaniam, learned counsel for the appellants, then refers to the affluence of the maternal grand-parents/respondents herein. The learned District Judge has recorded a finding, as already stated, that the 2nd respondent is employed as Tahsildar and the 1st respondent is employed as Headmistress, they are persons of means. The learned District Judge, according to Mr.S.P.Subramaniam, has not stated that the 1st appellant is not possessed of means. There is no averment in O.P.No.26 of 1991 that since the respondents herein are affluent persons, the first of them should be appointed as guardian. Nor is there any such averment in the counter in O.P.No.66 of 1991. On the other hand, the 1st appellant has alleged in paragraph 9 in O.P.No.66 of 1991, that he is in good circumstances having an income of about Rs.30,000 a year and is the proper person to be appointed as the guardian. This is the argument of Mr.S.P.Subramaniam on the above aspect. He also drew my attention to the evidence of P.Ws.1 and 2 on this aspect. The learned counsel for the appellants contended that the learned District Judge has erred in thinking that the 1st respondent has to be appointed as guardian in preference to the 1st appellant on the ground that she was more affluent, which itself has not been established.

22. Referring to the aspect of old age and alleged sickness of the 1st appellant, Mr.S.P.Subramaniam invited my attention to the finding of the learned District Judge, who has remarked that on account of his age, the 1st appellant's claim that he would be able to maintain and protect the minor does not appear to be acceptable. According to the learned counsel, there is no averment in the petition in O.P.No.26 of 1991, that the 1st appellant is old and sickly and therefore is disqualified to be the guardian. In this connection, he refers to the evidence of P.W.1, who does not speak about this at all. P.W.2 also does not speak about this aspect. They have not stated that on account of the old age, the 1st appellant will not be able to maintain and protect the minor. The 1st appellant, who was

examined as R.W.1, has stated in cross-examination that he was aged 67. It is not correct to state that he was suffering from diabetes. He was not having any disease and that he could head properly.

23. As regards the paternal grand-mother/2nd appellant, according to the learned counsel for the appellants, there is absolutely no evidence regarding her alleged sickness. Referring to the aspect in regard to the residence of the 1st appellant, the learned District Judge has observed that since the 1st appellant has deposed that he was residing at that time with his son, the 3rd appellant in the house taken on lease by the latter in Nagercoil, he was not in a position to protect and look after the welfare of the minor. This finding, according to the learned counsel for the appellants, is absolutely wrong and uncalled for. The 1st appellant as R.W.1 has denied this suggestion in cross-examination that the minor child was under the protection of the 3rd appellant. He has further stated that he was living with the child at that time in the 3rd appellant's house at Nagercoil. According to Mr.S.P.Subramaniam, it has been brought about in evidence that excepting the 1st respondent, there is no other lady in her house, her mother having died long ago. The 1st respondent is employed as an Headmistress in a school and therefore, will not be available to look after the minor during the school hours. None of her three sons is married. P.W.1 has stated so in her evidence. On the other hand, in the 1st appellant's house, his wife viz., the 2nd appellant/paternal grand-mother of the minor, is available. The averment that she is a sickly woman has not been proved. P.Ws.1 and 2 have not spoken about this at all in their evidence. Besides, both the 3rd appellant and Vivekanandan, the sons of appellants 1 and 2, are married. Therefore, it is incorrect to say that there is no female capable of taking care of the child in the house of the 1st appellant.

24. On the other hand, according to the learned counsel for the appellants, there is no female except the 1st respondent to take care of the minor in her house. Undoubtedly, the 2nd appellant would be able to bestow more attention and care on the minor than the 1st respondent in view of the latter's employment and pre-occupation as a school Headmistress. In this connection, Mr.S.P.Subramaniam, pointed out that the 2nd appellant has executed a settlement deed Ex.B-1

in favour of the minor settling upon her lands worth about rupees One lakh. The observation of the learned District Judge that this settlement has been made with an oblique motive, according to the learned counsel for the appellants, is, to say the least, most uncharitable.

25. Regarding the jewels, according to the learned counsel for the appellants, the 1st appellant has not stated anything in chief-examination about this. No suggestion has been put to him in cross-examination that Padmakumar entrusted the jewels of his wife Indu to the 1st appellant and that the 1st appellant is in possession of the same. Thus, the plea that the 1st appellant is in possession of the jewels has not been made out. This is a false averment and this shows the attitude of the respondents herein.

26. I have carefully considered the averments of the learned counsel for the appellants and the various aspects of the matter projected by the learned counsel for the appellants, and also the arguments of Mr. K. Alagiriswami, learned Senior Counsel for the respondents, which I have referred to in paragraphs supra.

27. It is the admitted case of the 1st appellant that he was doing coir business and that he stopped that business. He has also admitted that he has no appreciable bank balance. He has no other independent source of income. Though he states that he owns 6 acres of coconut tope, he has suppressed the fact that it is a joint family property. The other three sons, who are all married, will be having a share in the property. Hence, it is crystal clear that the 1st appellant is a man of no appreciable means. Though he claims that he gets an income of Rs. 30,000 per year from the joint family property, no evidence has been produced to substantiate the same.

28. The place of residence of the paternal grandparents is Kottumangalam Village, which is about ten miles from Nagercoil and about 8 miles from Thuckalay. Kottumangalam is a small hamlet and there are no schools in that village. The nearest primary school is about 1 1/2 miles away from Kottumangalam. This school has been recently started. The paternal uncle viz., the 3rd appellant is residing at Nagercoil in a rented house. It appears from the evidence, that the 1st appellant is living with the 3rd appellant. As already stated, the intention of the 1st appellant appears to be that the minor should be brought up by the 3rd appellant, the paternal uncle of the child. No

evidence has been adduced to show the financial status and the educational qualification of the 3rd appellant, though he has stated that he is having a spare parts shop at Nagercoil. His wife has not been examined to show that she is willing to bring up the minor child.

29. It is also clear from the evidence that the 3rd appellant and the father of the minor were not in good terms. As a matter of fact, the 1st respondent has categorically stated in her evidence as P.W.1, that the deceased father of the minor never used to visit his brother the 3rd appellant whenever he came to Nagercoil. Similarly, P.W.2 has categorically stated that the deceased father of the minor and the 3rd appellant were not in talking terms since more than six months before the marriage of the father of the minor. Nothing has been elicited in the cross-examination. P.W.2 has reiterated in the cross-examination that the strained relationship between the deceased father of the minor and the 3rd appellant made a futile attempt to get the deceased father of the minor married to some other close relation.

30. It is, therefore, submitted by Mr. K. Alagiriswami, learned Senior Counsel, that the 1st appellant is not a fit and proper person to be entrusted with the custody of the minor. As already stated, he is not a man of any means. Admittedly, he is not doing any business or having any appreciable bank balance. His main intention is only to give away the minor to his son the 3rd appellant, who has no issues. Neither the 3rd appellant nor his wife has been examined to show their willingness to bring up the minor child. There is absolutely no evidence to show the financial condition of the 3rd appellant. Secondly, none of the paternal grandparents are educated. There is no evidence to show the educational qualification of the 3rd appellant. Assuming that the minor child is intended to be brought up either by appellants 1 and 2 or by their issueless son, there is no evidence to show that they would provide congenial atmosphere for the up-bringing of the minor. For one thing, they seem to be residing in two places and the 2nd appellant is not living with the issueless son, but she is staying in her native place, viz., Kottumangalam.

31. The other aspect which is to be looked into is the age of the rival parties. Admittedly, the 1st appellant is aged about 70 years and his wife/2nd appellant is equally old. On the contrary, the

respondents are young and active. The minor child is only four or five years and it will not be conducive for the welfare of the minor to be left in the custody of such old people. The 2nd appellant is a presumptive heir to the property of the minor. It is settled law that while considering the appointment of a guardian, this fact should be taken into consideration and as far as possible, the presumptive heir should not be given the custody of the minor. There is also apprehension in the minds of the respondents that the father of the minor died in suspicious circumstances. It is in evidence that he died at 5.00 p.m., and the body was cremated at 7.00 p.m., on the same day, within two hours. The respondents were informed only after the cremation. On the day when the father of the minor died, he took leave of the respondent. At that time, he was hale and healthy. There seems to be some bickering in the family which would be evident from the fact that the land standing in the name of the deceased father of the minor was acquired and when compensation was paid out in the name of the father of the minor, he was asked to part with big chunk of the money in favour of his brothers and sisters besides his father. All these happened just five days prior to the death of the father of the minor. Further, if really he had died of heart attack, as alleged, no evidence has been let in to show that he was given proper treatment or that any attempt was made to take him to the hospital. The only evidence adduced is to the effect that one Dr. Rajan has opined that the father of the minor died of heart attack.

32. There are also suspicious circumstances surrounding the execution of the gift deed, on the same day when the father of the minor died. There is some contradiction in the evidence with regard to the time of the execution of the document. There is good reason to believe that this document has been executed to cover up the situation after the death of the father of the minor and to make it appear that everything was well within the family. Stamp paper for the same has been purchased on different dates and from different places. Though the value of the properties is stated to be rupees one lakh, the document shows the value at Rs.27,000. A mere look at the document would convince this Court that it is a make-believe affair and it is a sham and nominal document. The deed was executed in favour of the deceased father of the minor as guardian representing the minor on the same

day in which he died. It is natural on the part of anybody to expect that he would have presented the document for registration. What circumstances create is cloudy suspicion in the minds of the respondents that all is not well with the family of the appellants. As a matter of fact, the court below has held so in para.15 of the judgment. In the personal law of the parties, there is no custom that the minor child should be protected only by the paternal grand-parents. This Court has held in the decision reported in *Narasayya v. Venkatappa*, A.I.R. 1923 Mad. 359, that the personal law of the parties can be ignored in the interest of the welfare of the minor, which should be paramount consideration, even assuming that there is any such custom.

33. Even the passages referred by Mr.S.P.Subramaniam, learned counsel for the appellants, in Mayne's Hindu Law, Mulla's Hindu Law and N.R.Raghavachari's Hindu Law, only state that the father is the natural guardian of the person and of the separate property of his minor children and next to him, the mother, unless the father has, by his Will, appointed any person as the guardian of the person of his children. No relation, except the parents, is entitled, as of right, to be the guardian of the minor. Failing the father and mother, the court may appoint a nearest male paternal kinsman and failing paternal kinsman, nearest male maternal kinsman as guardian of the minor, *but the court is not bound to do so*. The court may appoint a maternal relation in preference to a paternal relation or it may even appoint a stranger if the welfare of the minor requires it.

34. It is clear from the evidence that the 2nd respondent is an educated man and had held the post of Tahsildar. Similarly, the 1st respondent is working as Headmistress in the Government High School of the locality. They are in very affluent circumstances and have evinced keen interest in the welfare of the minor. They live in Thuckalay, where there are a number of educational institutions for educating the minor. Thuckalay is the headquarters of Kalkulam Taluk. The 1st respondent in her evidence has clearly stated that she would be in a position to educate the minor child, being in the teaching line herself. It will be very conducive to the mental development of the minor and to the proper education of the child if the child is left in the custody of the respondents since they are educated and are in affluent circumstances.

Further, both the respondents have been examined in court and they have clearly stated that they are anxious to have the custody of the child since the minor child happens to be the only child of their only daughter.

35. I am very much impressed with the evidence tendered by the maternal grand-parents/respondents herein. The interest of the minor will be very much protected and safeguarded if I agree with the finding of the learned District Judge appointing the 1st respondent herein as the guardian of the person and property of the minor Aiswarya, which, in my opinion, alone is the paramount consideration. Though very many decisions have been cited by the learned Senior Counsel for the respondents, I do not think that there is any quarrel over the well-settled propositions.

36. In the instant case, there is a dispute between the maternal side and the paternal side. In such a dispute, the court is expected to strike a just and proper balance between the requirements of the welfare of the minor and the rights of the respective parties over the minor. As held by S.Nainar Sundaram, J. (as he then was) in the decision reported in *Rajaiah v. Dhanapal*, (1985) 1 M.L.J. 97, the sole consideration both in the case of guardianship and custody of the minor should be the welfare of the minor and the court is bound to take into consideration all the facts and circumstances of the case bearing in mind that the pivotal factor is the benefit and well-being of the minor. That the dominant factor for consideration of the court is the welfare of the child, has found statutory footing both in Sec.17(1) of Act 8 of 1890 and Sec.13 of Act 32 of 1956. Both the provisions emphasise that the powers of the court are to be exercised for the welfare of the minor, which should be the paramount consideration. I have also taken similar views in several other matters like this.

37. The Supreme Court in the decision reported in *Dr.Veena Kapoor v. Varinder Kumar Kapoor*, (1981) 3 S.C.C. 92, held that in deciding matters concerning custody of the minor children, main consideration of the court must be welfare of the minor and not legal right of a particular party. In an identical matter like this, N.S.Ramaswami, J. in *R.Santhakumari v. S.Natarajan*, (1973) 2 M.L.J. 286, held that though the mother was a school teacher, who would be obliged to leave the residence for her work, that does not mean that she would not be in a position to look after the child

properly. In the decision reported in *Narasayya v. Venkatappa*, A.I.R. 1923 Mad. 359, this Court has observed that in case of claims of distant relations, there is no question of preference other than what arises from a consideration of the minor's welfare, which is made the paramount consideration. V.Ratnam, J. in the decision reported in *Suresh Babu v. Madhu alias Kanchan*, (1984) 1 M.L.J. 381: A.I.R. 1984 Mad. 186: 97 L.W. 464: 1984 Writ L.R. 280, has held as follows:

"It is not merely the rights of parties with reference to custody that have to be considered and adjudicated upon, but what is most essential is that any such adjudication should be for the welfare of the infant child."

38. Hence, I am of the view that no valid reason has been given for accepting the case of the preferential right of the 1st appellant to be appointed as the guardian of the person and property of the minor. The learned District Judge, in my view, has not erred in appointing the 1st respondent herein as the guardian of the person and property of the minor. In my opinion, there is no justification on the part of the 1st appellant to ask for the custody of the minor child.

39. For the foregoing reasons, both the civil miscellaneous appeals are dismissed. However, taking into consideration the relationship of the parties, there will be no order as to costs. The interim stay granted in C.M.P.No.14788 of 1992 is vacated. Time for delivery custody of the minor child Aiswarya to the respondents, two weeks from to-day. However, it is made clear that the 1st appellant and his family members are always at liberty to see the minor child whenever they want. It is also made clear that they can take the minor to their home on festive occasions and during holidays by obtaining orders from the trial court.

R.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No.2019 of 1993 25th August, 1993.

D.Vijayan and another ...Petitioners
v.

V.K.Arumugam and another ...Respondents.

Civil Procedure Code (V of 1908), O.6, Rule 17 - Amendment of plaint - Suit for permanent injunction - Plaintiff seeking amendment of plaint - Seeking reliefs of possession - Alleging that defendant committed criminal trespass on suit property - Put up shops buildings thereon - Amendment, if can be allowed.

The law is that the court would take notice of the changed circumstances where by reason of the subsequent events, the original relief claimed has become inappropriate or where the litigation gets shortened or where the consideration of the subsequent events gives complete justice to the parties. Courts have even gone to the extent of saying that even without a formal amendment adding possession relief in the original injunction suit, possession could be given when such relief would not be inconsistent with the plaintiff's case.

[Para: 7]

Cases referred to:

Rajeshwar Dayal v. P.K.Kothari, A.I.R. 1979 Raj. 77. [Para. 7]

Shikharchand v. D.J.P.Karini Sabha, A.I.R. 1974 S.C. 1178: (1974)1 S.C.C. 675. [Para. 7]

Vineer Kumar v. Mangal Sain Wadhera, (1984)3 S.C.C. 352. [Para. 7]

Bundi Singh v. Shivanandan Prasad, A.I.R. 1950 Pat. 89. [Paras. 7, 12]

Allauddin v. P.S.Lakshminarayanan, (1969)2 M.L.J. 239: 82 L.W. 540: A.I.R. 1970 Mad. 247. [Para. 9]

Singara Mudaliar v. Govindaswamy Chetty, A.I.R. 1928 Mad. 400. [Para. 9]

Nagutha Mohammed Nainar v. Vedavalliammal, (1959)1 M.L.J. 307. [Para. 9]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court (VIII Assistant Judge), Madras, dated 30.4.1993 and made in I.A.No.6274 of 1993 in O.S.No.10966 of 1989.

K.P.Gopalakrishnan, for Petitioners.

T.V.Ramanujam, for Respondents.

The Court made the following

ORDER: Plaintiffs are the petitioners in this civil revision petition against the dismissal of their I.A.No.6274 of 1993 for amending their plaint in O.S.No.10966 of 1989 on the file of VIII Assistant Judge, City Civil Court, Madras. The said suit seeks permanent injunction against interference of their possession of the suit building. The proposed amendment seeks possession relief in the place of injunction relief.

2. Their averments in the said application are as follows: In I.A.No.12690 of 1989, they got temporary injunction which has been confirmed by the first appellate court in C.M.A.No.28 of 1990 and by this Court in C.R.P.No.1826 of 1990. But the defendants respondents filed C.S.No.659 of 1990 in this Court for declaration of title to the same suit land on the footing that the property was different. The said defendants also got temporary injunction against the plaintiffs herein on 6.8.1990. But subsequently on the filing of O.S.A.No.85 of 1991 in this Court by the plaintiffs herein, the said injunction was stayed by order dated 22.7.1991 and the said stay was also made absolute in C.M.P.No.5181 of 1991 therein. (The plaintiffs' vendors have also filed O.S.No.1077 of 1992 in this Court for declaration that the abovesaid suit property belongs to the plaintiffs herein). But the respondents have put up shops buildings in the suit land after committing criminal trespass over the present suit land. So, since they have thus forcibly taken possession from the plaintiffs pending the present suit, the petitioners have filed the abovesaid application for amendment of the plaint seeking possession relief with reference to the suit land after removing the superstructure put up by respondents. They also wanted suitable amendment of the body of the plaint introducing certain additional paragraphs narrating the abovesaid subsequent events and they also wanted suitable consequential amendment of paragraph 5 of the plaint altering the value of the suit to Rs.1,50,000.

3. In the counter affidavit to the said application, the respondents averred as follows:

The plaintiffs were never in possession of the suit property, but only the 2nd respondent has been in possession. The plaintiffs have been adopting all methods to see that they did not get on with the trial of the suit. The 2nd respondent purchased the property by the sale deed dated 14.12.1987. The

plaintiffs claim to have purchased on 29.8.1988 only from the very same vendors. But, their sale deed is not true or valid. In the plaint dated 23.11.1989, the plaintiffs have given some schedules, describing the suit property as T.S.No.31/1. But the said survey number is only read as per the revenue records C.S.No.659 of 1990 was filed with reference to T.S.No.31/23. The temporary injunction obtained in C.S.No.659 of 1990 on 6.8.1990 was subsequently made absolute on 6.2.1991. Between 6.5.1990 and 6.2.1991 only, the abovesaid ship buildings were put up on the said land. The stay of injunction was obtained by the plaintiffs in O.S.A.No.85 of 1991 only on 9.4.1991. The present suit was in the special list even on 27.11.1992. But the plaintiffs took adjournments on several dates subsequently and after several adjournments, the suit was posted to 8.1.1993. Then the plaintiffs filed transfer application and sought to get stay of the present suit. They also filed another transfer application and obtained *ex parte* order of stay of trial of the suit. Ultimately, on 4.3.1993, both the transfer applications and the stay applications therein were dismissed by Lakshmanan, J., who also gave direction to the trial court to take up the suit forthwith for trial. Then the defendants filed an application to advance the hearing of the present suit, knowing well that the hearing of the suit has been advanced to an early date, accordingly, the plaintiffs have filed the present application for amendment of the plaint and another application for punishment for contempt. They are only abusing the process of Court. The present application has been filed only to nullify the abovesaid order of Lakshmanan, J., directing the suit to be taken up forthwith for trial. The said application is not a *bona fide* one. By the proposed amendment, the plaintiffs only want to take the suit to the High Court on the ground that the value of the suit would be above Rs.1,00,000 if the proposed amendment is ordered. The plaintiffs can very well file a separate suit for possession. The plaintiffs have belatedly come forward with the abovesaid application with ulterior motive.

4. The court below has dismissed the application simply saying thus, without any discussion whatsoever,

5. The learned counsel for the petitioner submits that it is settled law that while the injunction suit is pending if the plaintiff is forcibly dispossessed by the defendant, the plaintiff could very well amend the plaint seeking possession relief itself in view of the abovesaid subsequent event of dispossession pending suit and despite this settled legal position, the court below has erred in dismissing the said application.

6. The learned counsel for the respondents vehemently makes the following submissions: If really the abovesaid application is insisted on the ground that the defendants have trespassed into the suit property and put up the abovesaid building the application should have been filed much earlier since the constructions of the building were done only between 6.8.1990 and 6.2.1991. But the present application has been filed only on 8.4.1993 more than two years after 6.2.1991. The said delay has not been explained at all. Further only to protract the trial of the suit the abovesaid transfer applications were filed and only when the transfer applications were dismissed the present application has been filed, despite the direction given in the order dismissing the transfer applications that the trial of the suit should be proceeded forthwith. So, the present application itself is abuse of process of court. If the plaint is amended, and, taking into account the value of the suit, if it is transferred to this Court, there will be inordinate delay in disposing of the suit, which will certainly result in failure of justice to the defendants. The discretion exercised by the trial court in dismissing the application should not be interfered with under Sec.115, C.P.C., when there is unexplained delay and abuse of process of court as stated above.

7. I have considered the rival submissions. Normally, there would have been no difficulty in setting aside the impugned order and allowing the proposed amendment since the said amendment is sought for only in view of the alleged subsequent event of dispossession of the plaintiffs from the suit property by the defendants and since the law is that the court would take notice of the changed circumstances, where by reason of the subsequent events, the original relief claimed has become inappropriate *Vide: Rajeshwar Dayal v. P.K.Kothari, A.I.R. 1979 Raj. 77* or where the litigation gets shortened or where the consideration of the subsequent events gives complete justice to the parties. *Vide: Shikharchand v. D.J.P.Karini Sabha, A.I.R.*

1974 S.C. 1178; (1974)1 S.C.C. 675 and *Vineer Kumar v. Mangal Sain Wadhera*, (1984)3 S.C.C. 352. In (1984)3 S.C.C. 352, the relevant observation is as follows:

"Normally amendment is not allowed if it changes the cause of action. But it is well recognised that where the amendment does not constitute an addition of a new cause of action, or raise a new case, but amounts to no more than adding to the facts already on the record, the amendment would be allowed even after the statutory period of limitation."

Courts have even gone to the extent of saying that even without a formal amendment adding possession relief in the original injunction suit, possession relief could be given when such relief would not be inconsistent with the plaintiff's case. *Vide: Bundi Singh v. Shivanandan Prasad*, A.I.R. 1950 Pat. 89.

8. But since, in the light of the lengthy averments in the counter affidavit to the abovesaid application, the learned counsel for the respondents argued vehemently as indicated above, I have to write out this lengthy order after setting out in extenso the averments in the affidavits and the arguments on either side.

9. One main contention of the learned counsel for the respondents is that if the amendment is allowed, the trial court (City Civil Court, Madras) will have no pecuniary jurisdiction to try the suit and consequently the plaint has to be returned to the plaintiffs for presentation in the High Court and that this process would only delay the trial of the suit very much. But, this cannot be normally a ground for objecting to the proposed amendment. In *Allauddin v. P.S. Lakshminarayanan*, (1969)2 M.L.J. 239; 82 L.W. 540; A.I.R. 1970 Mad. 247, this Court also held that where the plaintiff applied for an amendment of the plaint and it was found by the court that in case the amendment was allowed the value for the purpose of jurisdiction would probably exceed the court's powers, the right course to adopt was to allow the amendment, grant an opportunity to the plaintiff to pay the deficit court fee, and if there was any question about pecuniary jurisdiction arising, examine the matter on a definite finding on that question to decide whether the plaint should be retained or would have to be returned to the plaintiff as one in excess of the pecuniary jurisdiction of that court. In that context the said judgment also distinguishes the

earlier two judgments in *Singara Mudaliar v. Govindaswamy Chetty*, A.I.R. 1928 Mad. 400 and *Nagutha Mohammed Nainar v. Vedavalliammal*, (1959)1 M.L.J. 307. In the present case, both the counsel agree that in view of the fact that the value of the suit goes to Rs.1,50,000 if the amendment is allowed, the suit has to be necessarily taken up for disposal by this Court.

10. No doubt, there may be some delay because of the consequent transfer of the suit to the High Court. But, proper steps or representations have to be taken for early disposal of the suit once the suit reaches this Court. Therefore, on that ground amendment cannot be refused.

11. I also take note of the observation of Lakshmanan, J., in the above referred to order that the suit has to be tried forthwith. I also give below suitable directions for earlier disposal of the suit.

12. The learned counsel for the respondents also submits that the amendment sought for, itself is an abuse of process of court and is asked for only with ulterior motives and that the above referred to delay in filing the application has also not been explained. So far as the said delay is concerned, I have to state that after the abovesaid construction of the shop buildings by the defendants on the suit property was completed the plaintiffs were trying to transfer the suit to this Court for being tried along with the above referred to suits pending in this Court and the said transfer application was objected to by the defendants. If the transfer was granted, the plaintiffs would have had no necessity to formally amend the prayer in the suit in the light of O.7, Rule 6, C.P.C., in view of the above referred to legal position fortified by the above referred decision in *Bundi Singh v. Shivanandan Prasad*, A.I.R. 1950 Pat. 89. Anyway, after the transfer petitions were dismissed, the plaintiffs have filed the present application.

13. I do not think that in the circumstances of the case the delay is substantial or remains unexplained completely. Anyway, taking into account that there is some delay and taking into account that there may be some further delay when the suit is transferred to this Court, interest of justice would be served if while allowing the amendment, condition is stipulated directing the plaintiffs to pay the defendants a sum of Rs.1,000 by way of costs.

14. I am unable to concur with the contention of abuse of process of court, particularly in the light

of the temporary injunction granted in the suit which has been upheld by the higher courts including this Court and in the light of the fact that a Division Bench of this Court has made the stay of the temporary injunction obtained by the defendants in their suit, absolute.

15. No doubt Lakshmanan, J., has observed in the context of the transfer applications that there was abuse of process of court by the petitioners. But, in the light of the abovesaid other features. I am unable to come to the conclusion that the abovesaid transfer applications could be equally applied in the present proceedings so as to refuse as otherwise legitimate amendment sought for.

16. I am also of the view that in view of the legal position referred to by me in paragraph 7 above, the court below, in dismissing the application, erred in the exercise of its jurisdiction with material irregularity, which has occasioned in failure of justice in relation to the plaintiffs. Therefore, necessarily I have to interfere under Sec.115, C.P.C.

17. In the result, the civil revision petition is allowed, the impugned order is set aside and I.A.No.6274 of 1993 in O.S.No.10966 of 1989 on the file of VIII Assistant Judge, City Civil Court, Madras, shall stand allowed on condition that the plaintiffs pay the defendants a sum of Rs.1,000 as costs within four weeks from today failing which the civil revision petition shall stand automatically dismissed.

B.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J.

C.R.P.No.2113 of 1986 20th August, 1993.

Annadhana Kattalai Arulmigu Thiagaraja Swamy Devasthanam, Tiruvavur ...Petitioner v.

V.Vasudevan and others ...Respondents.

Civil Procedure Code (V of 1908), Sec.115 - Revision under - Powers of High Court - High Court if can reappraise evidence - Interference in revision - Scope of.

The finding recorded by the Tribunal below on appreciation of the evidence on record cannot be disturbed in a revision as it is not open to this Court to re-appreciate the evidence on record unless it touches or affects the jurisdiction of the Authority on it is perverse. [Para. 7]

Cases referred to:

Bhavanarayana Rao v. State of Andhra Pradesh, A.I.R. 1963 S.C. 1715. [Para. 7]

Sathya Narayana Rao v. State of Tamil Nadu, (1977)1 M.L.J. 302. [Para. 7]

Akkaloi Ammani Chatram v. State, A.I.R. 1980 Mad. 149. [Para. 7]

Petition under Sec.7 of the Minor Inams (Supplementary) Act 31 of 1963 read with Sec.115, C.P.C. praying the High Court to revise the order of the Court of the Subordinate Judge, Nagapattinam, dated 8.10.1983 and made in [I.A.T.] C.M.A.No.31 of 1982.

M.N.Padmanabhan, for Petitioner.

K.Chandrasekaran for M/s.B.Kumar and R.Loganathan, for Respondent Nos.1 to 3, 5 and 6. *R.Swaminathan*, Additional Government Pleader, for Respondent No.11.

The Court made the following

ORDER: This civil revision petition is preferred against the order dated 8.10.1983 passed by the Sub Judge at Nagapattinam, in [I.A.T.] C.M.A.No.31 of 1982. That was an appeal preferred against the order 7.7.1982 passed by the Settlement Officer [S.P.IX], Thanjavur in SRI/MNL/80]. It is not necessary to state the history of the case. It is sufficient to refer to the decision of this Court in C.R.P.No.1184 of 1980. By the order dated 5th November, 1981 the said civil revision petition which was filed by the petitioner herein was allowed and the matter was remitted to the Settlement Officer with a direction to dispose of the petition under Sec.5 of Act 31 of 1983 and then take up the inquiry under Act 26 of 1963. It is pursuant to this order, the Settlement Officer took up the proceedings. By the order dated 7.7.1982 in SRI/MNL/80, the Settlement Officer held that the land in question constituted a minor inam therefore the Assistant Settlement Officer shall take up action in pursuance of the said decision. 2. Aggrieved by the aforesaid order of the

Settlement Officer, the respondent herein preferred (I.A.T.) C.M.A.No.31 of 1982 before the Subordinate Judge, Nagapattinam who is the Appellate Tribunal prescribed for the purpose. The Subordinate Judge came to the conclusion that a Division Bench of this Court on an earlier occasion in respect of the very land is question in S.T.A.No.50 of 1960 and S.T.A.No.51 of 1960 and C.M.A.No.17 of 1964 had held that Perumpugalur Thottam formed part of the village and therefore, it would be a part inam estate as defined under Act 26 of 1963. Accordingly, he allowed the appeal and set aside the order of the Settlement Officer, consequently, further action has now to be taken up under Act 26 of 1963. Therefore the respondent before the Subordinate Judge, has come up in this revision petition.

3. In the light of the contentions urged on both sides, the point that arises for consideration is as to whether the estate in question can be considered to be part village inam estate.

4. As already pointed out, the learned Subordinate Judge has held that it is a part village inam estate. This finding he has arrived at on appreciation of the evidence on record.

5. It may be relevant to notice that on the coming into force of Act 26 of 1963, the State Government in exercise of its power under Sub-sec.(4) of Sec.1 of the Madras Act 26 of 1963 issued a Notification bearing G.O.[P] 1119, Revenue, dated 30.3.1965, appointing the 1st May of 1965 as the date on which the provisions of Madras Act 26 of 1963 other than Secs.1, 2, 4, 5, 7, 8, 56(3), 59, 64, 73, 75 and 76 which have already come into force, shall come into force, in the inam estates specified in the schedule to the Notification. The inam estate in question is Perumpugalur Thottam. It is included in the said Notification at serial No.2 under the Taluk Nannilam in District Thanjavur. In order to sustain that Notification, what the State Government has to do is to show that the estate in question is on inam estate. Sec.2(7) of Act 26 of 1963 which will be hereinafter referred to as the Act, defines the expression 'inam estate' as meaning an existing inam estate or a new inam estate. Sec.2(9) of the Act defines the expression 'new inam estate' as meaning a part village inam estate or a Pudukottai inam estate. To avoid any ambiguity the Act also further defines the expression 'part village inam estate' under Sec.2(1) as follows:

"Part village inam estate means a part of a village (including a part of a village in the merged territory of Pudukottai) (but not including such of the inam areas in the said territory as are specified in Schedule 1-A) the grant of which part has been under, confirmed or recognized by the Government, notwithstanding that subsequent to the grant, such part has been partitioned among the grantees or the successors-in-title of the grantee or grantees".

Explanation 1:- (a) Where the grant of a part of a village as an inam is expressed to be a specified fraction of, or a specified number of shares in, a village such part shall be deemed to be a part village inam estate notwithstanding that such grant refers also to the extent of such part in terms of acreage or conies or of other local equivalent.

(b) Where a grant as an inam is expressed to be only in terms of acreage or cawnies, or of other local equivalent, the area which forms the subject-matter of the grant shall not be deemed to be a part village inam estate [*Explanation 1-a* part of a Villages granted in inam shall be deemed to be a part village inam estate] notwithstanding that different parts of such part village were granted, confirmed or recognized on different dates or by different title-deeds or in favour of different persons".

The contention of the revision petitioner is that the land in question is in terms of acreage or cawnies and therefore, it cannot at all be considered to be a part village and it fails under *Explanation (1-b)* as such, it is not a part village inam estate and consequently, it cannot be held to be an inam estate. Therefore, it is wrongly included in the Notification. On the contrary, it is the contention of the respondents herein that it is not at all open to the revision petitioner now to contend that the estate in question is not part village inam, estate, as this has been concluded in an earlier proceeding between the parties wherein a specific finding has been recorded that the estate in question is a part of major village of that same. In addition, it is also the contention of the revision petitioner that when the Settlement Officer recorded finding that the land in question was not an inam estate, but it is a minor inam, as such, it did not fall under the provisions of the Act and the state did not challenge that finding, whereas the respondents herein

who claim to be the tenants of the land, challenged that finding, but in the absence of the challenge to it by the State which alone can be considered to be an aggrieved party with record to such finding, the respondents herein cannot successfully challenge the same and the appeal preferred by them should be held to be not maintainable.

6. I will take up the last contention first. It is relevant to notice that throughout, the respondents have been the parties to the proceedings. They were the parties to the C.R.P.No.1184 of 1980, which was allowed by this Court on 5.11.1981 with a direction to determine first the nature of the inam estate and then proceed further in accordance with such determination. Secondly, it is also not possible to hold that respondents do not have any interest in the estate in question. They claim to be the tenants cultivating the land in question and as such claim that they should be granted ryotwari patta under the provisions of Sec.10 read with Sec.12 of the Act. The fact that the State Government did not go up in appeal against the order dated 7.7.1982 of the Settlement Officer, did not in any way effect the right of the respondents to challenge the order of the settlement officer dated 7.7.1982, because that order affected the right of the respondents to claim ryotwari patta under Sec.10 read with Sec.12 of the Act. Therefore, they were entitled to challenge the order of the Settlement Officer including the finding recorded therein. Hence, I do not find any substance in this contention. It is accordingly rejected.

7. As far as the first contention is concerned, I have already adverted to the definition of the relevant expressions used in the Act. On an earlier occasion, in S.T.A.Nos.50 and 51 of 1960 and C.M.A.No.17 of 1964 the matter had come up before this Court pertaining to the land in question under the provisions of Act XXX of 1956, against the decision of the Estate Abolition Tribunal, Vellore, dated 27.4.1959 in O.A.No.49 of 1957. The question that came up for consideration in that case, was as to whatsoever Perumpugalur Thottam in question was an inam village or not. On considering the relevant evidence that was placed in the case, this Court observed as follows:

“There is, however, this to be noticed about Perumpugalur Thottam. Its extent, as noted above, is only about 48 acres. It is not very often that one finds an entire Village of

that extent of land. Further, the word “Thottam” which distinguished the areas of about 48 acres, now in question, is not always indicative of village. As pointed out by a Bench of this Court in S.T.A.No.27 of 1961, the word “Thottam” generally means a garden. It is no doubt true that the word sometimes forms part of the proper name of a village. But, when one finds as in this case, a major village called Perumpugalur and also an area distinguished as Perumpugalur Thottam, *prima facie* it would mean that the latter should only be a part of the main village or a hamlet attached thereto. Again, it must not be forgotten that it is the tenant that has taken the initiative in this case of filing the application before the Tribunal saying that the area in question is an inam estate.

As has been pointed out by the Supreme Court, in *Bhavanarayana Rao v. State of Andhra Pradesh*, A.I.R. 1963 S.C. 1715, the onus of proof that it is an inam estate will be on the tenant in the present case. We have got to see whether he has discharged that onus.

The original grant is not available, but we have an extract from the Inam fair Register of the ‘Inams in the village of Perumpugalur’ “Col (8) dealing with the description of the inam, states that it was given for the expenses of Sri Thiagarajaswami Pagoda at Tiruvarur, the worship to be conducted being called “Annadhana Kattalai”. Column 12 refers to the fact that no documents were produced before the Inam Commission and that it was stated that the grant was lost during the time of war. Column 21 says,

“The fasli 1938, this Inam Village was measured in two plots named Perumpugalur Thottam and Kannu Thottam, with distinct numbers in each. The two though evidently parts of the same village, are situated one on each side of a channel. Hence, they appear to have been measured separately..... The extent quoted in the Register of 1809 is an per accounts in the Devasthanam and it consists of only of wet and dry, no poramboke being entered. It is not at all likely that there could be a village without any poramboke. The Devasthanam accounts recorded generally only the lands from which any property was derived. The present extent exceeds the former imperfect as it is by less

than the average of the excess in the ayan lands of 3 out of the 4 adjoining villages, there being no excess in the other, and so the difference is not chargeable."

The foregoing remarks do certainly support the contention that the area in question was regarded as a Village, at any rate, at the time of the Inam Commission. If there be no other evidence in the case, one can reasonably conclude that the subject matter of the grant must have been a village even at the time of the grant. But where there is such evidence. The recitals in the Inam Fair Register, important as they are, can be regarded as conclusive on the question. In the present case; there are a number of unimpeachable documents, all interior to the enquiry. The lands forming the inam, were as we said, given at the time of the ancient Rajahs of Tanjore, for the performance of the services to the temple.

"After the extinction of the line of the Rajahs, they were taken over by the East India Company. It appears that the company allowed these lands to be cultivated by the Atheenakartha or Pandarasannadhi, in charge of the Kattalai, on receiving from him a muchalikka. We have in evidence a number of muchalikka. In all such cases, the Atheenakartha or Pandarasannadhi, first have a draft of what is called proposal muchalikka. Then, on approval as Ijara muchalikka was executed for the due performance of the obligations. Along with the Ijara muchalikka the Atheenakartha or Pandarasannadhi, obtained and gave a guarantee (or what has been called a security muchalikka). The first of the muchalikka is Ex.A-5 dated 25.9.1920. That is an Ijara muchalikka. Its corresponding security muchalikka is Ex.A-6 executed by one Appavayya. Neither of these two documents refers to Perumpugalur Thottam as a Village. The area in question was merely referred to as Perumpugalur Thottam and Kannu Thoppu. In the year 1833, we have got all the "three types of muchalikkas. Ex.A-9 is the proposal muchalikka and it is dated 18-7-1823. That describes the areas now in question as "Sarvamonia gramam- Perumpugalur Thottam," This description undoubtedly supports the case of the tenant that what was understood as forming the subject-matter of the grant, was a village. But the Ijara muchalikka does not incorporate this description of the

village. That has been executed by the same person Seshappiyan in favour of the East India Company. That describes that poverty as only "Sarvamaniyam Perumpugalur Thottam". The security muchalikka corresponding to Ex.A-11, is Ex.A-10 which gives the same description. In the same year, we have got Ex.A-12 executed by one Seshappiyan. That too does not describe Perumpugalur Thottam as a village. Then, in the year 1937, we have got Ex.A-13 the proposal muchalikka. Ex.A-14 the Ijara muchalikka and Ex.A-15 the security muchalikkas. None of them refers to the area in question as a village".

Ultimately, this Court recorded the following:

"On a view of the entire evidence in the case, we are of opinion that it has not been satisfactorily established by the tenant that the "original grant was of a village. The Tribunal came to a contrary conclusion mainly by reason of the entry contained in Column 21 of the Fair Inam Register to which we have made reference earlier and also on the recital in Ex.A-22. So far as the former documents is concerned, we are of opinion that the description of Perumpugalur Thottam as a Village can only *prima facie* indicate the character of the property at the time of the Inam Commission. In regard to the second document. We have pointed out that the Tribunal was under a misapprehension when it held that the descriptive words "Sarvamaniyam Village" applied to Perumpugalur Thottam as well. We cannot therefore accept the conclusion reached by the Tribunal. *In our view, Perumpugalur Thottam should be regarded as only part of a major village of that name and that the grant thereof was a minor inam.* It will therefore neither be an inam, much less an inam estate. The appeal therefore succeeds and is allowed with costs". [*emphasis supplied*].

This finding became final, as that decision of this Court was not challenged. Therefore, the finding that has become final in between the parties, is to the effect that Perumpugalur Thottam should be regarded only part of a major village of that name and the grant thereof was a minor inam. That under the provisions of Act 26 of 1963, it was not an inam village, but it was a minor inam, is not relevant for our purpose. What is relevant for our purpose. What is relevant is the finding recorded

herein that it was only a part of major village of that name. It is this finding which the settlement officer ignored on the ground that it was recorded in a proceeding under a different enactment and came to the conclusion that it was not an inam estate. However, the Appellate Authority on taking into consideration the finding recorded by the High Court in S.T.A.Nos.50 and 51 of 1960 and C.M.A.No.17 of 1964, which was produced as Ex.P-6 and also the other evidence, came to the conclusion that Perumpugalur Thottam is a part village Inam estate and not a minor inam. this finding which is based upon the evidence on record, cannot be held to suffer from any infirmity.

This is a revision under Sec.115 of the Code of Civil Procedure. The finding recorded by the Tribunal below on appreciation of the evidence on record cannot be disturbed in a revision as it is not open to this Court to re-appreciate the evidence on record, unless it touches or affects the jurisdiction of the authority or it is perverse. When once it is held that the finding of the Tribunal that it is a part village inam, there is no difficulty in holding that it is an inam estate, because inam estate means an existing inam estate or a new inam estate. Now inam estate means a part village inam estate or Pudukottai estate. The inam in question has been held to be a part inam. Therefore, it satisfies the definition as contained in Sec.3(11) of the Act. It is not necessary to go into the question about the correctness or otherwise of the decision in *Sathya Narayana Rao v. State of Tamil Nadu*, (1977) 1 M.L.J. 302, as for our purpose, a decision of the Full Bench in *Akkaloi Anmani Chatram v. State*, A.I.R. 1980 Mad. 149, is sufficient. In that decisions, the expressions part village inam estate has been considered and it has been held as follows:

"We have already extracted the provisions of Sec.2(ii) of the Tamil Nadu Act 26 of 1963, along with the explanation. The main part of the definition states that part village *inam estate* means 'a part of a village -- the grant of which part has been made, confirmed or recognised by the Government.....'. The ordinary meaning of the word 'part' as given in the dictionaries is as follows :

The Concise Oxford Dictionary, 6th Edn. states that 'part' means-

"Some but not all of a thing or number of things, portion allotted, share." The Shorter

Oxford Dictionary gives the following meanings for the word 'part'.

"Portion of a whole-(1) that which with another or others makes up a whole, a certain amount, but not all of anything or number of things, a portion, division, section, element, constituent, place."

Chambers Twentieth Century Dictionary, Revised Edn., gives the following means for the word 'part' as far as is relevant for the present purpose.

"Something less than the whole, a portion; that which along with others makes up, has made up or may at sometime make up a whole constituent; a member or organ, an equal quantity share." The word 'part' is not a word of art or a technical term conveying a special meaning. There is nothing in the scheme of the Tamil Nadu Act 26 of 1963, or in the context of the definition of the term "part village *inam estate*" justifying giving to the expression "part" occurring therein a meaning other than the dictionary meaning, referred to above. Therefore, even on the basis that Ex.A-1 constituted a grant and the loads covered by Ex.A-3 are situate in Maharajasamudram village will be a grant of a part of the village. The only grant that is taken away from the scene of this definition is what is contained in Explanation 1(b) to Sec.2(ii) and that explanation will come into operation only where a grant as an inam is expressed to be only in terms of acres or conies or of other local equivalent. As a matter of fact, the very Explanation 1(b) will justify the giving of the normal meaning to the word "part" occurring in Sec. 2(ii). The language of Explanation 1(b) to Sec.2(ii) of the Tamil Nadu Act 26 of 1963, as already extracted reads-

"Where a grant as an inam is expressed to be only in terms of acreage or cawnies, or of other local equivalent, the area which forms the subject matter of the grant shall not be deemed to be a part village in an estate." The very deeming provision will make it clear that but for the explanation, the grant would fall within the scope of the definition itself. Therefore, if Explanation 1(b) had not been there, even where the grant as an inam is expressed to be only in terms of acreage or cawnies or of other local equivalent, it will still mean a part village in an estate as defined in Sec.2(ii) of the Tamil

Nadu Act 26 of 1963 and by creating a fiction in Explanation 1(b), the said grant is taken out of the definition of a part village inam estate. Similarly Explanation II also will support our conclusion that the word part should be given its ordinary meaning."

For the reasons stated above, the revision fails and the same is dismissed. No order as to costs. Petition dismissed.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

L.P.A.No.96 of 1993 26th July, 1993.

R.Rajagopal ...Appellant
v.

M.P.Chellamuthu and others ...Respondents.

(A) *Letters Patent (Madras), Clause 15 - Single Judge - Declaring that person entitled to quarry sand in an area for a certain period - Directing District Collector and others to permit him to quarry sand - Order if 'judgment' - Appeal against order, if maintainable.*

Inasmuch as by the order under appeal, the learned single Judge has declared that the first respondent is entitled to quarry sand in the area in question for a period of 3 1/2 months and directed the respondents 2 to 4 to permit the first respondent to quarry sand for a period of 3 1/2 months from 1.5.1993, the Court is inclined to hold that such an order is a 'judgment' for the purpose of Clause 15 of the Letters Patent and that the order under appeal satisfies the conditions prescribed in Clause 15 of the Letters Patent. In these circumstances, there can be no hesitation in holding that the present appeal is maintainable under Clause 15 of the Letters Patent. [Para. 7]

(B) *Contempt of Courts Act (LXX of 1971), Secs.10 and 12 - Contempt application under - Earlier order by single Judge granting extension of quarrying lease upto 30.6.1990 in favour of first respondent - Order*

modified to 3 1/2 months from 15.2.1992 - Order becoming final - Quarrying getting frustrated by 'inaction of authorities - Contempt application filed against authorities - Single Judge reopening issue and ordering further extension of lease from 1.5.1993 - Permissibility.

Applying the ratio of the decision of the Supreme Court in *Brij Mohan Singh v. State of Punjab*, A.I.R. 1987 S.C. 943, it has to be held that when the order passed by the learned single Judge in W.P.No.12459 of 1989 as modified in W.M.P.No.2822 of 1992 has become final as such in law, it was not at all open to the learned single Judge to reopen the issue in the contempt application or for that matter even by way of W.M.P. and consider whether the 1st respondent is entitled to a further extension of lease by 3 1/2 months from 1.5.1993 for sand quarrying and granting such a relief to the first respondent on the ground that he could not quarry sand as per the earlier orders of this Court on account of obstruction by third parties, particularly when the learned single Judge has found that respondents 2 to 4 have not disobeyed any order of the Court. [Para. 9]

Cases referred to:

Union of India v. Mohindra Supply Company, A.I.R. 1962 S.C. 256; 1962 All.L.J. 1: (1962) 2 S.C.J. 179; (1962) 2 M.L.J.(S.C.) 63; (1962) 2 An.W.R.(S.C.) 63; (1962) 3 S.C.R. 497. [Para. 7]

Brij Mohan Singh v. State of Punjab, A.I.R. 1987 S.C. 943. [Para. 9]

Appeal under Clause 15 of the Letters Patent against the Order of the K.M.Natarajan, J., dated 8.4.1993 and made in the exercise of the Special Original Jurisdiction of the High Court, in Contempt Application No.507 of 1992, etc.

N.G.R.Prasad for M/s.Row & Reddy and M.Jayachandran, for Appellant.

T.N.Vallinayagam, for Respondent No.1.

A.S.Venkatachalamoorthy, Government Pleader, for Respondent Nos.2 to 4.

The Judgment of the Court was delivered by *Somasundaram, J.*: This Letters Patent appeal has been filed against the Order dated 8.4.1993 made in Contempt Application No.507 of 1992 filed by the first respondent herein, directing respondents 2 to 4 herein to permit the first respondent herein to quarry sand in Amaravathi river for a period of 3 1/2 months from 1.5.1993.

2. In the Sub Application No.133 of 1992 in Contempt Application No.507 of 1992, the appellant

along with 5 others was sought to be impleaded as respondents 4 to 9 in Contempt Application No.507 of 1992. However, Sub-Application 133 of 1992 was not pressed by the first respondent herein in the course of the proceedings in Contempt Application No.507 of 1992 and the parties proposed to be impleaded as respondents 4 to 9 were given up. The appellant got leave of this Court to file this L.P.A. in C.M.P.No.8488 of 1993.

3. Brief facts leading to the filing of this appeal are the following: The first respondent herein was granted lease of lands in the Amaravathi river poramboke area for the purpose of quarrying sand for the period from 1.7.1987 to 30.6.1988. After the expiry of the lease period, the first respondent obtained an order dated 7.3.1990 from the Learned single Judge in W.P.No.12459 of 1989 in the following terms:

"In the circumstances of the case, though the petitioner is not entitled to renewal of licence for three years, and prayed for by him yet extension can be granted till the end of this fasli 1389, that is upto 30th June, 1990 subject to paying 25 per cent more than the original lease amount along with L.C. and L.C.S. amount. In the result, it is hereby ordered in the writ petition that the petitioner is granted extension of lease on the same condition from 15.3.1990 to 30.6.1990 on condition of paying the proportionate lease amount. Originally fixed plus 25 per cent increased thereon plus L.C. and L.C.S. amount and that he should pay the entire lease amount as aforesaid on or before 15.2.1990. It is made clear that on no account further extension of time would be granted by virtue of this order and that this extension is granted by way of concession as a special case only taking into account the hardship expressed by the petitioner."

Pursuant to the order of the learned single Judge, the Collector of Periyar District in his proceedings dated 23.9.1991 granted a lease in favour of the first respondent for quarrying sand in the area in question for the period from 23.9.1991 to 6.1.1992. Feeling aggrieved by the said order of the Collector of Periyar District, one Sivabalakrishnan filed W.P.No.15116 of 1991 before this Court to quash the order dated 23.9.1991 and pending disposal of the writ petition, he obtained an order of interim stay. However, the first respondent was able to get the interim stay vacated on 2.12.1991. As against

the order vacating the interim stay, the said Sivabalakrishnan preferred W.A.No.1465 of 1991 and a Division Bench of this Court by the judgment dated 10.12.1991 allowed the writ appeal and directed the continuation of the stay of the operation of the order dated 23.9.1991 till the disposal of W.P.No.15116 of 1991. While allowing the writ appeal the Division Bench has observed as follows:

"Mr.T.N.Vallinayagam, learned counsel for the third respondent puts forth the plea that in case his client succeeds in throwing out the writ petition, there has got to be a working out of the period of the extension of the lease. That is a matter exclusively to be adverted to before the learned single Judge and it is for the learned single Judge to decide the question taking note of the relevant facts. This writ appeal is allowed."

When W.P.No.15116 of 1991 came for final disposal before Bakthavatsalam, J., on 10.2.1992, the period for which permission to quarry sand was given by the Collector, i.e., the period from 23.9.1991 to 6.1.1992 was over and therefore, Bakthavatsalam, J. dismissed the writ petition as infructuous with the following observation:

"It is open for the third respondent to take any other suitable action against the petitioner or the Government for any loss he had incurred in view of the pendency of the writ petition."

Then, the first respondent filed W.M.P.No.2822 of 1992 in W.P.No.12459 of 1989 requesting the learned single Judge to modify the order dated 7.3.1990 made in W.P.No.12459 of 1989. On 14.2.1992, the learned single Judge passed the following order in W.M.P.No.2822 of 1992.

"Heard both. In view of the difficulty which had been expressed in the affidavit filed in support of this petition in enjoying the fruits of the orders passed by this Court in W.P.No.12459 of 1989 and in view of the direction given by this Court in connected writ petition to ask for extension of time only in these proceedings and in view of the fact that the Government is also prepared to comply with the directions given by this Court on account of the inconvenience for the period to be specified by this Court, the order already passed on 7.3.1990 in W.P.No.12459 of 1989 granting the period for quarrying sand in Amaravathi River from 23.9.1991 to 6.1.1992 is modified to one from

15th February, 1992 to 31st May, 1992 or for a period of three and half months, which is convenient to the respondent”.

As against the order dated 14.2.1992 made in W.M.P.No.2822 of 1992 the said Sivabalakrishnan filed W.A.No.1422 of 1992 and a Division Bench of this Court by the judgment dated 28.10.1992 dismissed the writ appeal in the following terms:

“On a careful perusal of the papers placed before us, we find the order in W.P.No.12459 of 1989 enabling the first respondent to quarry sand for a period of 3 1/2 months has become final as the same has confirmed by the Division Bench and no further appeal was filed. Therefore, the first respondent is entitled to the benefit of that order. The order under appeal has only reiterated that order, and so, it cannot be said that the learned Judge has in any way exceeded the jurisdiction or granted a relief more than what was prayed for”.

4. Thereafter, the first respondent filed Contempt Application No.507 of 1992 under Secs.10 and 12 of the Contempt of Courts Act, 1971 (hereinafter referred to as the Act) to punish respondents 2 to 4 herein and others for having disobeyed the order dated 14.2.1992 made in W.M.P.No.2822 of 1992 in W.P.No.12459 of 1989. The case of the first respondent herein in Contempt Application No.507 of 1992 is that, though the second respondent gave an order to the first respondent for quarrying sand in the river in question, on 21.8.1992 certain private parties, who were sought to be impleaded as respondents 4 to 9 in Contempt Application No.507 of 1992 by filing Sub Application No.133 of 1992, by their acts of commission and omission and by initiating certain legal proceedings against the first respondent herein, prevented him from quarrying sand in the area in question for the period of 3 1/2 months as per the Orders made in W.M.P.No. 2822 of 1992 as confirmed in W.A.No.1422 of 1992. The further case of the first respondent in the contempt application is that when he approached the second respondent for relief, he directed the first respondent to go to the third respondent and when he approached the third respondent, he was not as co-operative as he was earlier and he in turn directed the first Respondent to get the Revenue officials to the spot in order to enable him to carry on his quarrying operation without any obstruction by third

parties. The first respondent further contended in the affidavit filed in support of the contempt application that he was driven from pillar to post and the ultimate result was that the fruits of the order of this Court were sought to be taken away from the first respondent by the deliberate, wilful and wanton efforts and actions of all the respondents, and therefore, they are liable to be punished under Secs.10 and 12 of the Act. respondents 2 to 4 filed separate Counter affidavits denying the various allegations contained in the affidavit filed in support of the contempt application. On a consideration of the facts and circumstances of the case, the learned Single Judge found that respondents 2 to 4 herein have not disobeyed any order of court and committed any contempt. However, the learned Single Judge by the order dated 8.4.1993 while holding that respondents 2 to 4 have not committed any contempt of any order of the court, issued the following directions.”

“Hence, the order granted by this Court, which was upheld by the Division Bench of this Court, admittedly was not implemented so far, and that the petitioner is entitled to quarry sand for 3 1/2 months. This Court directs the respondents 1 to 3 to permit the petitioner to quarry sand from 1.5.1993 for 3 1/2 months as already ordered by this Court and respondents 1 to 3 are directed to grant necessary adequate police protection to the petitioner and do necessary things and see that the quarrying operations by the petitioner is carried on peacefully without any difficulty by any interference of third parties. The petitioner is also directed to pay all the necessary charges if any for the protection to be afforded to him by the police. The petitioner is also directed to comply with all the conditions regarding the permission to be granted by the first respondent. This petition is ordered accordingly. The respondents 1 to 3 are discharged. The respondents 4 to 9 are given up since they are not parties in the impugned order”.

Aggrieved by the said directions given by the learned single Judge in C.A.No.507 of 1992, the appellant who was originally sought to be impleaded as 8th respondent in the contempt application but not actually impleaded with the leave of this Court, has filed the present L.P.A.

5. Mr.N.G.R.Prasad, learned counsel for the appellant contended that when the subject matter of

the contempt application was whether the respondents therein had disobeyed the order of this Court dated 14.2.1992 made in W.M.P.No.2822 of 1992 in W.P.No.12459 of 1989, the learned Judge has no jurisdiction to give a further period of lease in favour of the first respondent for a period of 3 1/2 months from 1.5.1993, that this Court in a contempt application or for that matter in a miscellaneous petition cannot grant extension of lease after the writ petition has been finally disposed of and that when the order dated 7.3.1990 made in W.P.No.12459 of 1989 granting lease for the period from 15.3.1990 to 30.6.1990 and the order dated 14.2.1992 made in W.M.P.No.2822 of 1992 have become final, the first respondent herein cannot get further extension of lease by filing a contempt application. The learned counsel for the appellant further contended that the order of the learned single Judge granting extension of lease for a period of 3 1/2 months from 1.5.1993 is totally without jurisdiction and it is liable to be set aside. Learned counsel for the appellant also contended that by the grant of extension of lease, by the order under appeal, for 3 1/2 months, the appellant would be seriously affected because the water table in the area will come down and the coconut grove in and around the places and the agricultural operations will be seriously affected.

6. *Per contra*, Mr.T.N.Vallinayagam, learned counsel for the first respondent, contended that inasmuch as by the order made in contempt application 507 of 1992, respondents 2 to 4 herein were discharged and nobody was punished under the provisions of the Act, the appeal filed against such an order of the learned single Judge is not maintainable, learned counsel for the first respondent, further contended that by the order dated 14.2.1992 in W.M.P.No.2822 of 1992 in W.P.No.12459 of 1989 the learned single Judge has modified the order dated 7.3.1990 made in W.P.No.12450 of 1989, by extending the time for sand quarrying by the first respondent for the period from 15.2.1992 to 31.5.1992 or for a period of 3 1/2 months which is convenient to the first respondent, that the said order of the learned single Judge made in W.M.P.No.2822 of 1992 has been confirmed in W.A.No.1422 of 1992, that as per the said orders, the first respondent is entitled to quarry sand in the area in question for a period of 3 1/2 months which is convenient to the first respondent and therefore, the learned single Judge while

disposing of the contempt application is justified in directing respondents 2 to 4 to permit the first respondent to quarry sand in the river in question for a period of 3 1/2 months from 1.5.1993. The learned counsel also contended that the order of the learned single Judge directing respondents 2 to 4 to permit the first respondent to quarry sand for 3 1/2 months from 1.5.1993 is in accordance with law equity and good conscience and therefore, it is not liable to be interfered with in this L.P.A.

7. Let us first examine the preliminary objections raised by the learned counsel for the first respondent with regard to the maintainability of this L.P.A. The contention of the learned counsel for the first respondent is that inasmuch as by the order under appeal, respondents 2 to 4 have been discharged and nobody is punished under the provisions of the Act, the appeal filed against such an order is not maintainable under Sec.19(1) of the Act. The learned counsel further contended that if an appeal against the order made in contempt application 507 of 1992 does not lie under Sec.19(1) of the Act, it does not follow that Clause 15 of the Letters Patent could be invoked and therefore, the present appeal filed under Clause 15 of the Letters Patent is also not maintainable. An identical contention regarding the maintainability of a Letters Patent Appeal came up for consideration before a Division Bench of this Court in *Vidya Charan Shukla v. Tamil Nadu Olympic Association and another, Contempt Appeal No.5 of 1990 and Letters Patent Appeal No.123 of 1990*. The Division Bench of this Court by the judgment dated 14.8.1990 in *Vidya Charan Shukla v. Tamil Nadu Olympic Association and another, Contempt Appeal No.5 of 1990 and Letters Patent Appeal No.123 of 1990*, while holding that an appeal under Clause 15 of the Letters Patent would lie against any order or decision passed in exercise of the contempt jurisdiction of the High Court, provided such an order or decision is a judgment and satisfies the other requirements of Clause 15 of the Letters Patent, has observed as follows:

“Various judgments, where recourse to an appeal under the Letters Patent has not been permitted, dealt with cases where the act provided an express prohibition or exclusion of an appeal under any other law. That was the petition in *Union of India v. Mohindra Supply Company*,

A.I.R. 1962 S.C. 256; 1962 All.L.J. 1; (1962) 2 S.C.J. 179; (1962) 2 M.L.J. S.C. 63; (1962) 2 An.W.R. S.C. 63; (1962) 3 S.C.R. 497, which concerned with the provisions contained in Sec.39(2) of the Arbitration Act and *A.I.R. 1965 S.C. 1442*, dealing with the Delhi Rent Control Act. Sec.100-A of the Code of Civil Procedure is again one of such instances where recourse to the Letters Patent cannot be had. Since, in our opinion, Sec.19(1) of the Act cannot be construed to be destructive of the valuable right of an appeal granted by Clause 15 of the Letters Patent and there is no provision contained in the Contempt of Courts Act abrogating or excluding the provisions of Clause 15 of the Letters Patent, we hold that except to the extent of the occupied field covered by Sec.19(1) of the Act, an appeal under Clause 15 of the Letters Patent would lie against any order or decision passed in exercise of the contempt jurisdiction of the High Court, provided such an order or decision is a 'judgment' and satisfied the other conditions laid down in Clause 15 of the Letters Patent and does not fall in any of the excluded categories. We, therefore, overrule the preliminary objection relating to the non-maintainability of the appeal under Clause 15 of the Letters Patent on the facts of the instant case".

We are in entire agreement with the above view expressed by the Division Bench of this Court in *Vidya Charan Shukla v. Tamil Nadu Olympic Association and another, Contempt Appeal No.5 of 1990 and Letters Patent Appeal No.123 of 1990*. Inasmuch as by the order under appeal, the learned single Judge has declared that the first respondent is entitled to quarry sand in the area in question for a period of 3 1/2 months and directed the respondents 2 to 4 to permit the first respondent to quarry sand for a period of 3 1/2 months from 1.5.1993, we are inclined to hold that such an order is a 'judgment' for the purpose of Clause 15 of the Letters Patent and that the order under appeal satisfies the conditions prescribed in Clause 15 of the Letters Patent. In these circumstances, we have no hesitation in holding that the present appeal is maintainable under Clause 15 of the Letters Patent.

8. The next question we have to examine is, whether the learned single Judge is right in issuing directions to respondents 2 to 4 to permit the first

respondent to quarry sand in the river in question for a period of 3 1/2 months from 1.5.1993, while disposing of Contempt Application No.507 of 1992. It is seen from the order in W.P.No.12459 of 1989, originally, the second respondent in his order dated 15.6.1987 granted a lease in favour of the first respondent to quarry sand in Amaravathi river for the period from 1.7.1987 to 30.6.1988. The learned single Judge while dismissing W.P.No.12459 of 1989 filed by the first respondent, for the issue of a writ of *mandamus* directing the respondents therein not to interfere with his quarry operations in Amaravathi river Poramboke during faslis 1399 and 1400, directed extension of lease till the end of June, 1990 as a special case. By the order dated 7.3.1990 made in W.P.No.12459 of 1989, the learned single Judge has further observed that it is made clear that on no account further extension of time would be granted by virtue of the said order and that extension is granted by way of concession as a special case. Again by the order dated 14.2.1992, made in W.M.P.No.2822 of 1992 the learned single Judge modified the original order made in W.P.No.12459 of 1989 and directed the extension of lease in favour of the first respondent, for quarrying sand, for the period from 15.2.1992 to 31.5.1992. The said order made in W.M.P.No.2822 of 1992 was confirmed in W.A.No.1422 of 1992. Since the order in W.M.P.No.2822 of 1992 has been confirmed by the Division Bench in W.A.No.1422 of 1992, we need not go into the correctness or otherwise of the order of the learned single Judge made in W.M.P.No.2822 of 1992 modifying the period specified in the original order made in W.P.No.12459 of 1989. However, the question is, in the contempt application, which is in the nature of a miscellaneous petition, can the learned single Judge reopen the issue whether the first respondent is entitled to further extension of the lease for sand quarrying for 3 1/2 months from 1.5.1993 and grant such relief to the first respondent. As already stated, the case of the first respondent in the contempt application is that, though the second respondent gave an order in favour of the first respondent for quarrying sand on 21.8.1992, certain private parties who were sought to be impleaded as respondents 4 to 9 in the contempt application, by their acts of omission and commission and by initiating legal proceedings against the first respondent prevented him from quarrying

sand in the area in question for the period of 3 1/2 months, as per the orders of this Court. The grievance of the first respondent against the third parties is stated in paragraph 13 of the affidavit filed in support of such application 133 of 1992 in Contempt Application No.507 of 1992 in the following terms:

"By now the time granted was slowly running out. After 2 1/2 months' fight in courts and before the police authorities and the Collector, when I was about to quarry sand on 21.10.1992, apprehending that his appeal is likely to be dismissed, the 4th respondent again obstructed my quarrying, along with respondents 5 to 9 and other rowdy people. Actually on the first day some 25 rowdies were taken into custody and then released. Again another fifty persons were taken into custody and released on bail. Now for a third time, the 4th respondent has set up his own people and obstructed my removal of sand".

Again the grievance of the first respondent, against respondents 2 to 4 is expressed in paragraphs 14 and 15 of the affidavit in the following terms:

"When I approached the 1st respondent, viz. the Collector of Erode, for relief, he directed me to go to the 2nd respondent, viz. Superintendent of Police, Erode. But the 2nd respondent was not as co-operative as he was earlier and he had directed me to get a Revenue Official, viz. either the Tahsildar or the Sub Collector, to be on the spot in order to enable me to carry on my quarrying operation without any obstruction by other people.

15. Thus I am being driven from Pillar to post and *vice versa* and the ultimate result is the fruits of the order of this Hon'ble Court are sought to be taken away from me by the deliberate, wilful and wanton efforts, action and attempts made by all the respondents. At the same time, time is also running short. This Hon'ble Court has given clear mandate that I shall be permitted to quarry sand for 105 days, i.e. 3 1/2 months. Now the authorities are making out some reason or other and are trying to thwart the effect of this order thus depriving me of the benefit of the special concession at the instance of my competitive contractor, viz. 6th respondent. Thus all the respondents have committed contempt of the orders of this Hon'ble Court. The order of this Hon'ble Court

was in full force and virtue on the acts of commission and omission on the part of the respondents and violation thereof has been committed by the respondents in the above manner".

The learned single Judge on a consideration of the materials on record found that respondents 2 to 4 have not committed any contempt in the following terms:

"It is seen from the various averments stated in the counter filed by the respondents 1 to 3 that though the permission and protection were granted, in view of the obstructions by some interested persons, the petitioner could not enjoy the fruits of the order that was passed and it is not responsible for the failure to implement the order and it cannot be said that the respondents 1 to 3 have disobeyed the order and committed any contempt proceedings".

The learned single Judge also found that the first respondent could not quarry sand pursuant to the orders of this Court on account of obstructions by the third parties. Even assuming the third parties have interfered with the quarrying operations of the first respondent, and prevented him from carrying on his quarrying operations during the relevant period, the proper course open to the first respondent is to take appropriate legal action against the third parties before appropriate forum. In fact, Bakthavatsalam, J. while dismissing the W.P.No.15116 of 1991 has observed that it is open for the first respondent herein to take any other suitable action against the petitioner in W.P.No.15116 of 1991 or the Government for any loss he had incurred in view of the pendency of W.P.No.15116 of 1991. As already pointed out, the first respondent also filed Sub Application 133 of 1992 to implead the third parties who obstructed the 1st respondent from quarrying sand, as parties in the contempt application, but however, the first respondent gave them up subsequently on the ground that they were not parties to the order dated 14.2.1992. In these circumstances, as rightly contended by the learned counsel for the appellant, there is absolutely no justification for the learned single Judge to grant further extension of lease and direct the respondents 2 to 4 to permit the first respondent to quarry sand in the area in question for a period of 3 1/2 months from 1.5.1993 particularly, when the learned single Judge has

found that respondents 2 to 4 have not disobeyed any order of the court. Again the order of the learned single Judge dated 7.3.1990 made in W.P.No.12459 of 1989 extending the quarry lease in favour of the first respondent, till 30.6.1990 has become final after the said order was confirmed in W.A.No.365 of 1990. Similarly, the order dated 14.2.1992 made in W.M.P.No.2822 of 1992 extending the period of lease upto 31.5.1992 has also become final when the said order was confirmed in W.A.No.1422 of 1992. When the said proceedings stand terminated by the final disposal of W.P.No.12459 of 1989 and by the modification order dated 14.2.1992 made in W.M.P.No.2822 of 1992 as confirmed in W.A.No.1422 of 1992, it was not at all permissible in law for the learned single Judge to reopen the issue whether the first respondent was entitled to further extension of lease by 3 1/2 months for sand quarrying, in the contempt application and acceding to the request of the first respondent, which was based on a separate cause of action, i.e., the inability of the first respondent to quarry sand for a period of 3 1/2 months on account of obstruction by third parties and directing respondents 2 to 4 to permit the first respondent to quarry sand in the area in question for 3 1/2 months from 1.5.1993.

9. In *Brij Mohan Singh v. State of Punjab, A.I.R. 1987 S.C. 943*, the Apex Court while laying down the principle that when the writ petition is disposed of finally, it is not open to the court to reopen the proceedings by means of a miscellaneous petition in respect of a matter which provided a fresh cause of action, observes thus:

"The High Court's order is not sustainable for yet another reason. Respondent's writ petition challenging the order of dismissal had been finally disposed of on 10.8.1984, thereafter nothing remained pending before the High Court. No miscellaneous application could be filed in the writ petition to revive proceedings in respect of subsequent events after two years. If the respondent was aggrieved by the notice dated 29.1.1986 he could have filed a separate petition under Art.226 of the Constitution challenging the validity of the notice as it provided a separate cause of action to him. The respondents was not entitled to assail validity of the notice before the High Court by means of a miscellaneous application in the writ petition which had already been decided. The High

Court had no jurisdiction to entertain the application as no proceedings were pending before it. The High Court committed error in entertaining the respondent's application which was founded on a separate cause of action. When proceedings stand terminated by final disposal of writ petition it is not open to the court to reopen the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action. If this principle is not followed there would be confusion and chaos and the finality of proceedings would cease to have any meaning".

Applying the ratio of the above decision of the Supreme Court, it has to be held that when the order passed by the learned single Judge in W.P.No.12459 of 1989 as modified in W.M.P.No.2822 of 1992 has become final as such in law, it was not at all open to the learned single Judge to reopen the issue in the Contempt Application or for that matter even by way of W.M.P. and consider whether the 1st respondent is entitled to a further extension of lease by 3 1/2 months from 1.5.1993 for sand quarrying and granting such a relief to the first respondent on the ground that he could not quarry sand as per the earlier orders of this Court on account of obstruction by third parties, particularly when the learned single Judge has found that respondents 2 to 4 have not disobeyed any order of the court. Therefore, the order of the learned single Judge directing respondents 2 to 4 to permit the first respondent to quarry sand in the area in question for 3 1/2 months from 1.5.1993 is liable to be set aside. On the facts and circumstances, of the case, we are also not inclined to accept the contention of the learned counsel for the first respondent that the order of the learned single Judge is in accordance with the equity and good conscience and therefore it is not liable to be interfered with in this Letters Patent Appeal, as the order passed by the learned single Judge is not permissible in law.

10. For all the reasons stated above, we allow the Letters Patent Appeal in part and set aside the directions issued by the learned single Judge to respondents 2 to 4 to permit the first respondent to quarry sand and in area in question for 3 1/2 months from 1.5.1993. The order of the learned single Judge discharging respondents 2 to 4 is not disturbed. No costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and S.M.Ali Mohammed, JJ.*

C.M.P.Nos.14392 and 14393 of 1993 in
C.M.P.Nos.14911 and 14912 of 1993 in
O.S.A.Nos.215 and 216 of 1993

1st November, 1993.

Dr.H.Ranganathan and another ...*Petitioners*
v.

V.Chandrasekar and others ...*Respondents.*

(A) *Letters Patent (Madras), Clause 15 - Civil Procedure Code (V of 1908), O.41, Rules 5 and 6 - Appeals under Letters Patent - Granting stay of execution of decree - Principles adopted for.*

Although in terms Rules to O.41 of the Code of Civil Procedure, 1908, are not applied to appeals under Clause 15 of the Letters Patent of this Court, it has always been the practice to adopt in principle the conditions in Rules 5 and 6 of the same and in granting stay, care is taken to see that no order for stay of execution is granted unless the court is satisfied that substantial loss may result to the party applying for stay of execution unless the order is made, that the application has been made without unreasonable delay and that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him and in case it is decided that a stay is not granted, it is either left for the court which has passed the decree to make suitable orders as to security or the appellate court itself makes an order to take such security which is found proper for the restitution of any property which may be or has been taken in execution of the decree or for the due performance of the decree or the order of the appellate court. The above rules have always guided this Court in deciding whether to order for stay of execution of decree as above or to decline to grant the stay and instead order for security by the decree-holder for the restitution or the due performance of the decree as the case may be.

[Para. 3]

(B) *Maxims - Res ipsa loquitur - Applicability - Defendant at a loss to explain accident or dying in it - Adverse inference of negligence, if cannot be drawn against him - Professional alleged to be guilty of negligence - Reference to the maxim how far*

relevant.

Judgment of this Court such as one in the case of *The Managing Director, M/s.Dunlop India Limited v. S.G.Krishnamurthy*, (1992)1 L.W. 625 and the Supreme Court in the case of *Shyam Sundar v. State of Rajasthan*, A.I.R. 1974 S.C. 890, have recognised that the doctrine of *res ipsa loquitur* is attracted in the case of the alleged negligence of the person under whose management and control or at whose hands the accident occurs is in the know of the things and nor the persons who has suffered the injury. This maxim is recognised, however, as a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff was invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts hearing in the matter are at the outset unknown to him and often within the knowledge of the defendant. But, though the parties relating access to evidence is an influential factor, it is not controlling. Thus, the fact that the defendant is as much at a loss to explain the accident or himself died in it does not preclude an adverse inference against him if the odds otherwise point to his negligence. The extent of this maxim sometimes has been that the mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. When, therefore, a professional shall be held guilty of negligence and subjected to an action for compensation shall depend not merely on a reference to a maxim like *res ipsa loquitur* or a note in evidence or an inference based on some entry in a book as to the nature of the ailment and for subsequent development but on the assessment as a whole of the evidence as to the extent of liberty that can be recognised in a professional and the limitation under which a professional is required to function. The balance on the one hand as to such accountability of a professional and on the other hand with the sufferings of the patient on account of any negligence on the part of the professional alone shall make a court to reach to a proper appreciation of the facts and law in this behalf.

[Paras. 4 & 5]

Cases referred to:

The Managing Director, M/s. Dunlop India Limited v. S.G. Krishnamurthy, (1992) 1 L.W. 624. [Para. 4]
Shyam Sundar v. State of Rajasthan, A.I.R. 1974 S.C. 890: 1974 Lab.I.C. 508: 28 Fác.L.R. 285: (1974) 1 S.C.C. 690: 1974 S.C.D. 498: 1974 A.C.J. 296: (1974) 2 S.C.J. 317. [Para. 4]

Roe v. Minister of Health, (1954) 2 Q.B. 66. [Para. 6]
 C.M.P.Nos.14392 and 14393 of 1993: Petitions praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to pass an order of interim stay of further proceedings pursuant to the decree passed in C.S.No.690 of 1985, dated 25.5.1993 on the file of the Original Side of this Hon'ble Court pending in O.S.A.Nos.215 and 216 of 1993 preferred to this Court against under Clause 15 of the Letters Patent against the Order of Pratap Singh, J. dated 25.5.1993 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S.No.690 of 1985, etc. *T.S. Krishnamurthy*, Senior Advocate for *T.P. Sankaran*, *N. Kirubakaran* and *Manishankar*, for Petitioners.

R. Krishnamoorthy, Senior Advocate for *A.S. Chandrasekaran*, *N. Ananth* and *S.D.S. Philip*, for Respondent Nos.2 and 3.

C.A. Sundaram, for Respondent No.1.

The Order of the Court was made by

Mishra, J.:- These petitions arise in O.S.A. Nos.215 and 216 of 1993, which were preferred against the judgment and decree passed in C.S.No.690 of 1985, wherein a learned single Judge of this Court has granted general as well as special damages to the plaintiff/respondent of Rs.10,00,000 and Rs.7,00,000 respectively with interest at the rate of 9% per annum from the date of the suit till the date of the decree and 6% per annum from the date of the decree till the realisation with costs payable by the appellants. We have ordered in C.M.P.Nos.14392 and 14393, dated 15.10.1993, as follows:

"The appellants in O.S.A.Nos.215 and 216 of 1993 have moved the above applications seeking stay of further proceedings pursuant to the decree passed in C.S.No.690 of 1985. Ordinarily, the appellate court is reluctant in staying money decrees including the decree by way of compensation as general damages or special damages. The appellants herein, however, are a public limited company and the doctors employed for the service to the patients

admitted to the hospital run by the company, who are engaged, it is claimed, in providing to the patients consultations and treatments including the surgery. The grant of the decree by way of general as well as special damages has come in the case of the plaintiff/respondent having been admitted for a health check up in the hospital, consultancy and treatment including surgery by the physicians and surgeons engaged by the hospital for the plaintiff/respondent including the appellants in O.S.A.No.215 of 1993."

The contentions raised on behalf of the appellants appear to take the court to the *maxim res ipsa loquitur*, the rule as to the onus of proof in such a case and the requirements of proof by deductions from established facts etc.

3. Keeping in view of the special facts of this case, we are inclined to order as follows:

"(i) Issue notice to the plaintiff/respondent only, as the other respondents are appellants either in O.S.A.No.215 of 1993 or in O.S.A.No.216 of 1993 as the case may be, to show cause why the prayer in the petitions be not granted returnable in four weeks.

(ii) The appellants shall furnish within fifteen days from today to the satisfaction of the court a bank guarantee drawn on a nationalised bank as regards the decree money.

(iii) There shall be an order of stay of further proceedings pursuant to the decree passed in C.S.No.690 of 1985 on the file of the Original Side of this Court for the said period of 15 days and shall continue thereafter only on the condition that the appellants herein shall furnish bank guarantee as above.

(iv) The bank guarantee furnished can be kept in either of the appeals but operate for both".

2. The plaintiff/respondent has, however, appeared with petitions for vacating the stay and has stated on facts that about nine years ago when he was entering the prime of his life—a sportsman of international repute and recognition; receipt of numerous awards including the Arjuna award; a gold medalist law graduate; an officer in the State Bank of India with a bright future and prospects of rising to the very top of his career, he went to the appellant Hospital for a simple knee surgery with the assurance that he would be discharged in three or four days. He, however, emerged from the hospital three months later a wreck, a cripple, a

shell of the human being-his reason affected; voice affected; without powers of locomotion or coordination-because on account of negligence during surgery in maintaining the supply of Oxygen his brain got damaged and permanently impaired his faculties. The handicaps that he suffered, however, persisted and, according to him, the Hospital and Doctors, whose negligence alone caused such injuries to him, at first were apologetic, but the apology wore thin when they accepted that his (plaintiff/ respondent) return to normal was a hopeless prospect. He has alleged in the affidavit as follows:

"Dr. Pratap Reddy, the Chairman of the Hospital, at first, apologised for what had happened and assured me that he would find avenues for my treatment abroad whose expenses would be borne by the hospital. After sometime, he began to avoid me and tried to wash his and the hospital's hands of the whole matter leaving me to reconcile myself to the situation. I was, however, not willing to accept that nothing further could be done and with the invaluable help and assistance of family, friends and well wishers searched for treatment to improve my condition which was finally found to be available in the United States and Canada. Dr. Reddy's promises of the Hospital bearing the expenses for the treatment turned out to be as hollow as his promise to find out able treatment for my condition. It was my parents' and my savings, monies raised from my friends, family, well wishers and the philanthropy and generosity of the general public which enables me to get the expensive medical treatment abroad which has resulted in the improvement in my condition from being a total wreck and cripple to a stage of at least a semblance of normalcy. It was the kindness of all such persons and their good wishes which saw me through these terrible days".

He has stated that he filed the suit C.S.No.690 of 1985 for compensation for the irreparable damage and untold suffering caused to him with pleas to settle the matter so that at least his further medical expenses for treatment in India and abroad could be taken care of. According to him, the defendants/ appellants took repeated adjournments in the suit and filed written statements after inordinate delay. It took over eight years to complete the trial and a decree has been passed after

taking into account the evidence and the law on the subject to which he has become entitled. He has contended, accordingly, that over the years, it is an established precedent that ordinarily money decrees are not stayed and in exceptional cases where an order of stay is justified, the pre-condition is that the judgment-debtor deposit the entire decretal amount and the decree-holder is permitted to withdraw such sum on conditions as to security as deemed fit.

3. The order staying the decree would show that the court was not unaware of the ordinary rule of not granting any stay of money decrees including the decree by way of compensation of general damages or special damages. Although in terms Rules to O.41 of the Code of Civil Procedure, 1908, are not applied to appeals under Clause 15 of the Letters Patent of this Court, it has always been the practice to adopt in principle the conditions in Rules 5 and 6 of the same and in granting stay, care is taken to see that no order for stay of execution is granted unless the court is satisfied that substantial loss may result to the party applying for stay of execution unless the order is made, that the application has been made without unreasonable delay and that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him and in case it is decided that a stay is not granted, it is either left for the court which has passed the decree to make suitable orders as to security or the appellate court itself makes an order to take such security which is found proper for the restitution of any property which may be or has been taken in execution of the decree or for the due performance of the decree or the order of the appellate court. The above rules have always guided this Court in deciding whether to order for stay of execution of decree as above or to decline to grant the stay and instead order for security by the decreeholder for the restitution or the due performance of the decree as the case may be.

4. The case in hand, however, has been first of its kind in this Court and the rules as to damages by way of compensation in case of the alleged medical negligence is not settled by any authority of this Court. Judgments of this Court such as one in the case of *The Managing Director, M/s. Dunlop India Limited v. S.G. Krishnamurthy*, (1992) 1 L.W. 624 and the Supreme Court in the case of *Shyam Sundar v. State of Rajasthan*, A.I.R. 1974 S.C. 890:

1974 Lab.I.C. 508; 28 Fac.L.R. 285; (1974)1 S.C.C. 690; 1974 S.C.D. 498; 1974 A.C.J. 296; (1974)2 S.C.J. 317, have recognised that the doctrine of *res ipsa loquitur* is attracted in the cases of the alleged negligence of the person under whose management and control or at whose hands the accident occurs is in the know of the things and not the person who has suffered the injury. This maxim is recognised, however, as a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff was invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts hearing in the matter are at the outset unknown to him and often within the knowledge of the defendant. But, though the parties relating access to evidence is an influential factor, it is not controlling. Thus, the fact that the defendant - is as much at a loss to explain the accident or himself died in it does not preclude an adverse inference against him if the odds otherwise point to his negligence. The extent of this maxim sometimes has been that the mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. Learned counsel for the appellants have readily acknowledged that medical negligence may be one professional negligence in which the doctrine of *res ipsa loquitur* would assume importance and the patient's position is such that he may very well not know and not be able to establish what treatment he received and how his injuries were caused. They have submitted that there must be a reasonable evidence of negligence and it should not be assumed that there cannot be either external and /or internal causes except any negligence on the part of the hospital and its doctors. According to them, the negligence must stem from any act or omission of the hospital and/or its doctors and found to have affected the patient adversely for attracting the maxim *res ipsa loquitur*. They have canvassed with the vehemance that the court ought to have taken notice of the statistical evidence as to operation and its success and should have asked for evidence from the plaintiff as to the alleged negligence. The main argument of the learned counsel for the appellants for

stay before us is that the court should not assume any negligence and that medical science has not yet reached the stage where the law ought to presume that a patient must come out of an operation better than he went into it. Although the treatment of the plaintiff was under the control of the defendant doctors, it was not under their sole control in the sense that they could see, observe and react to the immediate effects of the external application of such treatment but not such hidden and unexplained mysteries of the plaintiff's own physiology which developed as a consequence of the treatment that he received at the hands of the hospital. Learned counsel for the plaintiff/ respondent has, however, contended that this should not be taken into account as a ground to stay the operation of the decree at this stage of the proceeding in the appeal, for, according to him, learned single Judge has gone by a specific evidence of one of the defendants who was in court not stated about any mistake in administration of the Oxygen, but in an earlier letter for the records he has recorded that the plaintiff suffered a condition of post-anoxic encephalopathy, i.e. damage to the brain after the condition of total lack of Oxygen. There is no mistake in the inference of negligence on the part of the defendant doctors on such evidence and there is also no mistake in awarding compensation based on such evidence.

5. We have recorded that the issue before us is related to a profession that is involved in the medicare and care by way of such treatment that medical science has developed and in which there is always a risk of any fault in the system both of the treatment externally and in the physiology of the patient. Extent of the risk a patient runs is minimised by the quality and standard of the treatment and the knowledge of the health conditions of the patient which experts engaged in the profession ascertain by various medical tests. There can, however, be no doubt to the rule that professional negligence should be suitably punished and a patient, who has suffered on account of such negligence is compensated. When, therefore, a professional shall be held guilty of negligence and subjected to an action for compensation shall depend not merely on a reference to a maxim like *res ipsa loquitur* or a note in evidence or an inference based on some entry in a book as to the nature of the ailment and for subsequent development but on the assessment as a whole of the evidence as to the extent of

liberty that can be recognised in a professional and the limitation under which a professional is required to function. The balance on the one hand as to such accountability of a professional and on the other hand with the sufferings of the patient on account of any negligence on the part of the professional alone shall make a court to reach to a proper appreciation of the facts and the law in this behalf.

6. Learned counsel for the parties have drawn our attention to some of the authorities that are cited in Jackson & Powell on Professional Negligence-Third Edition', particularly as respects medical negligence and our attention has been drawn to such authorities that show when inference of negligence is permissible and when inference of negligence is rebutted and it is suggested on behalf of the appellants that like the case in *Roe v. Minister of Health*, (1954) 2 Q.B. 66, where patient suffered permanent paralysis from the waist down after being injected with a spinal anaesthetic at the defendant hospital, in the instant case the disaster, even if the evidence aforementioned is found against the appellant, occurred due to the failure in Oxygen supply instrument itself, should in a such case, they ask, negligence of this magnitude inferred and the appellants held liable for damages. Learned counsel for the plaintiff/ respondent has, however, no quarrel to the propositions of law in general. His submission is that the plaintiff/ respondent has suffered substantially and it has been after a long wait proceedings in the trial court that a decree has been granted. There should be something more than a mere question as to the liability which has been decided against the appellants by the trial court, which should alone give any occasion to depart from the ordinary rule of not granting stay of money decree.

7. We however, see on the facts of the instant case that it is not a mere transfer of certain amount of money as consequence of the decree of the trial court that is involved in the instant case. We shall have in circumstances where there is no chance of any irreparable damage on account of a mere stay to see whether on such facts the court should not ensure an early hearing of the appeal and until disposal of the appeal keep the transfer of money by the defendants/ appellants by way of execution of the decree to the plaintiff/ respondent suspended until the disposal of the appeal. It is not an exaggeration when it is stated on behalf of the

plaintiff/ respondent that a life as successful as his has come to such sufferings not only in body but in mind as well and a compensation as big as the amount of decree of the trial court or even more will be insufficient to satisfy the loss that the plaintiff has suffered even partly. The trial court has found that the plaintiff/ respondent has suffered as above on account of negligence on the part of the defendants. If the said finding is affirmed, even then the amount of compensation granted to the plaintiff/ respondent shall appear wholly inadequate and only in the nature of a solatium. A court, however, has to exercise restraint and avoid in such circumstances, in particular, being influenced by emotionally diatibe and keep in, as much as possible, all emotions in check in approaching any claim of damages. One who has been forced to live in anguish may not find anything just in the postponment of a decree granted to him until the same is affirmed by the appellate court. But that should not prevent the court from also seeing the opposite view of a determination given to the hospital and the doctors, which may cause to them indignity of being called negligent by a Court of Law. We have for the reasons aforementioned, chosen the option of keeping the order dated 15th October, 1993 in C.M.P.Nos.14392 and 14393 of 1993 in O.S.A.Nos.215 and 216 of 1993 in force for a period of three months and accordingly to order for listing of the appeals for final hearing before an appropriate Bench within three months. The appellants are directed to make the appeal ready, prepare the typed set of papers and serve as required under the rules upon the learned counsel for the plaintiff/ respondent within fifteen days from today. It shall be open to the plaintiff/ respondent to file any papers which are found omitted by the defendant/ appellants within fifteen days of the service of the typed set of papers upon his learned counsel.

8. It is accordingly ordered. The order dated 15th October, 1993 passed in C.M.P.Nos.14392 and 14393 of 1993 in O.S.A.Nos.215 and 216 of 1993 is made absolute subject to the hearing of the appeal within three months as directed.

B.S.

Petitions ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No. 623 of 1993 14th September, 1993.

Farooq Ahamed ...Petitioner
v.

Mohammed Hanif and another ...Respondents.

Tamil Nadu Court-Fees and Suits Valuation Act (XIV of 1955), Secs.12(4)(a) and 18 - Suit for declaration of title, possession and mesne profits - No issue regarding court-fees - Suit decreed - No request for decision on court-fee by court-fees Examiner - Appellate Court going into question of court-fees - Directing plaintiff to pay ad valorem court-fees - Whether correct.

In a suit for declaration of title, possession and mesne profits, sufficiency of court-fees was not raised by the defendant. The suit was decreed. The appellate court went into the question of court-fees and directed the plaintiff to pay *ad valorem* court-fee and granted time till 5.1.1993. The plaintiff filed a revision petition against that order.

Held: The lower appellate court which has registered the appeal in 1985 itself has chosen to hold in 1992 that the court-fee paid is not correct, nearly seven years after the appeal was registered, even though the respondent has not taken any objection to the court-fee paid. There was also no request for a decision regarding the court-fees by the court-fee examiner under Sec.18 of the Tamil Nadu Court-Fees and Suit Valuation Act. While so, the appellate court has no jurisdiction to assess the court-fee payable afresh in the above manner.

[Para. 5]

Cases referred to:

Ramachandran v. Anjammal, (1963)2 M.L.J. 59. [Para. 5]

Janaki Ammal v. Ragavachari, (1960)2 M.L.J. 527: 1960 L.W. 625. [Para. 5]

Lakshmanan Ayyer v. Palaniappa Chettiar, 42 L.W. 354. [Para. 5]

Venkatasubba v. Ramadoss, 59 L.W. 301. [Para. 5]

Mahalakshmanma v. Venkatanarayanamurthy, 53 L.W. 740 [Para. 5]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Tirupattur, North Arcot

District, dated 23.12.1992 and passed in A.S.No.67 of 1985 (O.S.No.65 of 1981, District Munsif Court, Tirupattur, North Arcot District).

P.V.Bakthavatchalam, for Petitioner.

R.Swaminathan, Additional Government Pleader, for Respondents.

The Court made the following

ORDER: Though order was pronounced in the abovesaid civil revision petition on 23.4.1993, just prior to the summer vacation, before I could sign the order, I felt further elucidation of the point involved was necessary and that it would also be better if notice also goes to the Government Pleader since the matter involves court-fee question. Accordingly, pursuant to my order dated 14.6.1993, after notice had gone to the Government Pleader, the case was argued by both the Government Pleader and the learned counsel for the petitioner, and I pass the following order, which only reiterates the relief given already, with a slight difference in the reasoning.

2. Pursuant to the notice of motion ordered, the respondents have been served privately in the third week of March itself. When service was sought to be made through court, the 1st respondent had refused to receive the notice. No doubt, with reference to the 2nd respondent, second batta was filed and it is not clearly known whether he was been served through court. However, in view of the fact that both the respondents have been served privately as stated above and in view of the fact the 1st respondent had refused to receive the notice and even the 1st respondent has not chosen to enter appearance I hold that the private service is sufficient. Accordingly, I heard the learned counsel for the petitioner and also the Additional Government Pleader.

3. The civil revision petition arises out of an order passed by the lower appellate court in A.S.No.67 of 1985 on the question of court-fee. The suit O.S.No.65 of 1981 was for declaration of title and for possession and also for mesne profits. There was no issue regarding the court-fee in the trial court and the suit also was decreed. The respondents preferred the abovesaid first appeal A.S.No.67 of 1985. In that appeal, the lower appellate court has gone into the question of court-fee and has held by the impugned order dated 23.12.1992 that the plaintiff must pay *ad valorem* court-fee, and for payment of additional court-fee, it granted time till 5.1.1993.

4. For passing the abovesaid order, the lower appellate court relies on Sec.12(4) of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955. But, the learned counsel for the petitioner points out that Sec.12(4) can have no application to the present case. Sec.12(4)(a) runs as follows:

"Whenever a case comes up before a court of appeal, it shall be lawful for the court either of its own motion or on the application of any of the parties, to consider the correctness of any order passed by the lower court affecting the fee payable on the plaint or in any other proceeding in the lower court and determine the proper fee payable thereon".

According to this provision, the appellate court can only consider the correctness of any order passed by the lower court affecting the fee payable on the plaint. But, there was not even an issue regarding the court-fee in O.S.No.65 of 1981. The learned counsel also points out that the defendant did not even plead that the court-fee paid was not sufficient.

5. Nevertheless, the lower appellate court, which has registered the appeal in 1985 itself has chosen to hold in 1992 that the court-fee paid is not correct, nearly seven years after the appeal was registered, even though the respondent has not taken any objection to the court-fee paid. There was also no request for a decision regarding the court-fee by the court-fee examiner under Sec.18 of the Tamil Nadu Court-Fees and Suits Valuation Act. While so, the appellate court has no jurisdiction to assess the court-fee payable afresh in the above manner. This Court also has held in *Ramachandran v. Anjammal*, (1963) 2 M.L.J. 59, after referring to an earlier decision of this Court in *Janaki Ammal v. Ragavachari*, (1960) 2 M.L.J. 527: 1960 L.W. 625, thus:

"After the registration of the appeal, it is only by means of an objection taken by the respondent, or with regard to a request for a decision by the court-fee examiner under Sec.18, that the court could review the court-fee paid. Otherwise, it has no power *suo motu* to do so".

I need not go into the other question whether under Sec.12(4) of the Court-Fees Act (which has been referred to by the lower appellate court) the expression "order passed by the lower court" found therein would include the order of the trial court in the present case, which was passed under Sec.12(1) of the abovesaid Act at the time of ordering the

plaint to be registered. There is also no necessity to discuss about the decisions cited by the Additional Government Pleader, including *Lakshmanan Ayyar v. Palaniappa Chettiar*, 42 L.W. 354, *Venkatasubba v. Ramadoss*, 59 L.W. 301 and *Mahalakshamma v. Venkatanarayanamurthy*, 53 L.W. 740. However, it is clear that the lower appellate court has committed the error of jurisdiction as stated above.

6. In the result, the civil revision petition is allowed and the order of the lower appellate court is set aside. No costs. Since the appeal is pending for a long time, I direct the lower appellate court to dispose of the appeal on merits as expeditiously as possible, preferably within three months from today.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.M.P.Nos.14089 of 1991, 8475 and 9815 of 1993,
etc. *14th September, 1993.*

S.Pakkiaraj *...Petitioner*
v.
S.N.Kulasekaran *...Respondent.*

Limitation Act (XXXVI of 1963), Sec.5 - Expression 'within such period' - Meaning of - Application for copies of judgment and decree - Made after expiry of period of limitation for further appeal - Delay in filing the appeal - Entire period from date of judgment and decree till date of filing of copy application - If forms part of whole delay in filing appeal or revision - That portion of delay upto the 90th day from date of judgment and decree if can be condoned.

No doubt there is no limit as such for making an application for obtaining copy of the judgment and decree appealed against. But, if such an application is made after the prescribed period of limitation of 90 days, the whole period beginning from the date of the judgment and decree till the date of

filing of the copy application would be certainly taken as forming part of the whole delay in filing the appeal or revision, as the case may be. But, that portion of the said delay upto the abovesaid 90th day from the date of the judgment and decree, cannot be excused at all under Sec.5 of the Limitation Act. This conclusion is only the necessary consequence of interpretation put by the Supreme Court in relation to the expression 'within such period' found in Sec.5 of the Limitation Act in *Ramlal v. Rewa Coalfields Limited*, A.I.R. 1962 S.C.361. [Para. 6]

Cases referred to:

The Land Acquisition Officer v. V.Kannan Pillai, (1992)2 L.W. 28. [Para. 2]

Ramalingam Pillai v. Arunachalam Pillai, (1988)2 M.L.J. 139. [Para. 2]

Parthasarathy v. State of A.P., 1965 M.L.J. (CrL) 831: (1965)2 An.W.R. (S.C.) 174: (1965)2 M.L.J. (S.C. 174: A.I.R. 1966 S.C. 38: 1965 S.C.D. 864: (1985)2 An.L.T. 168: (1965)2 S.C.W.R. 545: (1965)2 Comp.L.J. 178: (1965)2 I.T.J. 515: (1965)2 S.C.J. 601. [Para. 4]

Ramlal v. Rewa Coalfields Limited, A.I.R. 1962 S.C. 361: (1961)2 S.C.J. 556: (1961)2 M.L.J. (S.C.) 131: (1962)2 An.L.T. 444: (1962)2 S.C.R. 762: (1961)2 An.W.R. (S.C.) 131. [Para. 6]

Bechiv. Ashan Ullah Khan, I.L.R. 12 All. 461 at 473 (D.B.). [Para. 7]

Petitions praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to (i) condone the delay of 77 days in preferring the review C.M.P.SR. No.79570 of 1991 sought to be presented to this Court for review of the judgment of the High Court dated 22.11.1990 and passed in S.A.No.1356 of 1990 preferred against the decree of the court of the Subordinate Judge, Poonamallee dated 21.9.1989 and passed in A.S.No.15 of 1989 (O.S.No.1311 of 1981 on the file of the Court of the Principal District Munsif, Poonamallee, etc.).

R.Sankara Subbu, M.N.Padmanabhan, C.Chinnasami, Senior Counsel for M/s.S.Haja Mohideen Gisthi, K.Sethuram and E.Sampath Kumar, for Petitioners.

G.Kathirvelu, for Respondent.

The Order of the Court was made by

Abdul Hadi, J.: C.M.P.No.8475 of 1993 is for excusing the delay of 134 days in filing the first appeal against the judgment and decree dated

16.10.1992 in O.S.No.250 of 1988 on the file of Sub Court, Vellore.

2. Though it is not specifically stated in the affidavit in support of the petition, the learned counsel for the petitioners admits that the copy application for the abovesaid judgment and decree dated 16.10.1992 was made only after 90 days from the abovesaid date 16.10.1992. Yet, according to the said counsel, the civil miscellaneous petition cannot be dismissed on the footing of the decision given by the Division Bench of this Court in *The Land Acquisition Officer v. V.Kannan Pillai*, (1992)2 L.W. 28. I was also a party to the said Division Bench judgment and the said judgment only concurred with the earlier judgment of Ratnam, J. in *Ramalingam Pillai v. Arunachalam Pillai*, (1988)2 M.L.J. 139.

3. The submission of the said learned counsel is that even when the copy application is made after the abovesaid 90 days that is, after the expiry of the period of limitation provided for under the relevant Article of the Limitation Act, the delay in filing the copy application as stated above, *could also be excused* under Sec.5 of the Limitation Act, if sufficient cause is shown and that neither the decision of Ratnam, J. nor the abovesaid Division Bench judgment would be a bar for the court to consider in a given case whether there is justification for excusing the said delay in filing the copy application itself under Sec.5 of the Limitation Act.

4. In this connection, the learned counsel also drew my attention to a recent order of Srinivasan, J. in C.M.P.Nos.683 and 684 of 1993 dated 3.9.1993. In that case, the impugned order, sought to be revised in revision was dated 19.11.1991 and the copy application for the said order was made only on 30.10.1992 which was well beyond the period of 90 days from 19.11.1991. In that context Srinivasan, J., after referring to the abovesaid Division Bench judgment and the judgment of Ratnam, J. and also the decision in *Parthasarathy v. State of A.P.*, 1965 M.L.J. (CrL) 831: (1965)2 An.W.R. (S.C.) 174: (1965)2 M.L.J. (S.C. 174: A.I.R. 1966 S.C. 38: 1965 S.C.D. 864: (1985)2 An.L.T. 168: (1965)2 S.C.W.R. 545: (1965)2 Comp.L.J. 178: (1965)2 I.T.J. 515: (1965)2 S.C.J. 601, (which was referred to both in the said Division Bench judgment and the judgment of Ratnam, J.), held as follows:

"The Bench has not held that no application

under Sec.5 of the Limitation Act is maintainable, if applications for certified copies of the judgment and decree are made beyond the period of 90 days. On the other hand, the Bench has only held that the period taken by the court for issuing certified copies of judgment and decree should not be excluded under the provisions of Sec.12 of the Limitation Act when the delay in filing the appeal or revision is calculated by the appellant or petitioner..... On the other hand, the Division Bench has not held that Sec.5 cannot be invoked by a party who has applied for certified copies of judgment and decree after the expiry of a period of 90 days. The party has to explain that period also as part of the delay”.

Thus, according to Srinivasan, J. also with the party who files copy application after the expiry of the abovesaid period of 90 days *could explain* under Sec.5 of the Limitation Act that delay also, in filing the copy application itself apart from explaining any subsequent delay before filing the appeal or revision as the case may be. In that way only Srinivasan, J. has chosen to interpret the abovesaid judgment of the Division Bench and the said interpretation is now canvassed before me for approval by the learned counsel for the petitioners.

5. With due respect to my learned brother Srinivasan, J. I am unable to concur with his interpretation of the Division Bench judgment, particularly in the light of the Supreme Court decisions relied on by the said Bench and also by Ratnam, J.

6. To a great extent, the whole thing revolves round the meaning to be given to the term “within such period” appearing in Sec.5 of the Limitation Act, which runs as follows:

“5. *Extension of prescribed period in certain cases:* Any appeal or any application, other than an application under any of the provisions of O.21 of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period”.

No doubt, the term “prescribed period” in the abovesaid Sec.5 means the period of limitation prescribed in each case. The present case being no where time has to be computed for preferring an

appeal to this Court, Art.116(a) prescribes the said period of limitation as 90 days from “the date of decree or order” and, if the case is one for revision, the said period as prescribed in Art.131 of the Limitation Act is once again 90 days from “the date of the decree or order or sentence sought to be revised”. According to the learned counsel for the petitioners it is clear even from reading Sec.5 that the delay from the very date of decree or order, appealed against or sought to be revised could be excused under Sec.5 if sufficient cause is shown for not preferring the appeal or revision “within” the abovesaid period of limitation. In other words, the said counsel wants to read the expression “within such period” found in Sec.5 as meaning “during the prescribed period”, that is, during the abovesaid period of limitation.

6A. But the Supreme Court decision in *Ramlal v. Rewa Coalfields Limited*, A.I.R. 1962 S.C. 361: (1961)2 S.C.J. 556: (1961)2 M.L.J. (S.C.) 131: (1962)2 An.L.T. 444: (1962)2 S.C.R. 762: (1961)2 An.W.R. (S.C.) 131, which has been relied on in the abovesaid Division Bench judgment as well as the above referred to judgment of Ratnam, J. does not interpret the said expression “within such period” as stated by the abovesaid counsel. It has only observed thus:

“The context seems to suggest that ‘within such period’ means within the period which ends with the last day of limitation prescribed. In other words, in all cases falling under Sec.5 what the party has to show is why he did not file an appeal on the last day of limitation prescribed. That may inevitably mean that the party will have to show sufficient cause not only for not filing the appeal on the rest day but to explain the delay made thereafter day by day. In other words, in showing sufficient cause for condoning the delay the party may be called upon to explain for the whole of the delay covered by the period between the last day prescribed for filing the appeal and the day on which the appeal is filed. To hold that the expression ‘within such period’ means during such period would, in our opinion be repugnant in the context”.

6B. That is why the following passage in the judgment of Ratnam, J. referred to supra, was extracted by the abovesaid Division Bench, with approval in its judgment:

“Sec.5 of the Limitation Act contemplates

cases where a party having obtained all the required copies *well before the expiry* of the period of limitation prescribed for preferring an appeal, has been unable to do so, even on the last day owing to circumstances beyond his control and thus viewed, the petitioner *cannot be permitted* to approach this Court and ask for the condonation of the delay of 159 days". [emphasis supplied]

It is significant that the last part of the abovesaid passage definitely says, "the petitioner *cannot be permitted* to approach this Court and ask for the condonation of the delay of 159 days". [emphasis supplied]

The abovesaid 159 days delay was, as a result of the copy application itself having been filed after the expiry of the prescribed period of limitation. In *Ramalingam Pillai v. Arunachalam Pillai*, (1988) 2 M.L.J. 139, the judgment appealed against was dated 14.8.1987 and the copy application was made only on 16.11.1987 that is only after the abovesaid 90 days period expired on 13.11.1987. The copy was made ready on 29.1.1988 and the second appeal was filed on 19.4.1988. In that context only, Ratnam, J. observed thus:

"In as much as the petitioner is not entitled to exclude the time spent in obtaining the copies, it has to be taken the delay in this case is from 13.11.1987 till 19.4.1988. In other words, the delay is 159 days and not 84 days as stated by the petitioner".

6C. It is with reference to this delay of 159 days (that is, the period between 14.8.1987 and 19.4.1988, amounting to 249 days abovesaid 90 days) Ratnam, J. observed that the petitioner *cannot be permitted* to approach this Court for condonation of the said delay and the abovesaid Division Bench concurred with the said view. It is clear from the expression used, viz. "cannot be permitted", that it is not possible at all to condone the said delay under Sec.5 of the Act since part of the said delay is due to the fact that copy application itself was filed after the abovesaid 90 days. No doubt there is no time limit as such for making an application for obtaining copy of the judgment and decree appealed against. But, if such an application is made after the prescribed period of limitation of 90 days, the whole period beginning from the date of the judgment and decree till the date of filing of the copy application would be certainly taken as forming part of the whole delay in filing the appeal

or revision, as the case may be. But, that portion of the said delay upto the abovesaid 90th day from the date of the judgment and decree, cannot be excused at all under Sec.5 of the Limitation Act. This conclusion is only the necessary consequence of interpretation put by the Supreme Court in relation to the expression 'within such period' found in Sec.5 of the Limitation Act in *Ramlal v. Rewa Coalfields Limited*, A.I.R. 1962 S.C. 361: (1961) 2 S.C.J. 556: (1961) 2 M.L.J. (S.C.) 131: (1962) 2 A.L.T. 444: (1962) 2 S.C.R. 762: (1961) 2 A.W.R. (S.C.) 131.

7. No doubt the learned counsel for the petitioners drew my attention to the following passage in *Bechi v. Ashan Ullah Khan*, I.L.R. 12 All. 461 at 473 (D.B.):—

"There may of course be cases in which delay in applying for a copy.... is due to wholly unavoidable causes beyond the control of the litigant, but this delay being antecedent to the application.... cannot be called 'time requisite for obtaining a copy' within the meaning of Sec.12,..... and if there has been delay under excusable or unavoidable circumstances, that would be a matter for consideration under Sec.5....."

So according to the learned counsel the delay antecedent to the application for copy of the judgment and decree may be considered for being excused under Sec.5. But, this Allahabad decision has not considered the meaning of the term "within such time" found in Sec.5, as expounded by the Supreme Court in *Ramlal v. Rewa Coalfields Limited*, A.I.R. 1962 S.C.361.

8. No doubt, there may be hardship in some cases in view of the abovesaid interpretation given by the Supreme Court in *Ramlal v. Rewa Coalfields Limited*, A.I.R. 1962 S.C. 361: (1961) 2 S.C.J. 556: (1961) 2 M.L.J. (S.C.) 131: (1962) 2 A.L.T. 444: (1962) 2 S.C.R. 762: (1961) 2 A.W.R. (S.C.) 131, which the abovesaid Division Bench and Ratnam, J. followed. But, it is for the Legislature to set it right, if in its wisdom, it thinks the said hardship is a genuine one deserving to be relieved.

9. Hence, in view of the Division Bench judgment referred to supra, this civil miscellaneous petition is dismissed. No costs.

10. C.M.P.Nos.9815 of 1993 and 14089 of 1991 have also to be dismissed on the same reasoning stated above. C.M.P.No.9815 of 1993 is for excusing the delay of 109 days in filing the civil revision

petition. Here again, though the supporting affidavit does not say when actually copy application was made, the learned counsel for the petitioner fairly represented that the copy application was made beyond 90 days time prescribed under Art.131 of the Limitation Act. Likewise, C.M.P. No.14089 of 1991 is for excusing the delay of 77 days in preferring the review petition. The prescribed period of limitation in the case of review petition is 30 days as per Art.124 of the Limitation Act. Here again, as per the representation of the learned counsel for the petitioner, the copy application was made after the abovesaid 30 days time. Therefore, both these civil miscellaneous petitions are also dismissed. No costs.

B.S. ----- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: *Bakthavatsalam, J.*

W.P.Nos.597 and 598 of 1992 *11th October, 1993.*

N.Purushothama Reddy ...*Petitioner*
v.

The Revenue Divisional Officer, Thiruvallur,
Chingleput M.G.R. District ...*Respondent.*

■ *Evidence Act (I of 1872), Sec.115 - Equitable estoppel*
Candidate admitted to B.E. Civil Engineering on basis of community certificate issued by Independent Deputy Tahsildar, Pallipet - Revenue Divisional Officer holding that candidate did not belong to "Konda Reddi", Community - Revenue Divisional Officer directed to make further enquiry on writ petition filed by Candidate - Petitioner allowed to write Examination right through pending enquiry - Completing B.E., civil in May, 1993 - Director of Technical Education directed to publish results of candidate not awaiting result of enquiry.

In view of the decisions in *A.Chithra v. The Dean, Madurai Medical College, Madurai, 1993 W.L.R. 485* and *Umapathy v. The Director of Education,*

1991 W.L.R. 898, the court is of the view that the Writ Petition No.598 of 1992 has got to be allowed. Since the daughter of the petitioner has been allowed to write examination right through by interim orders of this court and applying the principle of equitable estoppel, the court is inclined to pass this order. As the petitioner's daughter has completed the course viz., B.E., (Civil) in May, 1993 as stated by the learned counsel for the petitioner, the court does not think that the pendency of the enquiry can stand in the way of petitioner's daughter in obtaining the degree. Instead of granting the prayer asked for, since this court can mould the prayer to suit the occasion, a direction is to issue to the respondents in W.P.No. 598 of 1992 to publish the results of the petitioner's daughter within a period of four weeks from the date of receipt of copy of this order. [Para. 9]

Cases referred to:

A.Chithra v. The Dean, Madurai Medical College, Madurai, 1993 W.L.R. 485. [Para. 9]

Umapathy v. The Director of Education, 1991 W.L.R. 898. [Para. 9]

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue writs of (1) *certiorari* calling for the records, of the Revenue Divisional Officer, Thiruvallur. The respondent herein made in his proceedings Pa.mu.137/90, dated 15.10.1990 and set aside the same etc.

G.Bharadwaj, for Petitioner.

M.M.Sundaresh, Government Advocate for Respondent in W.P.No.597 of 1992.

D.Krishnakumar, Government Advocate, for Respondent No.1 in W.P.No.598 of 1992.

S.Jagadeesan, for Respondent No.2 in W.P.No.598 of 1992.

P.Jothimani, for Respondent No.3 in W.P.No.598 of 1992.

The Court made the following

ORDER: Writ Petition No.597 of 1992 is filed by the petitioner against the order of the respondent therein to issue a community certificate to the petitioner's daughter to the effect that she belongs to Konda Reddy community.

2. Writ Petition No.598 of 1992 is an off-shot of the earlier order passed in the earlier writ petition (W.P.No.597 of 1992) by which Director of Technical Education has passed an order in the month

of December, 1991 directing the Principal of the second respondent college to remove the name of the petitioner's daughter from the rolls of the college.

3. When the miscellaneous petitions came up for hearing, by consent of both parties, the main writ petitions are taken up for final hearing, though no counter affidavit has been filed by the respondents.

4. The short facts are:

The petitioner's daughter N.P.Sayee Sankari was selected under the category of Scheduled Tribe Category for B.E. (Civil) Engineering course for the academic year 1989-90 and was allotted to S.R.M. Engineering College, Kattankolathur, who is the second respondent in W.P.No.598 of 1992. The petitioner's daughter was admitted to the second respondent college provisionally accepting the community certificate issued by the Independent Deputy Tahsildar, Pallipet, who issued the certificate in the year 1982 to the effect that the petitioner's daughter belongs to 'Konda Reddy Community'. Further, the petitioner's daughter seems to have applied to the Revenue Divisional Officer for the grant of community certificate and in turn the Revenue Divisional Officer directed the Tahsildar, Pallipet, to conduct an enquiry and send his report. In turn, the Tahsildar directed the Revenue Inspector to conduct an enquiry and send his report. On 31.8.1989, the Tahsildar, Pallipet conducted the enquiry and the petitioner was informed that the report would be sent to Revenue Divisional Officer. The case of the petitioner is that till December, 1989 the Revenue Divisional Officer did not pass any order. On 26.12.1989, it seems the petitioner met the Principal of the second respondent and submitted that community certificate would be produced as and when the same was issued by the Revenue Divisional Officer. On 28.12.1989, the Principal of the College sent communication to the petitioner informing that community certificate has to be produced on or before 5.1.1990 failing which the name of the petitioner's daughter would be removed from the college rolls. At that stage, the petitioner filed W.P.No.151 of 1990 for the issuance of a writ of *mandamus* to direct the Revenue Divisional Officer, Thiruvallur to dispose of the application for the grant of community certificate. It seems an order of injunction was also prayed as not to remove the name of the petitioner's

daughter from the rolls pending disposal of the writ petition. On 24.1.1990, the Revenue Divisional Officer, passed orders holding that the petitioner's daughter did not belong to Konda Reddy's community and in view of the said orders, W.P.No.151 of 1990 was dismissed as it had become infructuous. However, the injunction granted earlier was extended upto 28.2.1990 by Srinivasan, J. to facilitate the petitioner to challenge the order of Revenue Divisional Officer dated 24.1.1990, declining to issue a community certificate as prayed for by the petitioner. Accordingly, it seems the petitioner filed W.P.23.2.1990 before this Court and obtained an order of interim injunction from removing the name of the petitioner's daughter from the rolls of the College. By the orders of this Court in W.M.P.No.5942 of 1990 on 5.4.1990, permission was granted to the petitioner's daughter to appear for 1 year B.E. examination and also direction was issued to give the hall tickets. By order dated 12.10.1990, in W.M.P.No.19297 of 1990 a direction to publish the results of first year examination was issued. Again by order dated 20.11.1990 in W.M.P.No.27932 of 1990 the petitioner's daughter obtained permission to write III semester examinations and also a direction was issued for the issuance of hall ticket. Ultimately, W.P.No.2182 of 1992 was allowed on 27.2.1991 by Ramalingam, J. directing the Revenue Divisional Officer to dispose of the application in accordance with law. Again, Writ Petition No.4412 of 1991 was filed by the petitioner praying for the writ of *mandamus* not to remove the name of the petitioner's daughter from the rolls and an order of injunction was obtained. By order dated 26.9.1991, Govindasamy, J., directed the Revenue Divisional Officer to dispose of the application for grant of community certificate within four weeks from the said date. The Revenue Divisional Officer again passed order on 15.10.1991 holding that the petitioner's daughter did not belong to Konda Reddy community. Consequently, W.P.No.5412 of 1991 was dismissed on 8.11.1991. At this stage, the impugned order has been passed by the Director of Technical Education against which W.P.No.598 of 1992 has been filed. Against the order, dismissing the claim of the petitioner that his daughter belongs to 'Konda Reddy' community, W.P.No.597 of 1992 has been filed.

5. During the pendency of the writ petitions, the

petitioner's daughter seems to have finished B.E. (Civil) degree and the results have been withheld. 6. Mr. G. Bharadwaj, learned counsel for the petitioner contends that the order passed by the Revenue Divisional Officer, rejecting the application of the petitioner thrice, as if the petitioner's daughter did not belong to 'Konda Reddy' community is erroneous in law in view of the orders of the Division Bench followed by Venkataswami, J. in W.P.No.7242 of 1986 dated 5.9.1986. Learned counsel further points out that in the impugned order, the Revenue Divisional Officer has referred to a document in which the term 'Konthala' appears and has stated that 'Konthalakulam' is different from 'Konda Reddy' community. Learned counsel argues that the statement made by the Revenue Divisional Officer in the impugned order dated 15.10.1991 is not in accordance with law laid down by the Division Bench of this Court in *R. Valan v. The Collector of Chengalpattu*, W.P.No.3363 of 1986 dated 31.7.1986, consisting of Chandurkar, C.J. and Sathiadev, J. (as he then was) and followed by the Order of Venkataswami, J. in *P.N. Gunasekar v. The Revenue Divisional Officer, Thiruvellore*, W.P.No.7242 of 1986 dated 5.9.1986. That apart, it is contended, that the Revenue Divisional Officer has not taken into consideration the materials including the reports of the Revenue Inspector and the Village Administrative Officer and inasmuch as the Revenue Divisional Officer has failed to take the relevant materials into consideration, the impugned order is liable to be set aside. It is also stated by the learned counsel for the petitioner that the inability of the petitioner to produce a witness cannot be taken advantage by the respondents to reject the request of the petitioner for the issuance of the community certificate. It is also pointed out by the learned counsel for the petitioner that even though there are instructions of the Government to the effect that 'Konthalakulam' and 'Konda Reddy' communities are different law laid down by this Court has to weigh more than the instructions of the Government.

7. Learned Government Advocate has contended that the petitioner has not produced relevant materials or evidence so as to enable the Revenue Divisional Officer to arrive at a decision and that the impugned order is not bad in law.

8. Having considered the arguments of the learned counsel for the petitioner and of the learned

Government Advocate and also on going through the materials placed before this Court, I am of the view that the order of the Revenue Divisional Officer dated 15.10.1991 is liable to be set aside. As I have already stated above, on the basis of the community certificate issued by the Independent Deputy Tahsildar, Pallipat, the petitioner's daughter wrote the examination for the academic year 1989-90 and joined the B.E. (Civil) degree course. When application was made by the petitioner to issue a community certificate to the effect that his daughter belongs to 'Konda Reddy' community, it was dismissed by the Revenue Divisional Officer by order dated 24.1.1990. A writ petition has been filed against the orders of the Revenue Divisional Officer in W.P.No.2182 of 1990 and by order of the Division Bench of this Court dated 27.2.1992, Revenue Divisional Officer was directed to dispose of the application of the petitioner in accordance with law. Again by order dated 15.10.1991, the Revenue Divisional Officer has passed orders holding that the petitioner's daughter did not belong to 'Konda Reddy' community and it is impugned in this writ petition. In my view, the order impugned in W.P.No.597 of 1992 is liable to be set aside as the Revenue Divisional Officer has not applied his mind. I am of the view that the Revenue Divisional Officer has not taken into consideration the relevant records available to arrive at a correct decision. Reliance made upon the administrative direction of the Government to hold that 'Kondalakulam' is different from 'Konda Reddy' is different will not hold good since the law laid by this Court is different as stated above. In view of that, the impugned order in W.P.No.597 of 1992 has necessarily got to be set aside and accordingly the impugned order of the Revenue Divisional Officer dated 15.10.1991 is set aside. The matter is remitted back to the Revenue Divisional Officer to take into consideration the entire materials available on record and also the judgment of Division Bench of this Court and also the order of a learned single Judge, cited supra with regard to this question and the Revenue Divisional Officer is directed to pass a well considered order within a period of two months from the date of receipt of a copy of this order, giving an opportunity to the writ petitioner. Writ Petition No.597 of 1992 will stand allowed to that extent. No costs.

9. Coming to Writ Petition No.598 of 1992 it is a

case where the petitioner's daughter has finished her B.E. (Civil) degree course during the pendency of the writ petition. It is not disputed and it cannot be disputed that the petitioner's daughter has written the entrance examination on the basis of the certificate issued by the Independent Deputy Tahsildar, Pallipet. Only after her joining in the course, when a dispute arose with regard the community of the petitioner's daughter, a series of writ petitions came to be filed before this Court and interim orders have been obtained by the petitioner so as to enable the petitioner's daughter to complete the B.E. (Civil) course, in which she had joined in the academic year 1989-90. This Court had an occasion to consider a similar issue in *A. Chithra v. The Dean, Madurai Medical College, Madurai*, 1993 W.L.R. 485, where the petitioner had finished the M.B.B.S. course and that on the fact that the community certificate has not been issued, the course completion certificate was not given to the petitioner in that case, it has been held that the pendency of the enquiry cannot stand in the way of petitioner getting the completion certificate. In that case, this Court has held as follows: (at P.485)

"The pendency of the enquiry cannot stand in the way of petitioner getting the completion certificate. What will be the result of the enquiry is entirely a different matter. It may be open to the respondents to pass any order in the said enquiry and it is also open to the petitioner to challenge that order in any matter which may be open to her in-law. But as the matter stands to-day, there is no reason to deny the petitioner the issuance of the certificate, not a provisional, but a completion certificate, in recognition of her successfully completing her M.B.B.S. course..."

This Court again in *Umapathy v. The Director of Education*, 1991 W.L.R. 898, considered the same issue, wherein a completion certificate was refused on the ground that the candidate therein has given a false certificate. Though this Court had dismissed the writ petition, directed the authorities to take into the peculiar facts of that case into consideration that the petitioner has finished the course and the authorities therein also are partly responsible for delaying the enquiry to consider the issue, on human angle and pass orders within a stipulated time. In view of the decisions cited supra, I am of the view that the writ petition

W.P.No.598 of 1992 has got to be allowed. The view I take since the daughter of the petitioner has been allowed to write examination right through, by interim orders of this Court and applying the principle of equitable estoppel, I am inclined to pass this order. As the petitioner's daughter has completed the course viz. B.E. (Civil) in May 1993, as stated by the learned counsel for the petitioner, I do not think that the pendency of the enquiry can stand in the way of petitioner's daughter in obtaining the degree. Instead of granting the prayer asked for, since this Court can mould the prayer to suit the occasion, a direction is to issue to the respondents in W.P.No.598 of 1992 to publish the results of the petitioner's daughter one M.P. Sayee Sankari, who joined B.E. (Civil) course in the second respondent College, within a period of four weeks from the date of receipt of copy of this order. It is made clear that the Revenue Divisional Officer has to proceed with the enquiry of the petitioner's daughter and he has nothing to do with the order passed in W.P.No.598 of 1992. This writ petition is ordered accordingly. No costs.

B.S.

Petitions ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thangamani, J.*

C.R.P.No. 1826 of 1993

15th October, 1993

Vellai Ammal and others
v.

...Petitioners

Chinnammal and others

...Respondents.

Civil Procedure Code (V of 1908), O.6, Rule 17 - Amendment of Pleadings - If can be refused because of mistake, negligence, inadvertence or infraction of rule of procedure - Relief when can be denied.

A party cannot be refused relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party unless it is satisfied that the party applying was acting *mala fide* or that by his blunder, he had

caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side. Rules of Procedure are intended to be a hand-maid to the administration of justice. [Para 6].

Cases referred to:

Natesan v. Govindaswami, (1988)2 L.W. 397. [Para. 3]

Radhakrishnan v. Auvudai Ammal, (1993)1 M.L.J. 375 [Para. 4]

Haridas Aildas v. Godrej Rustom, A.I.R. 1983 S.C. 319. [Para. 5]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Nilakottai, dated 18.2.1993 and passed in I.A.No.387 of 1992 in O.S.No.431 of 1992.

K.Sampath, for Petitioners.

P.S.Seetharaman, for Respondents.

The Court made the following

ORDER:- The revision petitioners herein are the plaintiffs in O.S.No.431 of 1992 in the Court of District Munsif of Nilakottai. They filed the suit for a permanent injunction restraining the defendants from interfering with their enjoyment of the suit property which is Survey No.381 /11-0.94 acres - Old Patta No.798, New Patta No.1918 in Jambuthuraikottai Village, Nilakottai Taluk. The *ad interim* injunction obtained by them in I.A.No.694 of 1991 in that suit was vacated on 16.3.1992. Alleging that subsequently the defendants have trespassed into the suit land and dispossessed them, they have come forward with I.A.No.387 of 1992 under O.6, Rule 17, C.P.C. to amend the plaint so as to substitute the relief of injunction by one for recovery of possession. Besides, stating that the trespass alleged is not true and that they are in enjoyment of the property since the date of their purchase on 9.10.1979 the defendants did not give any valid objection for amending the plaint in their counter - statement. They only stated that the proposed amendment is not valid in law. The court below has dismissed the said application for the reason that as per the averments in the counter the defendants are in possession since the date of their sale deed on 9.10.1979. And this revision is directed against the said order. After notice of motion, on common consent

arguments were heard on this civil revision petition.

2. The trial court states that on consideration of the claims of both sides, there is no merit in the contention of the petitioners/plaintiffs. Evidently this is a non-speaking order and the court below has not stated the contentions of the respective parties and the reason for its conclusion.

3. Learned counsel for the revision petitioners submits that what is asked for by way of amendment is only an alternative prayer for possession because the trial court has negatived the injunction application. O.6, Rule 17, C.P.C. provides that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. In this case the proposed amendment does not alter the nature and character of the suit. In fact, it is necessary for determination of the rights of the parties. In *Natesan v. Govindaswami*, (1988)2 L.W. 397, a suit for declaration and injunction was resisted by the defendants that they were in possession of the property and prescribed title by adverse possession. There upon plaintiff came forward with an application to amend the plaint substituting his relief of possession in the place of injunction. A single Judge of this Court has held that the amendment of plaint becomes important because of the fact that possession is claimed by the defendants and in case the trial court finds that they are in possession, then the plaintiffs will be without any effective remedy. It is only to avoid such a contingency and to avoid multiplicity of proceedings, the provisions in O.6, Rule 17, C.P.C. are intended.

4. In *Radhakrishnan v. Auvudai Ammal*, (1993)1 M.L.J. 375, the petitioner originally filed a suit for a permanent injunction restraining the defendants from interfering with his peaceful possession of the suit properties and for costs. The defendants stated in the written statement that they were in possession of the suit properties. Therefore, the plaintiff filed an application for amendment seeking two new prayers, (i) for a declaration that the plaintiff was the absolute owner of the suit property, and (ii) for a direction to the defendants to deliver vacant possession of the plaint properties failing which to direct the

Officer of the trial court to put the plaintiff in vacant possession of the suit properties. The trial court dismissed the application holding that the amendment would change the nature of the suit. In revision, held: the plaintiff has stated all the facts with regard to his title and also his possession and by way of the amendment, he seeks to introduce a new prayer based on the pleadings already brought to him in the plaint. The plaintiff is entitled to have the plaint amended and the contentions of the learned counsel for the respondents that the plaintiff is introducing a new cause of action or a new case cannot be countenanced. 5. In *Haridas Aildas v. Godrej Rustom*, A.I.R. 1983 S.C. 319,

the District Judge allowed an amendment of plaint to insert of relief for recovery of possession. Holding that the District Judge in that case had exercised a sound discretion in allowing the amendment of the plaint the Supreme Court held that by allowing such amendment neither the nature of the suit could be altered nor any valuable right of limitation accrued to the defendant could be taken away. The High Court, therefore, was clearly wrong in interfering in revision by reversing the discretionary order of the District Judge. The Apex Court also observed that the Civil Court should be extremely liberal in granting prayer of amendment of pleading unless serious injustice or irreparable loss is caused to the other side. And a revisional Court also ought not to lightly interfere with a discretion exercised in allowing amendment in absence of cogent reasons or compelling circumstances.

6. On the principles laid down in the aforesaid decisions, it is evident that the court below has erred in negating the claim of the plaintiff. In view of the dismissal order passed in the injunction application, the plaintiff has no other remedy except to amend his plaint in order to get his remedy. Besides the defendants will not be prejudiced in allowing this amendment. And in the circumstances, the order of the lower court refusing to amend the plaint is not in accordance with law. A party cannot be refused relief merely because of some mistakes, negligence, inadvertence, or even infraction of the rules of procedure. The court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting *mala fide* or that by his blunder he had caused injury to his opponent which

may not be compensated for by an order of costs. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side. Rules of procedure are intended to be a handmaid to the administration of justice.

7. In the result, the Civil Revision Petition is allowed and the order of the Court below in L.A.No. 387 of 1992 is set aside and the amendment prayed for is permitted. Parties are directed to bear their respective costs throughout.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Thangamani, JJ.

App.No. 387 of 1987

27th July, 1993.

M.Subramania Mudaliar
v.

...Appellant

Janardhanam and others

...Respondents.

Civil Procedure Code (V of 1908), Sec.11 - Constitution of India (1950), Arts.133 and 136 - Trial court deciding two suits having common issues on merits - Two appeals filed therefrom - One of them dismissed on preliminary ground like limitation or default in printing - Appellant intending filing Special Leave Petition before Supreme Court of India - Section if would come into play only after decision of the Supreme Court - Fact that appellant could go to Supreme Court as of right if will take away finality of the judgment in the other case.

It is a sufficient if there is finality concerning the suit in which the proceeding is pending. It is not necessary that finality should have been attained by the proceeding being taken to the highest court of the country and confirmed. This Court's order dismissing the application for condonation of delay in representation and consequently rejecting the appeal against O.S.No.3262 of 1978 is not a matter falling under Art.133 of the Constitution of India. The case does not involve a substantial question of

law of general importance. Nor in the Court's opinion the question needs to be decided by the Supreme Court. The appellant can, if at all, approach the Supreme Court only under Art.136 of the Constitution of India and seek the special leave of that Court. Grant of Special Leave under Art.136 of the Constitution is discretionary and not a matter of right to any person. Hence, the appellant cannot claim that he has a right of appeal and this Court should wait till he exhausts that remedy or the time for preferring an appeal comes to an end. Even in a case falling under Art.133 of the Constitution of India, the Supreme Court held that the finality of the decision so far as the High Court was concerned was not taken away by the fact that the appellant could go to the Supreme Court as of right by means of a certificate of fitness under Art.133. *A fortiori* the fact that the appellant could approach the Supreme Court of India under Art.136 will not take away the finality of the judgment of this Court in the other case. As on date, the appellant is precluded by the findings given in O.S.No.3262 of 1978 which got confirmed by rejection of the appeal filed against the same. Consequently, there can be no hesitation to hold that the present appeal is barred by *res judicata* in view of the judgment and decree in O.S.No.3262 of 1978 as confirmed by the rejection of the appeal filed against the same. [Paras. 14, 15 & 16]

Cases referred to:

Badri Narayan Singh v. Kamdeo Prasad Singh, A.I.R. 1962 S.C. 338 [Para. 9]
Sheodan Singh v. Daryao Kunwar, A.I.R. 1966 S.C. 1332; (1966)1 S.C.W.R. 891; (1966)2 S.C.J. 768. [Para. 9]
Koshal Pal v. Mohan Lal, A.I.R. 1976 S.C. 688. [Para. 9]
Lonankutty v. Thomman, A.I.R. 1976 S.C. 1645; 1976 S.C.R. (Supp.) 74. [Para. 9]
Venkateswara Prabhu v. Krishna Prabhu, A.I.R. 1977 S.C. 1268. [Paras. 9, 10, 15]
K.Khaja Mohideen v. K.Muhaideen Batcha, A.I.R. 1979 Mad. 155. [Para. 9]
Angappa Gounder v. Rajavelu Gounder, A.I.R. 1981 Mad. 282; 1981 T.L.N.J. 280; (1981)94 L.W. 444; (1981)2 Serv.L.R. 547. [Para. 9]
S.Kandaswamy v. R.A.Murugesu, A.I.R. 1983 Mad. 131; (1982)2 M.L.J. 362; (1982)95 L.W. 660. [Para. 9]
Thangavelu Kounder v. Venkatarama Kounder, (1988)2 L.W. 14. (Summary of Cases). [Para. 9]

M.Subramaniam v. Chhottabhai and Company, (1990)2 M.L.J. 66. [Para. 9]

Arunugha Nainar v. Lakshmana Perumal, (1992)1 M.L.J. 457. [Para. 9]

Chengalavala Gurraju v. Madapathy Venkateswara Rao Pantulu Garu, A.I.R. 1917 Mad. 597. [Para. 12]

Jaspal Rai v. Kahan Chand, A.I.R. 1938 Lahore 232. [Para. 13]

Appeal against the decree of the Court of the VII Assistant City Civil Judge, Madras in O.S.No.2353 of 1981, dated 13.5.1986.

The Judgment of the Court was delivered by *Srinivasan, J.*: This appeal is at the instance of the 7th defendant in the suit O.S.No.2353 of 1981 on the file of the VII Assistant Judge, City Civil Court, Madras. The suit was filed by respondents 1 and 2, sons of the K.Subbarayalu Chetty, who was the first defendant in the suit. He died during the pendency of the suit. Subbarayalu Chetty had two wives, Annapoornammal and Saradambal, who were defendants 11 and 10 respectively in the suit. Through the former, he had three daughters and a son, who were defendants 13, 15, 16 and 4 respectively. Through the latter he had four sons, two of them being the plaintiffs and the other two were defendants 2 and 3. There were two daughters, who were defendants 12 and 14. The third defendant died pending suit and his wife and children were brought on record as defendants 24 to 26. The 5th defendant was a mortgagee of item No.1 of plaint 'A' Schedule. That is the only item which is the subject matter of this appeal. The 7th defendant/appellant was a purchaser of the said item of property in an auction held by the official assignee, Madras, on 15.11.1973 pursuant to an order of this Court made in Application No.625 of 1973 in I.P.No.85 of 1972. The sale was confirmed by this Court on 3.12.1973 and a sale deed was executed by the official assignee in favour of the appellant on 19.12.1973.

2. The present suit was filed for declaration that the official assignee was not entitled to sell the share of the plaintiffs in the properties described in Schedule 'A' to the plaint and in any other assets of the joint family for payment to the creditors of defendants 1 to 3 being the insolvents in I.A.No.85 of 1972, for a declaration that the sale held on 15.11.1973 with respect to item No.1 of plaint 'A' Schedule by the official assignee in public auction was void and not binding on the plaintiffs and for

a declaration that the mortgage deed dated 19.11.1969 with respect to the said property in favour of the fifth defendant was not valid and binding on the plaintiffs. In short, the case of the plaintiffs was that the properties belonged to the joint family of the first defendant, his father and brother and in a family partition dated 15.11.1956, the suit properties were allotted to the first defendant. The first defendant was conducting a business in partnership with the second defendant. On 19.11.1969, a mortgage was executed by defendants 1 and 2 in favour of the fifth defendant for a sum of Rs.35,000. The debt was an *avyavaharika* one and not binding on the plaintiffs, who were minors at that time. The step-mother of the plaintiffs, purporting to act as their next friend, filed a suit O.S.No.6994 of 1972 on the file of the City Civil Court, Madras for partition and separate possession. The binding nature of the mortgage in favour of the fifth defendant was not questioned. The suit was filed on 1.7.1972. On the very next day, the creditors of the first defendant filed I.P.No.85 of 1972 for adjudicating defendants 1 to 3 as insolvents. On 30.11.1972 the first defendant attained majority. There was a preliminary decree for partition of half share of the plaintiffs in that suit on 28.7.1973. On 24.8.1973, defendants 1 to 3 were adjudicated as insolvents by this Court. In the final decree proceedings in the partition suit, orders were passed for selling the subject-matter of this appeal in auction for the purpose of discharging the mortgage debts. At that stage, the official assignee applied to this Court for staying the auction. In that application, by consent of parties, the court directed sale of the properties by the official assignee in public auction by order dated 24.9.1973. The order of adjudication passed by this Court in the insolvency proceedings had the only effect of vesting the shares of defendants 1 to 3 in the joint family properties with the official Assignee and the latter had not right whatever to sell the shares of the plaintiffs and the other sons of the first defendant, who were not adjudicated.

3. After the execution of the sale deed in favour of the appellant herein, on 19.12.1973, the official Assignee filed Application No.452 of 1974 in this Court for a declaration that he was entitled to sell the share of the plaintiffs and the fourth defendant for the purpose of payment of debts due to the creditors of the first defendant. An *ex parte* order was passed on the said Application on 7.10.1974

granting the prayer. On coming to know of the same, the plaintiffs filed Application No.29 of 1975 to set aside the *ex parte* order. On 17.2.1975, this Court granted the prayer in the application on the following reasoning:

"From the records, there is no material to accept the statement of the official assignee. Notwithstanding the fact that the sale had taken place as early as December, 1974 (*sic.*) inasmuch as it is evident that the minor had attained majority even long before viz., on 30.11.1972, it is a just and fit case for getting aside the *ex parte* order. Accordingly it is set aside.

Time to file counter two weeks".

Thereafter, the said application was ultimately dismissed as infructuous by this Court on 17.6.1977. Thus, the official assignee did not get a declaration that he was entitled to sell the shares of the plaintiffs and the fourth defendant.

4. Even before that, the plaintiffs filed the present suit on 19.11.1975 for the reliefs referred to already. We are not referring to the other reliefs prayed for by the plaintiffs relating to the other property in the suit, as we are not concerned with the same.

5. The appellant herein filed the suit O.S.No.3262 of 1978 for declaration that defendants 1 to 5 in his suit had no right to occupy portion of the subject matter of this appeal and for recovery of possession and for damages. The plaintiffs in the present suit were defendants 1 and 2 in that suit. Defendants 2, 3, 10 and 24 to 26 in the present suit were defendants 4, 5, 3 and 6 to 8 respectively in that suit. Both the suit were tried together and the evidence was recorded in common. The issues raised in the present suit insofar as they relate to the subject matter of this appeal were also raised in the other suit.

6. By judgment dated 13.5.1986, the 7th Assistant Judge, City Civil Court, Madras, granted a decree in favour of the plaintiffs in the present suit and dismissed the suit filed by the appellant herein. The relevant findings are that the mortgage in favour of the fifth defendant was not binding on the plaintiffs, the shares of the plaintiffs did not vest in the official assignee and the sale in favour of the appellant herein was not binding on the plaintiffs' shares.

7. The 7th defendant filed this appeal on 23.4.1987 in this Court. As against the judgment and decree

in O.S.No.3262 of 1978, the appellant herein, who was the plaintiff therein, presented an appeal in this Court on 6.7.1987. It was returned on 18.9.1987 by the Registry for rectification of certain defects. The papers were represented only on 25.6.1993 and again returned on the same day. The Registry pointed out that the appeal was not maintainable in this Court, as the value of the suit being Rs.26,585 is below Rs.30,000. The appellant presented the papers in the City Civil Court on 30.6.1993. That court returned the papers on 5.7.1993 for getting the delay in representation condoned by this Court. Once again, the Deputy Registrar of this Court returned the papers stating that it is only the City Civil Court which has jurisdiction. The papers were represented in the City Civil Court on 15.7.1993.

8. On 15.7.1993, this appeal was taken up for hearing and the appellant's counsel stated the facts. Learned counsel for the respondents raised an objection that the appeal is barred by the principle of *res judicata* inasmuch as there is no appeal against the judgment and decree in O.S.No.3262 of 1978. Learned counsel for the appellant represented that the appeal against the said decree is in the City Civil Court, Madras with a petition for condonation of delay in representation. We passed an order on that date exercising our *suo motu* powers and withdrew the proceedings in the City Civil Court, Madras, to this Court to be heard along with this appeal. We adjourned the matter to 21.7.1993. On that date, the papers from the City Civil Court had been received and we found that there was an inordinate delay of nearly six years in representation of the appeal. We passed a detailed order dismissing the application for condonation of delay in representation. Consequently, we rejected the said appeal. On a request by learned counsel for the appellant, we adjourned this appeal to yesterday for further hearing. Yesterday, learned counsel on both sides argued the question of *res judicata*.

9. Learned counsel for the respondents contend that the present appeal is barred by the principles of *res judicata* in view of the rejection of the appeal as against the decree and judgment in O.S.No.3262 of 1978. According to him, the judgment of the trial court gets confirmed by our rejection of the appeal and the findings therein will be conclusive in the present appeal. It is submitted that there cannot be a decree in this appeal, which would

conflict with the decree passed in the other suit. In support of his contention, he relies on the following rulings:

Badri Narayan Singh v. Kamdeo Prasad Singh, A.I.R. 1962 S.C. 338, *Sheodan Singh v. Daryao Kunwar*, A.I.R. 1966 S.C. 1332; (1966)1 S.C.W.R. 891; (1966)2 S.C.J. 768, *Koshal Pal v. Mohan Lal*, A.I.R. 1976 S.C. 688, *Lonankutty v. Thomman*, A.I.R. 1976 S.C. 1645; 1976 S.C.R. (Supp.) 74, *Venkateswara Prabhu v. Krishna Prabhu*, A.I.R. 1977 S.C. 1268, *K.Khaja Mohideen v. K.Muhaideen Batcha*, A.I.R. 1979. Mad. 155, *Angappa Gounder v. Rajavelu Gounder*, A.I.R. 1981 Mad. 282; 1981 T.L.N.J. 280; (1981)94 L.W. 444; (1981)2 Serv.L.R. 547, *S.Kandaswamy v. R.A.Murugesu*, A.I.R. 1983 Mad. 131; (1982)2 M.L.J. 362; (1982)95 L.W. 660, *Thangavelu Kounder v. Venkatarama Kounder*, (1988)2 L.W. 14. (Summary of Cases), *M.Subramaniam v. Chhottabhai and Company*, (1990)2 M.L.J. 66 and *Arumugha Nainar v. Lakshmana Perumal*, (1992)1 M.L.J. 457.

It is not necessary to refer to all the above cases in detail. The principle laid down in those cases is the same. In *Sheodan Singh v. Daryao Kunwar*, A.I.R. 1966 S.C. 1332; (1966)1 S.C.W.R. 891; (1966)2 S.C.J. 768, the court said:-

"Where the trial court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial court's decision stands confirmed, the decision of the appeal court will be *res judicata* and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial court given on merits, and if that is so the decision of the appeal court will be *res judicata* whatever may be the reason for the dismissal."

10. In *Venkateswara Prabhu v. Krishna Prabhu*, A.I.R. 1977 S.C. 1268, the court said:-

"16. So far as the question of appeal to this Court is concerned, it is true that no appeal lay as a matter of right against the judgment in the appeal in the money suit, but, we think that the learned counsel for the respondents is correct in submitting that the question whether there is a bar of *res judicata* does not depend on the existence of a right of appeal of the same nature against each of the two decisions but on

the question whether the same issue under the circumstances given in S.11 has been heard and finally decided. That was certainly purported to be done by the High Court in both the appeals before it subject, of course to the rights of parties to appeal. The mere fact that the defendant-appellant could come upto this Court in appeal as of right by means of a certificate of fitness of the case under the unamended Art.133(1)(c) in the partition suit, could not take away the finality of the decision so far as the High Court had determined the money suit and no attempt of any sort was made to question to the correctness or finality of that decision even by means of an application for special Leave to appeal”.

11. Recently, we have reiterated the principle of *res judicata* in our judgment in *D.Krishnamurthy v. V.K.Parasuraman*, A.S.No.566 of 1986, which was rendered on 15.7.1993.

12. Learned counsel for the appellant seeks to distinguish the above rulings on the ground that in all those cases, the decision relied on by the parties for invoking the principle of *res judicata* had become final as there was no appeal against the same. According to him, in the present case, our order rejecting the appeal against O.S.No.3262 of 1978 was made only on 21.7.1993 and the appellant had already applied for certified copies of our order with a view to take up the matter on appeal to the Supreme Court of India. An affidavit sworn to by the appellant has been filed today before us. It is stated in that affidavit that the appellant is keen and anxious to take our order dated 21.7.1993 to the Supreme Court of India by filing special leave petition as soon as copies are made available to him. It is stated that he had not abandoned his claim in the suit O.S.No.3262 of 1976 at any time and is prosecuting the same in the special leave petition before the Supreme Court of India. It is contended by learned counsel for the appellant that so long as the time for preferring the appeal has not expired, the judgment cannot be said to have attained finality. According to learned counsel, the appellant has a right of appeal to the Supreme Court of India and at this stage, the judgment and decree in O.S.No.3262 of 1978 cannot bar the hearing of this appeal on the principle of *res judicata*. Learned counsel places reliance on a decision of a Division Bench of this Court in *Chengalavala Gurraju v. Madapathy Venkateswara*

Rao Pantulu Garu, A.I.R. 1917 Mad. 597. In that case, the respondent had filed two suits against the appellant to enforce acceptance of pattas for Faslis 1318 and 1319. They were dismissed by the Sub-Collector for want of jurisdiction, but on appeal the District Court remanded the matters. After remand, the Sub Collector passed decrees in both the suits. Appeals were preferred against the said decrees in the District Court. While the proceedings were pending, the respondent filed another suit to enforce acceptance of the patta for Fasli 1320. The Sub Collector passed a decree in favour of the plaintiff, on the ground that the decision in the earlier suits constituted *res judicata*. There was no appeal against the decree in the later proceedings. When the appeals against the earlier decrees were taken up, the District Judge dismissed them on the ground that the decision of the Sub Collector in the later proceeding barred the same on the principle of *res judicata*. It was that judgment of the District Judge, which was challenged in second appeal before this Court. The Bench held that the judgment in the later proceeding by the Sub Collector was on a mistaken view of the law and that would not render the question raised in the appeals before the District Judge *res judicata*. One of the arguments advanced before the Bench was that the possibility of filing an appeal and of a reversal of a judgment cannot affect the present validity of the judgment. Dealing with that argument, the Bench observed:

“There is some force in this argument but, on the other hand, so long as a party is given a right of appeal it would lead to great hardship if an erroneous judgment operates as *res judicata* during the interval allowed by law between the date of judgment and the filing of an appeal, especially as a party cannot in this country file an appeal at once”.

The Bench concluded:

“The erroneous decision in Suit No.412 of 1911, which was not on the merits but on a mistaken view of the law taken by the Sub Collector, would not therefore render the question raised in the appeals filed against the decrees in Suits Nos.466 of 1909 and 276 of 1910 *res judicata* because the correctness of the decisions in Suit No.412 of 1911 would not be questioned in the appeals against those decrees”.

Consequently, they reversed the decision of the

District Judge and remanded the appeals for fresh disposal on merits. The ruling will have no bearing whatever on the present case. It is seen that the later judgment which was relied on by the party raising the question of *res judicata* was not a judgment on merits, but it merely depended upon the earlier judgment, which was subject matter of the appeal.

13. A similar ruling in *Jaspat Rai v. Kahan Chand, A.I.R. 1938 Lahore 232*, is referred to by learned counsel for the appellant. The facts of that case are entirely different and the ruling will not help the appellant in this case.

14. The contention of learned counsel that Sec.11 of the Code of Civil Procedure would come into play only after a judgment attains finality once and for all is fallacious. The relevant part of Sec.11 of the Code of Civil Procedure reads:

“.....such issue has been subsequently raised, and has been heard and finally decided by such court.”

It is sufficient if there is finality concerning the suit in which the proceeding is pending. It is not necessary that finality should have been attained by the proceeding being taken to the highest court of the country and confirmed.

15. The contention of learned counsel that the appellant has a right of appeal to the Supreme Court is also unsustainable. Our order dismissing the application for condonation of delay in representation and consequently rejecting the appeal against O.S.No.3262 of 1978 is not a matter falling under Art.133 of the Constitution of India. The case does not involve a substantial question of law of general importance. Nor, in our opinion, the question needs to be decided by the Supreme Court. The appellant can, if at all, approach the Supreme Court only under Art.136 of the Constitution of India and seek the special leave of that court. Grant of special leave under Art.136 of the Constitution is discretionary and not a matter of right to any person. Hence, the appellant cannot claim that he has a right of appeal and this Court should wait till he exhausts that remedy or the time for preferring an appeal comes to an end. We have already referred to the judgment in *Venkateswara Prabhu v. Krishna Prabhu, A.I.R. 1977 S.C. 1268*, and extracted the relevant passage. Even in a case falling under Art.133 of the Constitution of India, the Supreme Court held that the finality of the decision so far as the High Court was

concerned, was not taken away by the fact that the appellant could go to the Supreme Court as of right by means of a certificate of fitness under Art.133. A fortiori, the fact that the appellant could approach the Supreme Court of India under Article 136 will not take away the finality of the Judgment of this Court in the other case. As on date, the appellant is precluded by the findings given in O.S.No.3262 of 1978 which got confirmed by our rejection of the appeal filed against the same.

16. Consequently, we have no hesitation to hold that the present appeal is barred by *res judicata* in view of the judgment and decree in O.S.No.3262 of 1978 as confirmed by the rejection of the appeal filed against the same.

17. The appeal is dismissed. The parties will bear their respective costs.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Swamidurai, J.

C.R.P.No.3278 of 1991 and 1238 of 1992.
30th September, 1993.

B.Puthan ... *Petitioner*
v.

B.M.Billan and another ... *Respondents.*

(A) *Civil Procedure Code (V of 1908), O.9, Rule 13 - Petition under Secs.195 and 340, Criminal Procedure Code - To sanction to prosecute for offence under Sec.193, Indian Penal Code - Respondents remaining absent set ex parte - Petition allowed - Order if can be set aside.*

The court is of the View that the application under O.9, Rule 13, Civil Procedure Code is maintainable. [Para. 4]

(B) *Criminal Procedure Code (II of 1974), Secs.195 and 340 - Petition in civil court for sanction to prosecute - Lower court issuing notice to respondents whether correct.*

On a careful consideration of the order of the

lower court, the provisions of the Indian Penal Code and the Code of Criminal Procedure and the judgment of the courts in *Varadarajulu Naidu v. Emperor*, A.I.R. 1937 Mad. 716, *Canti v. Harcourt*, A.I.R. 1931 Cal. 436. In *Narayana Nadan*, A.I.R. 1915 Mad. 229 and *Raja Rao v. Emperor*, A.I.R. 1926 Mad. 1008, the court is of the view that the trial court has taken the view that a preliminary enquiry is necessary and, therefore it has ordered notice. Therefore, there is no error in jurisdiction of the trial court directing a preliminary enquiry.

[Para. 8].

Cases referred to:

Narayana Nadan, In re., A.I.R. 1915 Mad. 229. [Paras. 3, 5]

Raja Rao v. Emperor, A.I.R. 1926 Mad. 1008. [Paras. 3, 5]

Canti v. Marcourt, A.I.R. 1931 Cal. 436. [Paras. 3, 5, 8]

Kumaravel v. Shanmugha Nadar, (1940) 1 M.L.J. 719; A.I.R. 1940 Mad. 465; I.L.R. 1940 Mad. 762; 51 L.W. 542 (2); 1940 M.W.N. 472 (2); 1940 M.W.N. (CrL) 61; 189 I.C. 630; 41 Cr.L.L.J. 769 [Para. 4]

Nadiarila Pariabad v. Sentimay Biswan, (1980) Cr.L.L.J. 531. [Para. 4]

Varadarajulu Naidu v. Emperor, (1937) 1 M.L.J. 396; A.I.R. 1937 Mad. 716; I.L.R. 1937 Mad. 612; 45 L.W. 257; 1937 M.W.N. 330; 1937 M.W.N. (CrL) 58; 170 I.C. 255; 38 Cr.L.L.J. 871. [Para. 5]

Queen Empress v. Sheik Beari, I.L.R. 10 Mad. 232. [Para 5].

Petitions under Sec.115 of Act V of 1908 praying the High Court to revise the orders of the Court of the District Munsif, Uthagamandalam dated 8.11.1991 and made in I.A.Nos.186 of 1991 and 187 of 1991 in O.P.No.1 of 1991 respectively.

K.Sampath, for Petitioner.

Ashok Menon, for Respondents.

The Court made the following

ORDER: Civil Revision Petition No.3278 of 1991 is filed against the order made in I.A.No.186 of 1991 in O.P.No.1 of 1991 on the file of the learned District Munsif, Uthagamandalam. O.P.No.1 of 1991 was filed by the petitioner herein against B.M.Billan and B.Rani in the court of the District Munsif, Uthagamandalam under Sec.193, I.P.C. and under Secs.195 and 340, CrI.P.C., praying for sanction to prosecute the respondents therein. That O.P. was posted on 12.12.1990 for notice to respondents and Mr.W.P.Sivaraj, advocate entered appearance for the respondents in the

O.P. on 6.2.1991 and time was requested for filing counter. But he filed the vakalat on 20.2.1991 and prayed for further time for filing counter. The O.P. was adjourned to 20.3.1991 for the said purpose. But on that date, no counter was filed by the respondents and again it was adjourned to 2.4.1991 for counter finally. On 2.4.1991 counter was not filed. Again it was adjourned to 12.4.1991 for counter. Even on that date, it was not filed. The respondents absented themselves in the lower court and so they were called and set *ex parte*. Counsel for the respondents Mr.M.P.Sivaraj also did not attend the court on that date. The case of the petitioner in the O.P. is that the respondents gave false evidence in O.S.No.263 of 1989 of the said court. The trial court framed points for consideration, namely, whether the respondents gave false evidence in O.S.No.263 of 1989 on his file and if so, whether the respondents are liable to be prosecuted under Secs.193 and 109 I.P.C. and the third point is whether that was a fit case for granting sanction for prosecution of the two respondents. The trial court observed in its order that though it was not necessary that there should be a preliminary enquiry under Sec.340, CrI.P.C. yet the lower court gave an opportunity to the respondents to put forward their contentions. After discussion, the trial court found that it was a fit case for granting sanction for prosecution against the respondents and as an order was passed accordingly on 30.4.1991. B.M.Billan, the first respondent in the O.P. filed I.A.No.186 of 1991 under O.9, Rule 13, C.P.C., for setting aside the *ex parte* decree dated 30.4.1991 in O.P.No.1 of 1991 stating that he is a teacher in a school, that on the date when the O.P. was posted finally for filing his counter, he could not obtain leave to meet his advocate for filing counter and so his absence was not wilful but *bona fide*. This petition was resisted by the petitioner (Puthan) in the O.P. by filing a counter stating that the absence of the petitioner in the I.A.No.186 of 1991 is wilful and that the provision under O.9, Rule 13, C.P.C. does not apply to the proceedings at all. According to him, the order passed in the O.P. is not at all a decree as per the provisions of the Code of Civil Procedure. Learned District Munsif allowed that application by his order dated 8.11.1991 on condition that the petitioner in I.A.No.186 of 1991 should pay a sum of Rs.100 as costs before 28.11.1991 failing which the said application would stand dismissed. The

trial court posted that application I.A.No.186 of 1991 to 29.11.1991 for compliance. As against that order made in I.A.No.186 of 1991 dated 8.11.1991 C.R.P.No.3278 of 1991 is filed in this Court.

C.R.P.No.1238 of 1992: B.Rani, the second respondent in O.P.No.1 of 1991 filed I.A.No.187 of 1991 for setting aside the *ex parte* order passed under O.9, Rule 13, C.P.C. stating that she was a student in a Government teachers Training School at Kothagiri that she could not meet her counsel on 30.4.1991 for filing the counter as she could not get leave on that date and so that her absence was not wilful but *bona fide*. This I.A.No.187 of 1991 was resisted by Puthan the petitioner in the O.P. on the ground *inter alia* that O.9, Rule 13, C.P.C. will not apply since the order passed in the O.P. is not a decree as per C.P.C. and that the absence of the petitioner Rani is wilful. The lower Court passed an order on 8th November, 1981 allowing I.A.No.187 of 1991 on condition that the petitioner in I.A.No.187 of 1991 should pay a sum of Rs.100 as costs to the respondents in the I.A. within 28.11.1991 failing which the said application would be dismissed and posted the I.A. to 29.11.91. As against that order dated 8.11.1991 made in I.A.No.187 of 1991, C.R.P.No.1238 of 1992 is filed.

3. Mr.K.Sampath, learned counsel for the petitioner in both the civil revision petitions filed written arguments contending that the application I.A.No.187 of 1991 filed under O.9, Rule 13, C.P.C. is not at all maintainable and that if at all the respondent is aggrieved with the order made *ex parte* in O.P.No.1 of 1991, he has to file an appeal as against that order. The second contention of Mr.K.Sampath is that no enquiry is necessary and that the lower court has committed an error in ordering notice and calling upon the respondent to show cause as to why the application filed under Sec.193, I.P.C. and also under Secs.195 and 340 CrI.P.C. should not be ordered. In support of his contention, he relied upon the decisions in the case of *In re. Narayana Nadan*, A.I.R. 1915 Mad. 229, *Raja Rao v. Emperor*, A.I.R. 1926 Mad. 1008, *Canu v. Marcourt*, A.I.R. 1931 Cal. 436, *Varadarajulu Naidu v. Emperor*, (1937)1 M.L.J. 396: A.I.R. 1937 Mad 716: I.L.R. 1937 Mad. 612: 45 L.W. 257: 1937 M.W.N. 330: 1937 M.W.N. (CrL) 58: 170 I.C. 255: 38 CrL.L.J. 871.

4. Learned counsel for the respondents Mr.Ashok Menon filed his arguments in writing. His

contention is that when an O.P. is filed under the abovesaid provisions of the Act seeking for sanction to prosecute and if an *ex parte* order is passed, a petition under O.9, Rule 13, C.P.C. is maintainable and in support of that he relied upon the decision in the case of *Kumaravel v. Shanmugha Nadar*, (1940)1 M.L.J. 719: A.I.R. 1940 Mad.465: I.L.R. 1940 Mad.762: 51 L.W. 542(2): 1940 M.W.N. 472 (2): 1940 M.W.N. (CrL) 61: 189 I.C. 630: 41 CrL.L.J. 769. The Division Bench held that a civil court does not cease to be a civil court when it is considering the application made to it under Sec.476, C.P.C. (Old Act) and if for the purpose of that application it remains a civil court, it must be governed by the provisions of the code of Civil Procedure and not by those of the Code of Criminal Procedure. It was further held that where an order has been passed by a Civil Court under Sec.476, CrI.P.C. (old Act), Sec.439, CrI.P.C. has no application. Sec.476, CrI.P.C. of the old Act corresponds to Sec.340, CrI.P.C. of the New Act. The Full Bench decision of our High Court reported in A.I.R. 1940 Mad.465 *Supra* has been later followed by the Calcutta High Court in the decision in the case of *Nadiarila Pariabad v. Sentimay Biswan*, (1980) CrL.L.J. 531. Learned single Judge of Calcutta High Court held that the provisions of O.9, Rule 13, C.P.C. are attracted and an application for rehearing of the proceedings under Sec.340, CrI.P.C. is maintainable. I am bound by the Full Bench Judgment of this Court referred to above. Therefore, I am of the view that the application under O.9, Rule 13, C.P.C. is maintainable and I answer this point accordingly.

5. With respect to the second contention that no enquiry is necessary at all and that even notice ought not to have been sent to the respondent to show cause to the proceedings made in O.P.No.1 of 1991. Mr.K.Sampath, learned counsel for the petitioner contended that in view of the above decisions relied upon by him, a preliminary enquiry itself is not at all contemplated and that the lower court has exceeded its jurisdiction in ordering notice in I.A.Nos.187 of 1991 and 186 of 1991 in O.P.No.1 of 1991. He relied upon the decision in the case *Varadarajulu Naidu v. Emperor*, (1937)1 M.L.J. 396: A.I.R. 1937 Mad 716: I.L.R. 1937 Mad. 612: 45 L.W. 257: 1937 M.W.N. 330: 1937 M.W.N. (CrL) 58: 170 I.C. 255: 38 CrL.L.J. 871. In that decision, a Division Bench of this Court has held that any High Court Judge

has jurisdiction to make complaint under Sec.476, C.P.C. when fabricated documents are produced during trial of suit in exercise of original civil jurisdiction. The Division Bench has also held as follows:

“When a suit is tried by a Judge of the High Court, the term ‘Court’ occurring in Sec.476, Crl.P.C. must be taken to mean ‘the High Court’. There is nothing to prevent any Judge of the High Court from dealing with the matter, though as a matter of convenience this would seldom be done. Where therefore, some fabricated documents are put in evidence during trial of a suit by the High Court and the trial Judge is absent, the officiating Chief Justice of that High Court has jurisdiction to make a complaint under Sec.476, Crl.P.C.”

The Division Bench further observed that there is nothing to prevent any Judge of the High Court from dealing with the matter though as a matter of convenience this would seldom be done, and the matter was in this case placed before the officiating Chief Justice as the trial Judge was absent at the time. The Court may, under Sec.476, Crl.P.C. make the complaint on the application made to it or otherwise, and it need not hold a preliminary enquiry, Notice to the person proceeded against is not essential, and it is apparent from the order itself that it was passed by officiating Chief Justice in the exercise of ordinary original jurisdiction. There is therefore no substance in the contention that the Officiating Chief Justice had no jurisdiction to pass the order under Sec.476, Crl.P.C., and questions 1 and 3 do not arise. The proper course for the accused was to appeal against the order under Sec.476, Crl.P.C., and it is queer that objection should have been raised and permitted before the Magistrate. In the decision in the case of *Canti v. Marcourt*, A.I.R. 1931 Cal. 436, learned single Judge of the Calcutta High Court has held as follows:

“When a person is alleged to have given false evidence before arbitrator, an application under Sec.476, in the Court in which the Suit was instituted is necessary. But the question whether a preliminary enquiry is necessary or not will depend upon the facts and circumstances of each case. Where the application is supported not by oral evidence, but only by documents, no further preliminary inquiry is necessary beyond that which the Court makes on the

materials before it.

In such cases it is not necessary that a notice should be given to the person against whom the order is sought on an application under Sec.476.

There is the further question whether the person, against whom the application is made, should be given an opportunity of being heard upon the preliminary enquiry but this, in my judgment, is generally to be deprecated. It might result, in some measure, in converting the enquiry into an enquiry not dissimilar from that which it would be the duty of a Magistrate to make and it might involve the person against whom the order is sought in himself giving evidence on oath by affidavit or otherwise which would be contrary to the spirit of the criminal law in this country. I do not therefore consider that it is necessary that notice should be given to the person against whom the order is sought on an application such as this. He will, moreover, have every opportunity of being heard by the Magistrate upon whom the duty will be cast of proceeding according to law, if a complaint is made. I find that it is expedient in the interest of justice that an enquiry should be made into the offences specified in the petition in respect of the statements of Marcourt, which I have quoted; and I direct that a complaint thereof in writing shall be prepared for signature as required to be forwarded to the Chief Presidency Magistrate for him to proceed in accordance with the law.”

In the decision in the case of *In re Narayana Nadan*, *In re*, A.I.R. 1915 Mad. 229, a Division Bench of this Court consisting of Wallis and Sadasiva Ayyar, JJ has held as follows:

“*Per Wallis, J.*: Sec.195, Crl.P.C., does not enumerate the considerations which should guide the courts in granting sanctions nor does it prescribe indefeasible that the Court should hold a fresh enquiry and take evidence before granting sanction. Such a proceeding is quite unnecessary in a case, where the court has acquired a knowledge of the facts in the course of the proceedings in or in relation to which the offence is alleged to have been committed. *Queen Empress v. Sheik Beari*, I.L.R. 10 Mad. 232 distinguished. The dicta contained in some of the decided cases that the order should be made on judicial evidence do not mean that

such evidence must have been given on the application for sanction or even on the hearing of the complaint itself".

In the judgment in the case of *Raja Rao v. Emperor*, A.I.R. 1926 Mad. 1008, a Division Bench of this Court (Devadoss and Waller, JJ.) has held as follows:

"What a Court has to decide under Sec.476 is (a) whether an offence of the kind contemplated appears to have been committed; (b) Whether it is expedient in the interest of justice that it should be further enquired into. In order to arrive at a decision the Court may, if it thinks fit, hold such preliminary enquiry as it considers necessary. The nature method and extent of the preliminary enquiry are entirely at its discretion. The enquiry need not be such as to satisfy the court that an offence actually has been committed by merely that an offence appears to have been committed. If, therefore, a court holds such an enquiry, the persons against whom it is carried on, cannot claim to cross-examine the witness."

In the judgement in the case of *Canti v. Marcourt*, A.I.R. 1931 Cal. 436 a Division Bench of Calcutta has held as follows:

"Where a person is alleged to have given false evidence before arbitrator, an application under Sec.476, in the court in which the Suit was instituted is necessary. But the question whether a preliminary inquiry is necessary or not will depend upon the facts and circumstances of each case. Where the application is supported not by oral evidence, but only by documents, no further preliminary inquiry is necessary beyond that which the court makes on the materials before it.

In such cases it is not necessary that a notice should be given to the person against whom the order is sought on an application under Sec.476."

The Division Bench of Calcutta High Court has also referred to the Division Bench judgment at this Court in *Raja Rao v. Emperor*, A.I.R. 1926 Mad. 1008.

6. Sec.340, CrI.P.C. of 1973 is equivalent to Sec.476, CrI.P.C. of 1898. Sec.340, CrI.P.C. of 1973 reads as follows:

"340. *Procedure in cases mentioned in Sec.195:* when, upon an application made to it in this behalf or otherwise, any Court is of opinion

that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of Sub-sec.(1) of Sec.195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such court may, after such preliminary inquiry, if any as it thinks necessary,--

(a) record a finding to that effect;
(b) make a complaint thereof in writing;
(c) send it to a Magistrate of the first class having jurisdiction;
(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and Court thinks it necessary so to do, send the accused in custody to such magistrate; and
(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a court by Sub-sec.(1) in respect of an offence may, in any case where that Court has neither made a complaint under Sub-sec.(1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the court to which such former Court is subordinate within the meaning of Sub-sec.(4) of Sec.195.

(3) A complaint made under this Section shall be signed,---

(a) Where the court making the complaint is a High Court, by such officer of the court as the Court may appoint;

(b) In any other case, by the presiding officer of the Court.

(4) In this section "Court" has the same meaning as in Sec.195".

7. O.P.No.1 of 1981 was filed under Sec.193, I.P.C. and under Secs.195 and 340, CrI.P.C. Sec.193, I.P.C. reads as follows:

"193. *Punishment for false evidence:* whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceedings shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;
and whoever intentionally gives or fabricates

false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

- *Explanation 1:* A trial before a court martial is a judicial proceeding.

Explanation 2: An investigation directed by law preliminary to a proceeding before a court of justice, is a stage of a judicial proceeding, though that investigation may not take place before a court of justice.

Explanation 3: An investigation directed by a court of justice according to law, and conducted under the authority of a court of justice, is a stage of a judicial proceeding, though that investigation may not take place before a court of justice."

Sec.195, CrI.P.C. reads as follows:

"195. *Prosecution for contempt of lawful authority of public servants for offences against public justice and for offences relating to documents given in evidence:* (1) No Court shall take cognizance - (a)(i) of any offence punishable under Secs.172 to 188 (both inclusive) of the Indian Penal Code, or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate.

(b)(i) of any offence punishable under any of the following sections of the Indian Penal Code, namely, Secs.193 to 196 (both inclusive), 199, 300, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in violation to, any proceeding in any Court, or

(ii) of any offence described in Sec.463, or punishable under Sec.171, Sec.475 or Sec.476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a public servant under clause (a) of Sub-sec.(1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the court; and upon its receipt by the court, no further proceedings shall be taken on the complaint;

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of Sub-sec.(1) the term "Court" means a Civil, Revenue, or Criminal Court, and includes a tribunal constituted by or under a General, Provincial or State Act if declared by that Act to be a court for the purposes of this section.

(4) For the purposes of clause (b) of Sub-sec.(1), a Court shall be deemed to be subordinate to the court to which appeals ordinarily lie from the appealable decree or sentences of such former Court, or in the case of a civil court from whose decrees no appeal ordinarily lies, to the principal court having ordinary original civil jurisdiction within whose local jurisdiction such civil court is situated.

Provided that---

(a) Where appeals lie to more than one court, the appellate court of inferior jurisdiction shall be the court to which such court shall be deemed to be subordinate;

(b) Where appeals lie to a civil and also to a revenue court, such court shall be deemed to be subordinate to the civil or revenue court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

8. On a careful consideration of the order of the lower court, the provisions of the Indian Penal Code and the Code of Criminal Procedure stated *supra* and the judgment of the courts stated *supra*, I am of the view that the trial court has taken the view that a preliminary enquiry is necessary and therefore, it has ordered notices. Therefore, there is no error in jurisdiction of the trial Court directing a preliminary enquiry held in *Raja Rao v. Emperor*, A.I.R. 1926 Mad. 1008, which was later followed by a Division Bench judgment of Calcutta High Court in *Canti v. Harcourt*, A.I.R. 1931 Cal.436. The Division Bench which decided the case reported in *Varadarajulu Naidu v.*

Emperor, A.I.R. 1937 Mad. 716, had no occasion to consider the judgment reported in *Raja Rao v. Emperor, A.I.R. 1926 Mad. 1008*. Similarly the Division Bench which decided the case reported in *A.I.R. 1926 Mad. 1005* had no occasion to consider the judgment reported in *Narayana Nadan, In re., A.I.R. 1915 Mad. 229*.

9. In the circumstances, the petition filed under O.9, Rule 13, C.P.C., is maintainable and the lower court has exercised its jurisdiction correctly and there is no illegality or irregularity in the order passed in I.A.Nos.186 and 187 of 1991.

10. In the result, both the civil revision petitions are dismissed. In the circumstances, there is no order as to costs.

B.S. ---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: *Bakthavatsalam, J.*

W.P.No.17167 of 1993 4th October, 1993.

S.Mohanakrishnan ... *Petitioner*
v.

**State of Tamil Nadu represented by its Secretary,
Department of Education, Madras and others**

... *Respondents.*

Evidence Act (I of 1872), Sec.115 - Estoppel - Equitable estoppel - Candidate for examination submitting application belatedly - Allowed to take examination - Issued hall-ticket - His name finding place in computerised Nominal Roll - No undertaking obtained from him that he should write examination at his own risk - Government, if estopped from saying that his result cannot be published pending decision on his belated application.

It is true that the principle of promissory/ equitable estoppel cannot override the provisions of any statute and there cannot be any estoppel against any statute, but if the case on hand is looked into, certainly, the principle or equitable estoppel has

got to be applied. In view of the admitted fact that the petitioner had been allowed to take the Tamil Examination concerned or X Standard in March, 1993 and he had been issued a hall ticket to take up the said examination and his name did find a place in the computerised nominal roll and the petitioner's application having been accepted as a valid one without getting any undertaking from the petitioner, the court is of the view that the Principle of equitable estoppel has got to be applied to this case and if so applied, it is not open to the respondents 1 and 2 now to say that the petitioner's result cannot be published pending decision on his belated application.

[*Paras. 6 and 7*]

Cases referred to:

Union of India v. Anglo Afghan Agencies, A.I.R. 1968 S.C. 718: (1968)2 S.C.R. 366. [Para. 6]

Municipal Corporation of the City of Bombay v. Secretary of State, 1964 I.L.R. 29 Bom. 580. [Para. 6]

V.P.Thirunavukarasu v. The State of Tamil Nadu, (1973)2 M.L.J. 181. [Para. 7]

Petition under Art. 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 2nd respondent to announce the results of the petitioner in respect of Tamil Subject examination of 10th Standard revised course held in the month of March, 1993 and also issue mark sheet.

Ibrahim Kalifullah, for Petitioner.

D.Krishnakumar, Government Advocate, for Respondent Nos.1 and 2.

The Court made the following

ORDER: The writ petition is for the issue of writ of *mandamus* directing the 2nd respondent to announce the results of the petitioner in respect of Tamil Subject examination of 10th Standard revised course held in the month of March, 1993 and also issue mark sheet.

2. When the writ miscellaneous petition came up for admission, by consent of parties, the main writ petition itself is taken up for disposal.

The facts are: The petitioner was a student of 10th Standard Class in the Madras Christian College Higher Secondary School at Chetpet. After completing the Course, the petitioner wrote the Xth Standard examination in April, 1992, but since he was not successful and failed in the subject Tamil,

he wrote the Tamil paper in the supplementary examination held in October, 1992 after taking necessary coaching in the 3rd respondent. As the petitioner had once again failed in the subject (Tamil) he took up the examination in March, 1993 and wrote the same as a private candidate at Pallavaram Government Higher Secondary School. The results in respect of the examination held in March, 1993 were published in June, 1993, but the results of the petitioner and other students were withheld. When the petitioner contacted the 2nd respondent, he was asked to send a postal order for Rs.2. Thereafter the petitioner sent a letter on 22.7.1993 to the 2nd respondent for the publication of the results of the petitioner but nothing was forthcoming. In the meanwhile, it is alleged, the petitioner's father has made arrangements to secure admission for the petitioner into the Technical Institute at Coimbatore so as to improve the future of the petitioner. Since the date of admission to the said Technical Institute is fast approaching and since the petitioner's result in the Tamil subject (concerning X Standard) had not yet been published, the petitioner has come forward with this writ petition.

3. The learned Government Advocate, Education, on respect of written instruction states that the petitioner, a private candidate, had submitted his application for admission to the examination in Tamil subject concerning X Standard to be held in March, 1993, as late as 20.2.1993, 20 days after the last date fixed for the receipt of the examination (that last date for receipt of the application for examination was fixed upto 30.1.1993). It is further contended by the learned Government Advocate that all such applications were processed by the Regional Deputy Director for Government Examinations and computerised Nominal Roll was prepared and Hall Tickets were issued to the private candidates through the Chief Superintendents of the concerned examination centres. In the above process....., the petitioner's name had been included in the Computerised Nominal roll and he had been issued Hall Ticket to write the examination in Tamil subject concerning X Standard in March, 1993. However, the fact remains, it is contended by the learned counsel for the respondents 1 and 2 that the petitioner had submitted his application after the last date fixed for the receipt of the application for writing examination and his result has been withheld pending

decision on his belated application. In this connection, it is relevant to note the extracts of the Notifications issued at the time of calling for applications to write the X Standard Public examinations to be held in March, 1993, which reads as follows:

"Applications received after last date will be summarily rejected and fees once paid will not be refunded. Any delay in respect of applications will not be condoned. There is no provision.... for belated submission of application with penal fee".

From the above it is clear the learned Government Advocate (Education) contended that since the petitioner had submitted his application after the last date fixed for the receipt of applications for writing X Standard examinations from private students, he has been allowed to write the examination pending decision on his belated application and the petitioner cannot ask as a matter of course to publish the results. It is further contended by the learned Government Advocate (Education) that instructions were issued to the Chief Superintendent of the examination centres to admit the private candidates also whose names were not found in the Computerised Nominal Roll supplied by the Director of Government Examinations to safeguard the interest of genuine private candidates who had applied in time but whose names did not find a place in the nominal Roll after taking a written declaration from the candidates that they were taking their examination at their own risk.

To curb the corrupt practices, it is contended by the learned Government Advocate, the Department is very strict in entertaining applications after the last date.

4. Mr.P.Kalifulla, learned counsel for the petitioner contends that the petitioner's name had been listed in the computerised Nominal Roll and he had been issued hall ticket to take up the examination and accordingly the petitioner wrote the examination under the hope that he would get his result published along with others, though he had submitted his application beyond the last date fixed for the receipt of the application, the respondents 1 and 2 cannot now say that the petitioner's result cannot be published pending decision on his belated application. It is further contended by the learned counsel for the petitioner that once that petitioner's application, which was presented

after 20 days from the date of the last date fixed for the receipt of the application, without any protest and without obtaining any undertaking from the petitioner that the petitioner was taking up the examination at his risk, at the stage of publication of results, the respondents 1 and 2 cannot find fault with the petitioner on the presentation of his application. Though there is a specific instruction in the Notification, as extracted above that the applications received after the last date will be summarily rejected, and though the petitioner had submitted his application nearly 20 days after the last date, his application had been accepted and he had been issued a hall ticket and the petitioner's application had not been rejected at all. In such circumstances it is contended by the learned counsel for the petitioner, that if the facts of the case are tested with the principles of promissory estoppel, it will clearly emerge that the attitude of the respondents 1 and 2 in not publishing the results of the petitioner is arbitrary and unreasonable.

5. The learned Government advocate (Education) per contra contends that admittedly the petitioner has submitted his application after the last date fixed for the receipt of the application for writing the X Standard examination in March, 1993. Whether his application can be treated as valid one or not is yet to be decided and simply because the petitioner has been issued a hall-ticket for writing the examination and his name had been included in the computerised Nominal Roll, that will not confer any right on the petitioner to seek for the publication of his result pending decision on the belated application. The learned Government Advocate further contends that in the case of the petitioner no undertaking had been obtained from the petitioner at the time of issuing hall ticket that he took up the examination at his own risk but he cannot take advantage of the situation and ask for publication of his results when no decision has been taken on his belated application.

6. I have heard the learned counsel for the petitioner and the learned Government advocate (Education) for respondents 1 and 2. Certain facts are not in dispute. The petitioner is a private candidate. Admittedly he had sent his application for writing the Government Examination in Tamil concerning X Standard class, after the last date fixed for the examination, that is, 20 days after the

last date fixed for the receipt of the application. Though the petitioner had submitted his application beyond the last date, his application had not been rejected, as contemplated in the Notification. His application, it appears, had been processed and the petitioner's name did find a place in the computerised nominal roll and he had been issued a hall ticket to take up the examination in Tamil subject concerning X Standard in March, 1993 along with others, without getting an undertaking that the petitioner shall write the examination at his own risk, since decision was pending on his belated application. When once the application of the petitioner, though submitted after the last date, is entertained, processed and treated it as valid one and thereupon issued a hall ticket to the petitioner, I am of the view, that it is not open to the respondents 1 and 2 to stop the publication of results on the ground that no decision has yet been taken on his belated application. 7. In *Union of India v. Anglo Afghan Agencies*, A.I.R. 1968 S.C. 718: (1968)2 S.C.R. 366, the question came up for consideration before the Supreme Court was whether persons acting on representation made by the Government, can claim in the absence of execution of formal contract under Art.299 of the Constitution, that Government shall be bound to carry out promise. In that case the Supreme Court has held:-

"We hold that the claim of the respondents is appropriately founded upon the equity which arises in their favour as a result of the representation made on behalf of the Union of India in the Export Promotion Scheme, and the action taken by the respondents acting upon that representation under the belief that the Government would carry out the representation made by it. On the facts proved in this case no ground has been suggested before the court for exempting the Government from the equity arising out of the acts done by the exporters to their prejudice relying upon the representation. This principle has been recognised by the courts in India and by the Judicial Committee of the Privy Council in several cases. In *Municipal Corporation of the City of Bombay v. Secretary of State*, 1964 I.L.R. 29 Bom. 580, it was held by the Bombay High Court that even though there is no formal contract as required by the statute, the Government may be bound by a

representation made by it. In that case in answer to a requisition by the Government of Bombay addressed to the Municipal Commissioner to remove certain fish and vegetable markets to facilitate the construction of an arterial road, the Municipal Commissioner offered to remove the structures if the government would agree to rent to the Municipality other land mentioned in his letter at the nominal rent. The Government accepted the suggestion and sanctioned the application of the Municipal Commissioner for a site for stabling and establishing the new markets. The Municipal Commissioner then took possession of the land so made available and constructed stables workshops and cha-wls thereon. Twenty-four years thereafter the Government of Bombay served notices on the Municipal Commissioner determining the tenancy and requesting the Commissioner to deliver possession of the land occupied by the markets and to pay in the meantime rent at the rate of Rs.12,000 per annum. The Municipality declined to pay the rent and the Secretary to State for India filed a suit against the Municipal Commissioner for a declaration that the tenancy of the Municipality created by Government Resolution of December 9, 1865, stood determined and for an order to pay rent at the rate of Rs.12,000 per annum. It was urged before the High Court of Bombay that the events which had transpired had created an equity in favour of the Municipality which afforded an answer to the claim of the Government to eject the Municipality, Jenkins, C.J., delivering the judgment of the Court observed.

"The doctrine involved in this phase of the case is often treated as one of estoppel, but I doubt whether this is correct, through it may be a convenient name to apply.

It differs essentially from the doctrine embodied in Sec.115 of the Evidence Act which is not a rule of equity but is a rule of evidence that was formulated and applied in Courts of law; while the doctrine with which I am now dealing, takes its origin from the jurisdiction assumed by courts of Equity to intervene in the case of or to prevent fraud".

After referring to *Ramsden v. Dyson*, (1866) L.R. 1 H.L. 129 (170), the learned Chief Justice observed that the Crown comes within the

range of equity and proceeded to examine whether the facts of the case invited the application of that principle.

This case, is in our judgment, a clear authority that even though the case does not fall within the terms of Sec.115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it even though the promise is not recorded in the form of a formal contract as required by the Constitution".

It is further held by the Supreme Court that: Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future contract and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on *ex parte* appraisal of the circumstances in which the obligation has arisen".

It is true that the principle of promissory/equitable estoppel cannot override the provisions of any statute and there cannot be any estoppel against any Statute, but if the case on hand is looked into, certainly, I am of the view, the principle of equitable estoppel has got to be applied.

8. In *V.P. Thirunavukkarasu v. The State of Tamil Nadu*, (1973) 2 M.L.J. 181, Palaniswamy, J., has on the scope of the application of equitable estoppel observed that....,

"If the terms of a statute are absolute and do not admit of any relaxation or exemption, then anything done contrary to the terms of such a statute would be *ultra vires* and would be void and no person could be estopped from putting forward the contention that what he did was illegal or void. But if, on the other hand, a statute having prescribed certain conditions or qualifications for the doing of a certain thing itself provides for exemption therefrom under certain circumstances or authorises somebody to exercise the power of exemption then anything done not in terms of those conditions or qualifications could not be said to be *ultra vires*. It may amount only to an irregularity and to such an act the proposition that there can be no estoppel against a statute will have no application".

In view of the admitted fact that the petitioner had been allowed to take the Tamil Examination concerned of X Standard in March, 1993 and he had been issued a hall ticket to take up the said examination and his name did find a place in the computerised nominal roll and the petitioner's application having been accepted as a valid one without rejecting it and without getting any undertaking from the petitioner, I am of the view that the principle of equitable estoppel has got to be applied to this case and if so applied, it is not open to the respondents 1 and 2 now to say that the petitioner's result cannot be published pending decision on his belated application. The submission of application late is only a irregularity. If the respondents 1 and 2 had committed any mistake in entertaining the application of the petitioner and in allowing the petitioner to take up the Government examination in March, 1993, for such an act the petitioner cannot be penalised. If the application of the petitioner is not a valid one, the respondents 1 and 2 should have thrown out the application at the initial stage itself and they ought not to have proceeded at all. It has not been done here. In such circumstances, I am of the view, that there is no justification for not publishing the result of the petitioner.

8. In the result, the writ petition is allowed and the respondents 1 and 2 are directed to publish the result of the petitioner within ten days from to-day (4.10.1993). No costs.

B.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A. Swami, C.J. and Somasundaram, J.

W.A.No.1076 of 1992 7th September, 1993.

The Indian Overseas Bank represented by the General Manager, Madras. ...Appellant
v.

R.Sathyamurthi ...Respondent.

Civil services - Disciplinary enquiry - Reasoned order passed by enquiry officer - Appellate authority not

going into reasons in detail - Order of appellate authority, if vitiated.

In a case where the reasons are contained in the findings recorded by the enquiry officer and even if the appellate authority does not go into them in detail, the order may not be vitiated as held by the Supreme Court in *S.N.Mukherjee v. Union of India*, A.I.R. 1990 S.C. 1984. [Para. 2]

Case referred to:

S.N.Mukherjee v. Union of India, A.I.R. 1990 S.C. 1984. [Para. 2]

N.G.R.Prasad, for Appellant.

K.Palanisamy, for Respondent.

The Judgment of the Court was delivered by K.A.Swami, C.J.: This writ appeal is preferred against the order dated 19.3.1992 passed by the learned single Judge in W.P.No.2273 of 1984. In the writ petition, the respondent hereinsought for quashing the order in Ref.No. DO:GM:664, dated 3.12.1975 issued by the General Manager of the appellant/Bank, terminating the services of the respondent. Learned single Judge has allowed the writ petition on the ground that the order passed by the appellate authority is not a speaking order, and consequently has directed the appellate authority to reconsider the appeal afresh. Hence, the Bank has come up in appeal.

2. We have been taken through the proceedings of the Board which are found in pages 82 to 85 of the typed set and also the findings of the enquiring authority which are found in pages 56 to 64 of the typed set. From the order of the learned single Judge it is apparent that the proceedings of the Board have not been looked into. What has been taken into consideration is only the communication sent to the respondent informing him that his services are terminated. That communication has been issued pursuant to the decision of the Board incorporated in the proceedings of the Board. We are of the view that instead of stating as to what is contained in the proceedings of the Board, it is appropriate to reproduce the same, which is as follows:

"Memorandum to the Board

(For Information)

Central Office:

Head of subject: Staff - Supervising Nature of subject: Shri R.Satyamoorthy, Shri R.Satyamoorthy, an officer of our Bank was dismissed by us on 27.8.1975 for committing breach of the Rules of the Bank and for doing

acts detrimental to its interest while he was working as Manager of Swamiarmadam Branch. Against the order of dismissal, he has now preferred an appeal to the Board of Directors under Rule 36 of the Rules governing the service of officers.

Brief summary of the case: Shri R.Satyamoorthy was charge-sheeted for committing breach of the rules of the Bank and for displaying negligence, inefficiency and indifference and for knowingly acting to the detriment of the Bank's interest under the following circumstances:

He passed unauthorised debits in suspense account as advance towards LFC and utilised such amounts for his monetary needs, without undertaking any journey. He failed to refund a sum of Rs.125.51 drawn by him from the Bank in excess of the T.A. bill sanctioned to him as early as on 15.9.1971.

He misappropriated a sum of Rs.100 being the provision made for electricity charges and held in the branch sundry creditors account on 29.12.1973.

He had failed to check the branch Despatch Register as a result of which a sum of Rs.110.45 was found to have been debited to charges account (postages) in excess of the actual postages incurred.

He granted personal loans to some members of the staff and public, but did not ensure that they actually purchased the articles for which the loans were granted. He allowed members of staff to draw medical aid expenses in excess of their entitlements.

According to the findings of the enquiry officer, the irregularities committed by the member are serious in that he abused his powers as Manager of the Branch and displayed negligence and inefficiency and knowingly acted in a manner detrimental to the interests of the Bank. On the basis of the findings of the enquiry officer, Shri R.Satyamoorthy was dismissed from service with effect from 27.8.1975. Aggrieved by this dismissal order, he has preferred this appeal for consideration of the Board of Directors.

The member in his appeal has stated that he had not done anything which has resulted in a loss to the Bank and that he was not given access to the books and files during the enquiry. He also contends that the recording

of the proceedings of the enquiry has led to distortion of facts and the omissions and misleading comments have resulted in wrong conclusions.

There is nothing on record to show that the members made a request to the enquiry officer, to allow him to have access to the books and files during the enquiry. The very fact that Shri R.Satyamoorthy has certified in the enquiry proceedings that the recordings were made in his presence and that it is a true and complete record of the proceedings and that every opportunity has been given to him to defend himself, goes to prove that his above contentions are baseless.

He contends that due to deferment of his transfer he could not proceed on LFC and foreseeing that he would not be able to complete the journey in accordance with the rules, he refunded the advance of Rs.750 on 19.2.1974, availed of earlier. But in the enquiry he has admitted that he debited suspense account with Rs.700 on 30.1.1974 as advance for LFC to respond to a debit made by Chinnasalem Branch on account of his R.D. account. He has also admitted that he reversed this entry on 19.2.1974 when the amount was received from Chinnasalem Branch. He has expressed his regret for passing such unauthorised transaction in suspense account. He also admitted that he did not refund the sum of Rs.121.51 due by him to the Bank in respect of his T.A. bill sanctioned for a reduced amount.

He contends that there was no need for him to misappropriate the amount of Rs.100 debited to sundry creditors account on 18.1.1974. In the enquiry though he denied having received the amount himself, he could not explain how the amount was disposed of and why it was not credited to charges account. His contention that the relative voucher was not passed for payment, did not bear the pay cash stamp, Manager's signature or recipient's signature on the back of the voucher do not hold good since he has entered the same in the scroll as the last item for the day and has also admitted at the enquiry that voucher was omitted to be passed by oversight.

His contention that he should be exonerated from the charge that he granted loans to members of the staff and public although they did not

actually purchase the articles for which the loans were granted cannot be accepted since he himself admitted at the enquiry that he granted loans on the request of the members to meet their urgent/medical aid needs.

The punishment meted out to him is mainly for passing unauthorised debits in suspense account, misappropriating a sum of Rs.100 negligence in checking the despatch registers resulting in excess debits to charges (postages), granting personal loans to staff and the public although they did not purchase the articles, allowing members of staff to draw medical aid expenses in excess of their entitlements. It has been clearly established in the enquiry that he abused his powers as Manager of the branch, committed breach of the rules of the Bank and displayed negligence, inefficiency and indifference and knowingly acted to the detriment of the Bank's interest.

As Manager of the branch, it was highly irregular on his part to have committed the above acts with dishonest intentions for which the punishment of dismissal cannot be said to be unjustified.

The following matters relating to Shri R.Satyamoorthy's case leading to his dismissal are attached for consideration of the Board of Directors:

1. Enquiry Officer's findings dated 10.4.1975 (including charge sheet).
2. Show-cause notice dated 30.4.1975.
3. Shri R.Satyamoorthy's reply dated 31.5.1975.
4. Dismissal order dated 27.8.1975.
5. Shri R.Satyamoorthy's appeal dated 4.10.1975.

Sd/- K.R.
CHIEF OFFICER
MANAGER
INSPECTION

Disposal by the Board

He may be treated as having been terminated instead of dismissal.

Sd/-
GENERAL MANAGER".

It is thus clear that the Board has gone into all the charges and the findings recorded by the enquiry officer and thereafter it has decided to treat the

punishment of dismissal imposed by the disciplinary authority into one of termination. The entire proceedings that was placed before the Board would become part of the decision of the Board. As already pointed out, what was communicated to the respondent was only the ultimate decision. The reasons are contained in the proceedings which have been reproduced above. That being so, it is not possible to agree with the learned single Judge that the order of the Board is not a speaking order. In addition to this, this is a case in which the disciplinary authority recorded findings on each one of the charges on the basis of the findings recorded by the enquiry authority. Sufficient reasons are contained in the order of the enquiring authority. Therefore, it was not necessary for the appellate authority to go into the matter in detail and detail reasons, if such reasons are available in the original order. However, as already pointed out, the Board has gone into the matter in detail. In a case where the reasons are contained in the findings recorded by the enquiry officer and even if the appellate authority does not go into them in detail, the order may not be vitiated as held by the Supreme Court in *S.N. Mukherjee v. Union of India*, A.I.R. 1990 S.C. 1984. Under these circumstances, we are of the view that the order of the Board did not suffer from any infirmity. Therefore, we see no justification to quash the same. In view of the conclusion we have reached, it is not necessary to consider the contention urged by Mr. N.G.R. Prasad that the petitioner/respondent was guilty of laches and as such he was not entitled to any relief in a petition under Art. 226 of the Constitution of India.

3. For the reasons stated above, the writ appeal is allowed. The order passed in W.P.No.2273 of 1984 dated 19.3.1992 is set aside and the said writ petition is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.

B.S. ----- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Janarthanam, J.*

W.P.No.8583 of 1984

5th July, 1993.

Jeevendra Nainar

...Petitioner

v.

Smt.Kanakammal and others

...Respondents.

Tamil Nadu Debt Relief Act (13 of 1980), Sec.6 - Amount due on a mortgage - Suit filed by the mortgagor for recovery - Application by the mortgagor before the Special Tahsildar - Praying for the releasing of the mortgaged property - Application dismissed - Appeal filed against that order also dismissed - Writ petition by the mortgagor to quash the order of the appellate authority - Dismissed.

Held: The ruling of the Division Bench in *A.I.R. 1983 Mad. 38*, once a civil court passed a decree, it is not permissible for the authority under the Act to have the power to give a certificate of redemption and if so allowed, it would tantamount to giving power to the Tahsildar to nullify a decree passed by the civil court when especially the Legislature has not enacted any express provision to interfere with the decree passed by the civil court but it is however permissible for the civil court to consider the question as to whether the debtor is entitled to the benefits of the Act, even at the stage of execution proceedings. *[Para. 5]*

Case referred to:

Annamalai v. Pappathi, A.I.R. 1983 Mad. 38: (1982)95 L.W. 630: I.L.R. (1983)2 Mad. 40. [Para. 5]

A.K.Kumarasamy, for Petitioner.

Miss.V.Sumathi, for Respondent No.1.

R.Chandrasekaran, Additional Government Pleader, for Respondents Nos. 2 and 3.

The Court made the following

ORDER: The petitioner Jeevendra Nainar, it is said, borrowed a sum of Rs.3,000 from the first respondent, Srimathi Kanakammal, wife of Krishnaji Reddiar on 21.7.1966 and executed a mortgage in her favour by mortgaging certain items of his landed properties. The first respondent appeared to have filed a suit in O.S.No.1715 of 1981 on the file of the District Munsif, Tindivanam on the said mortgage and obtained a decree therefor.

2. The petitioner appeared to have filed an application under Sec.6 of the Tamil Nadu Debt Relief Act, 1980 (Tamil Nadu Act 13 of 1980, for short 'the Act') before the second respondent the Special Tahsildar, Debt Relief, Tindivanam, praying for release of the mortgaged properties. The second respondent dismissed the said application. Consequently, aggrieved by the order of the second respondent, the petitioner preferred an appeal to the third respondent, the Sub-Collector, Tindivanam under Sec.8 of the Act, who in turn on consideration of the materials available on record also dismissed the appeal concurrent with the view of the second respondent.

3. The aggrieved petitioner resorted to the present action, praying for issue of a writ of *certiorari* to quash the order of the third respondent confirming the order of the second respondent.

4. Arguments of learned counsel for the parties were heard.

5. During the course of arguments, learned counsel for the petitioner himself drew my attention to the decision of the Division Bench of this Court in the case of *Annamalai v. Pappathi, A.I.R. 1983 Mad. 38: (1982)95 L.W. 630: I.L.R. (1983)2 Mad. 40* and stated that as per the ruling of the said decision, once the civil court passed a decree, it is not permissible for the authorities under the Act to have the power to give a certificate of redemption and if so allowed, it would tantamount to giving power to the Tahsildar to nullify a decree passed by the civil court when especially the Legislature has not enacted any express provision to interfere with the decree passed by the civil court but it is however permissible for the civil court to consider the question as to whether the debtor is entitled to the benefits of the Act, even at the stage of execution proceedings. Learned counsel appearing for the respondents have no other go, except to bow their heads in reverence to the decision of the Division Bench as referred to by learned counsel for the petitioner. It is, however, made clear that it is open to the petitioner to claim the benefits of the Act at the time when the execution is sought to be resorted to by the petitioner by filing the necessary application therefor in the competent forum and if such a question is raised, it is for the civil court to consider the same and give a finding thereon.

6. Hence on the face of the Division Bench ruling, it goes without saying that the writ petition as

such, deserves to be dismissed and the same is accordingly dismissed. *Rule Nisi* issued shall stand discharged. There will be no order as to costs, in the circumstances of the case.

R.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan and Thangamani, JJ.*

App.No.735 of 1983 24th June, 1993.

M/s.Futnani Dairy Farm and another...Appellants
v.

P.Rangaswamy Nadar and another...Respondents.

Specific Relief Act (XLVII of 1963), Sec.19(b) - Agreement for sale of property - Entire consideration not paid to seller - Purchaser, if can claim benefit of section.

It is admitted that the entire consideration had not been paid to the first defendant. Hence, defendants 2 and 3 are not entitled to claim the benefit of Sec.19(b) of the Specific Relief Act. [Para. 27]

Cases referred to:-

Narayana Dosjee v. Board of Trustees, A.I.R. 1959 A.P. 64: (1958)1 An.W.R. 427: 1958 An.L.T. 19. [Para. 23]

Sinna Ponnu v. Singaru Udayar, (1969)2 M.L.J. 358. [Para. 27]

Durga Prasad v. Lilawati, A.I.R. 1972 All. 396: 1972 All.L.J. 945: 1973 Ben.C.R. 117. [Para. 28]

Ramchander Singh v. Bibi Asghari Begum, A.I.R. 1957 Pat. 224. [Para. 28]

Kirtarath Rai v. Sripat Rai, A.I.R. 1928 All. 307. [Para. 28]

Appeal against the decree of the court of the I Additional Subordinate Judge, Chengalpattu, dated 26.8.1983, in O.S.No.212 of 1982.

The Judgment of the Court was delivered by *Srinivasan, J.*: Defendants 2 and 3 are the appellants. They are aggrieved by the decree for specific performance passed by the First Additional Subordinate Judge, Chengalpattu, in favour of the

first respondent herein. For the sake of convenience, the parties are referred to by their rank in the suit.

2. The case of the plaintiff is as follows: The first defendant, who is the owner of the suit property which is an agricultural land comprised in Survey Numbers 14 and 14/1 in Egathur Village, Chingleput District of an extent of 7.35 acres fully described in the plaint, executed an agreement at Srivaikuntam on 20.9.1982 in favour of the plaintiff agreeing to convey the property to him for a total sum of Rs.1,65,000 and received an advance of Rs.15,000. The agreement stipulated that the sale should be completed and a deed should be executed and registered within six months therefrom, and that the plaintiff would be at liberty to take possession of the property in the meanwhile. The plaintiff has always been ready and willing to pay the balance of consideration and tenders the same along with the plaint. The plaintiff has also taken possession of the property. It would appear that on 11.10.1982 the first defendant executed and registered a sale deed in relation to the said property in favour of the second defendant in violation of the agreement in favour of the plaintiff. The plaintiff came to know of the same from a letter received by him from the first defendant that her husband, who died on 7.7.1982, had borrowed some money from one of the partners of the second defendant firm and that she was compelled to sell the property to the second defendant. She expressed her inability to perform the agreement and offered to return the advance of Rs.15,000. The second defendant represented by the third defendant, one of the partners, was always aware of the agreement in favour of the plaintiff and in order to make it appear to be a valid sale in his favour ante-dated the document as if it was executed on 30.6.1982. Defendants 2 and 3 are not *bonafide* purchasers without notice for value. The recitals in the document in favour of the second defendant show that it is brought into existence only on or about 11.10.1982 when it was supposed to have been registered. The sale is null and void and not enforceable in law. The second defendant did not get any right under the document. The plaintiff has, therefore, prayed for a decree for specific performance directing the defendants to execute a conveyance in favour of the plaintiff after receiving the balance of sale price.

3. The first defendant filed a written statement

raising the following pleas: It is true that she entered into an agreement with the plaintiff on 20.9.1982. Originally she entered into agreement with the father of the third defendant for the sale of the property and as the period of agreement expired, she entered into an agreement with the plaintiff. Thereafter, she was forced to execute a sale deed in favour of defendants 2 and 3 on 11.10.1982. When her husband was alive, he had some transactions with the father of the third defendant and the property was given for lease for a certain period. The father of the third defendant was enjoying the usufructs and even after the expiry of the lease, he continued to enjoy the same against the willingness and protest of the first defendant and her husband. After the death of her husband, she was threatened that she would face serious consequences and thus forced to execute the sale deed. The document was prepared by one S.A.Rajan, Advocate, Madras, who is also advocate for defendants 2 and 3. She signed the document only on 11.10.1982 and did not notice the date of sale deed as 30.6.1982. Out of the sale consideration of Rs.1,25,000, she was given only a sum of Rs.5,000 on the date of registration and defendants 2 and 3 promised to settle the account after the receipt of the registered deed. She was persuaded by the advocate S.A.Rajan to accept the terms and conditions of defendants 2 and 3 as otherwise she would be put into trouble. Believing their words and the promise given by the advocate S.A.Rajan that the remaining amount could be realised from them, she executed the document on 11.10.1982. She was not aware that the document was ante-dated.

4. Defendants 2 and 3 filed a written statement setting out the following case:

The truth of the agreement in favour of the plaintiff is denied and at any rate defendants 2 and 3 had no knowledge of the same. Possession could not have been delivered to the plaintiff as alleged by him, as even during the year 1975, the husband of the first defendant handed over possession of the suit property to defendants 2 and 3 and they continue to be in possession of the same till now. They are not aware of the readiness and willingness of the plaintiff. On 11.10.1982 the first defendant executed a registered sale deed and registration has been completed. The husband of the first defendant was known to defendants 2 and 3 from 1974. During March, 1982 when he was at Madras,

he expressed his desire to sell the suit property to defendants 2 and 3. They entered into an agreement to purchase the same on 15.3.1982 with the first defendant and her husband. During June, 1982, the husband of the first defendant was in Stanley Hospital as an in-patient and the sale deed could not be completed though stamp papers were purchased. As agreed, the first defendant and her husband obtained income-tax clearance certificate and handed over the same to the defendants. However, during June, 1982 the first defendant's husband expressed his desire to execute and register the conveyance after returning from Srivaikuntam. He left by the end of June and, therefore, the execution and registration of the sale deed were postponed. He died on 7.7.1982 at Srivaikuntam. Two weeks later, the first defendant came to Madras with her brother-in-law and promised to execute and register the sale deed. Inasmuch as the first defendant was the owner of the property and her late husband was to join the sale deed by way of abundant caution, all the defendants decided that the first defendant should execute the sale deed which was already prepared on stamps, after deletion of any reference to her late husband. The first defendant left for Srivaikuntam and did not return to Madras for registering the conveyance as promised by her and on 11.9.1982 defendants 2 and 3 sent a telegram about their readiness to go through the sale. The telegram was followed by a notice by their advocates on the same day, which was received by the first defendant on 13.9.1982. In the second week of October, 1982, she came to Madras and expressed her willingness to execute and register the document. Defendants 2 and 3 are transferees for value and they paid their monies without any notice of any contract as alleged by the plaintiff. To the knowledge of defendants 2 and 3, the plaintiff never entered into possession of the property. Later on after the suit was filed, the plaintiff, who is generally aggressive, at the time of the visit of the Court Commissioner of which there was no due or proper notice to the defendants, the plaintiff inducted his workers, obviously by way of trespass, to make it appear as if he was in possession. It is not known whether the first defendant for any reason had colluded with the plaintiff to make it appear as if an agreement was entered into even before the sale could be completed. At any rate, the first defendant ought not to have agreed to such an agreement even if it was

true especially when she had received a lawyer's notice on 13.9.1982. The sale in favour of defendants 2 and 3 is true and valid. The plaintiff has not come to court with clean hands and is not entitled to the discretionary and equitable relief of specific performance. However, non-performance can be adequately met with by pecuniary compensation in favour of the plaintiff by the first defendant and, therefore, the plaintiff cannot succeed in the suit. Hence, the suit should be dismissed.

5. The first defendant, who filed a written statement, remained *ex parte* thereafter. The plaintiff examined himself and filed two documents in his support. Defendants 2 and 3 examined the third defendant and another partner of the second defendant firm as D.W.2 and D.W.1 respectively. They also examined their accountant as D.W.3. They filed 25 documents in support of their case. As soon as the suit was filed, a Commissioner was appointed by the court to inspect the property and submit a report. The report of the Commissioner is marked as Ex.C-1 and the plan prepared by him is marked as Ex.C-2. The trial court framed four issues and found all of them in favour of the plaintiff. As per the findings of the trial court, the agreement in favour of the plaintiff is true and anterior to the sale deed in favour of defendants 2 and 3. The agreement alleged by defendants 2 and 3 said to have been entered on 15.3.1982 is found to be not proved and the said agreement must have been prepared later. The sale deed in favour of defendants 2 and 3 has also been prepared later, *i.e.*, after the agreement in favour of the plaintiff. Defendants 2 and 3 are not in possession and the plaintiff has proved his possession. Defendants 2 and 3 have also not proved that they are *bona fide* purchasers for value without notice. On the above findings, a decree has been passed in favour of the plaintiff for specific performance as prayed for by him.

6. Before considering the arguments advanced on both sides, we will analyse the evidence on record. Ex.A-1 is the agreement dated 20.9.1982 in favour of the plaintiff, who has examined himself as P.W.1. He has given evidence that he paid a sum of Rs.15,000 on the date of agreement and the total consideration was fixed at Rs.1,65,000. He has spoken to the fact that the agreement was executed by the first defendant. He has also deposed that he took possession of the property as he was authorised to do so by the terms of the agreement.

The first defendant has remained *ex parte* after admitting the genuineness of the agreement in favour of the plaintiff. She has also admitted the receipt of Rs.15,000 by way of advance. Her letter written to the plaintiff on 19.10.1982 has been marked as Ex.A-2. In that letter, she has stated that due to compulsions and forced circumstances, she executed a sale deed in favour of the second defendant on 11.10.1982. She also stated as during the life time of her husband, he has borrowed some money from Futnani the latter had negotiated with her husband for sale of her properties. She has also stated that after the death of her husband, she has been pressurised by Futnani through his advocate S.A.Rajan to execute the sale deed in his favour. She has expressed her sorrow for not being able to fulfil the agreement in favour of the plaintiff and offered to return the advance of Rs.15,000. It is not the case of the defendants that the signatures of the first defendant found in Ex.A-1 and Ex.A-2 are not true. There is not much dispute in this case about the execution of Ex.A-1 by the first defendant. Defendants 2 and 3 pleaded ignorance of the same.

7. Ex.B-1 is a lease deed between the first defendant and her husband on the one hand as lessors and Futnani Poultry Farm, a registered partnership firm as lessee on the other. The document bears the date 27.11.1975. It is engrossed on Stamp papers worth Rs.80. in all besides four plain papers. The first page is on a stamp paper of Rs.50 purchased on 22.3.1973. The second page is on a stamp paper of Rs.30 purchased the same day but from a different stamp vendor. Both are in the name of Mr.Futnani. This shows that Mr.Futnani would usually have old stamp papers with him to be used for his transactions. There is nothing in evidence to show that there was any negotiation even in 1973 between the parties. The contents of the document read that A.Krishna Pillai (husband of the first defendant) and Dr.B.Sakunthala (first defendant) are executing the same as the lessors. But in pages 1 and 2 A.Krishna Pillai has signed twice. The first signature is as sole proprietor of Vanathi Talkies and the second signature is as individual. There is nothing in the document to connect the same with Vanathi Talkies. Curiously, pages 3 to 6, which are on plain paper, have been signed by A.Krishna Pillai only once in each paper and that is as an individual. The colour of the ink of the signatures of the lessors in pages 1

and 2 is light blue, whereas the colour of the ink of the signatures in pages 3 to 6 is black. There is nothing in the evidence to explain these discrepant features. The document was presented for registration on 21.1.1976. It bears an endorsement that registration was refused on 25.8.1976. It is seen from Exs.B-3 and B-4 that three documents were presented for registration on the same day i.e., 21.1.1976. Ex-B-1 is the third document bearing No.P3/76. There is no evidence to show as to what the other two documents are. Exs.B-3 and B-4 show that the defendants were called upon to produce the income-tax clearance certificate for the purpose of completing the registration of the documents and in default registration would be refused. Obviously, the certificates were not produced and ultimately registration was refused on 25.8.1976. This document Ex.B-1 is mainly relied on by defendants 2 and 3 to prove their prior possession of the suit property from 1975. The recitals in the document read that the lessors viz., the husband and wife, own and possess the properties set out in Schedules A and B thereto and they are leasing out the same to the lessees on a yearly rent of Rs.3,000. It is further stated that the lease amount shall be paid to Messrs.Murlimal Santram & Company to whom the lessors owed money. The period of the lease is stated to be five years. A clause in the lease deed is to the effect that so long as Messrs.Murlimal Santram & Company acknowledge having received the rent regularly from the lessees, the lessors shall not be entitled to determine the lease. Schedule A describes an agricultural land in Survey No.5 in the village of Egattur of an extent of 7.25 acres. Schedule B describes an agricultural land in Survey No.14/1 in the same village of an extent of 5.17 acres. The document does not contain any clause that possession was handed over to the lessees; nor does it authorise the lessees to take possession as such. The terms of the document are very peculiar, but they have not been explained by any of the witnesses. Two persons have attested the document and none of them has been examined.

8. Ex.B-2 is a letter dated 27.11.1975, the same date as that of Ex.B-1, written by the first defendant to Mr.Kishore Kumar Futnani, a partner of M/s.Futnani Poultry Farm. Strangely, it is on a stamp paper of the value of Rs.1.25. If it was intended to be an agreement, it should have been on a stamp paper of Rs.2.50. The stamp paper was

purchased on 5.4.1973 from a stamp vendor different from the two stamp vendors from whom the stamps for Ex.B-1 were purchased. The stamp paper stands in the name of Futnani. This also shows that Mr.Futnani was in the habit of keeping old stamp papers. According to the letter, the first defendant has directed the addressee to take care of her farm at Egattur as she was likely to be transferred to moffusil places and as there was nobody to take care of the firm. The relevant part of the letter reads:

“....I request you to enter possession of the farm as my lessee from to-day. As myself and my husband have borrowed amounts by way of loan on Hundis, you may possess the farm, until we repay the amount with interest.”

The schedule describes an agricultural land measuring about 7.35 acres comprised in Survey Numbers 14 and 14/1 in Egattur Village. The Schedule does not set out the boundaries and does not contain any other details. This letter is attested by four persons including the husband of the first defendant. The letter does not make any reference whatever to Ex.B-1. The description of the land in the letter is different from the description of the land in Schedule B to Ex.B-1. It cannot be presumed that the land in Schedule B to Ex.B-1 forms part of the land described in this document. There is no evidence to explain the discrepancy. While in Ex.B-1 the loan is said to have been taken from M/s.Murlimal Santram and Company, this document reads as if the loan was taken from the addressee. There is no explanation for this discrepancy also. Ex.B-5 is a letter by the first defendant and her husband written on 21.10.1975 to M/s.Murlimal Santram & Co., According to the letter, the first defendant and her husband have farm properties measuring about 14 acres in Egathur Village and a cinema theatre known as Vanathi Talkies. It is also stated that farm properties were already offered as security by deposit of title deeds in favour of Indian Bank, Thiruvannamiyur for a value of Rs.44,000. There is an undertaking to create and register first simple mortgages in favour of the addressees encumbering the farm property and Vanathi Theatre in security of the debts due. As per the letter, a sum of Rs.80,000 was due already and if any further amount was advanced by the addressee, the properties would be security therefor also. The addressee is authorised to collect and receive a sum of Rs.250 every day after the

registration of the mortgages from out of the collections made in the theatre and appropriate the same towards the debts due under the mortgages. The paragraph relating to possession is very significant and it reads thus:

"In respect of the farm lands, as the mortgages created are simple mortgages, today we deliver physical possession of these two estate lands together with buildings fixtures and standing crops in the presence of the concerned officer of the village, and having taken the possession, you have also put your servants and workers to be in-charge of the farm properties. Until the entire amount is paid up, you will be in possession of the farm properties and work-up on the farm improving of the same, and adjust the lease money at a specified rate to be mentioned in the lease deed, as against the debts payable by us."

The letter is attested by Mr.S.A.Rajan, Advocate, who has appeared for the appellants in this appeal and argued the matter. It is his junior Mr.S.Murali who was on record, appeared for the defendants in the trial Court. The contents of the letter run counter to the contents of Ex.B-1 as well as Ex.B-2. There is no evidence on record to explain the discrepancy.

9. Exs.B-6 and B-7 are letters from the Deputy Commercial Tax Officer to M.D.Futnani calling upon him to produce the copy of the lease agreement with the first defendant and her husband regarding the landed property at Egattur Village. The letters are dated 13.7.1981 and 31.8.1981. It is seen from Ex.B-7 that M.D.Futnani had prayed for a month's time to produce the copy of the lease agreement in his letter dated 21.7.1981. The two documents do not in any way help the case of defendants 2 and 3.

10. Ex.B-8 is said to be the agreement dated 15.3.1982 entered between the first defendant and her husband on the one side and the second defendant on the other. It is on a stamp paper purchased on 13.3.1982 in the name of Futnani. The first page is on the stamp paper and it contains only the signatures of the first defendant and her husband. The signature of the second defendant's partner is not found in the first page. The second page is on a plain paper. It contains the signatures of the two vendors and the partner of the second defendant. It is attested by two witnesses, none of whom has been examined to speak in support thereof. It is

the case of the plaintiff that this document has been ante-dated and brought into existence on a much later date. As per the recitals of the document, the first defendant is the only owner of the properties described therein and her husband, who has no right to the property, has agreed to join the same. The consideration is Rs.1,25,000 out of which a sum of Rs.25,000 was paid as advance on the date of the agreement. It is stated that the purchaser may pay off mortgage loans subsisting on the property, one in favour of Chengalpattu District Primary Land Development Bank, Chengalpattu, and the other in favour of Tamil Nadu Small Industries Development Corporation, Madras, either before or after purchase. The time for completion of the transaction is six months from the date of the agreement. The balance of consideration is to be paid on the date of sale deed. The schedule describes the property as agricultural land measuring 7.35 acres in Survey Numbers 14 and 14/1. As per the document, the purchaser is in physical possession of the property. That is contrary to the recitals in Exs.B-1, B-2 and B-5.

11. Ex.B-9 comprises of three cash vouchers. The first of them is dated 15.3.1982 purporting to be evidencing the payment of Rs.25,000 to the first defendant and her husband. Both of them have signed on a revenue stamp affixed at the bottom. It is the evidence of D.W.1 that the other two vouchers do not relate to the suit transaction. The second voucher purports to be in evidence of payment of a sum of Rs.1,000 made towards the account to the first defendant in cash on 25.5.1982. The number of the voucher is 249. It should be noted that the earlier voucher dated 15.3.1982 does not bear any number. The third voucher is again for payment of a sum of Rs.21,000 to the account to the first defendant on 21.7.1975. The evidence does not disclose the transactions under which the two payments were made to the first defendant.

12. Ex.B-10 is a letter written by S.A.Rajan, Advocate to Mohanlal Futnani, father of the third defendant, on 18.3.1982. According to the letter, the advocate verified the encumbrance certificate and it is clear that the sale in 1979 was made by auctioning the property at the instance of Land Development Bank. The advocate has opined that it might have been done without any knowledge of Mr.Pillai, obviously referring to the first

defendant's husband. According to the letter, the first defendant's husband wants to leave for Tirunelveli and if the addressee feels like, he can relieve him, so that the latter can work for the I.T. clearance. It is also stated that the advocate will send the corrected copy of the sale deed the next day. Though D.W.1 says that the letter relates to title to the suit property, it cannot be correct as it refers to an auction sale in 1979. D.W.1 has not chosen to explain the contents of the document. The document does not by itself disclose that it relates to the suit transaction.

13. Ex.B-11 is the sale deed under which the first defendant has sold the suit property to the second defendant. The stamp papers have been purchased on 8.6.1992 and 9.6.1992 in the name of the first defendant. There is no explanation at all as to why the stamps were purchased in her name as admittedly the stamp papers will be purchased only by the purchaser. It is also admitted in evidence that the sale deed was prepared by S.A.Rajan, counsel for the defendants. The date of the sale deed as entered in the document is 30th day of June, 1982. The figure 30' and the letters 'th' are written in ink while the remaining part is typed. It is in evidence of defendants 2 and 3 that the document was prepared and made ready even in June, 1982 for being executed by the first defendant and her husband and after his death, the portions referring to the first defendant's husband were removed by whitening those parts. The document was presented for registration on 11.10.1982. It is admitted that the document was executed only on that day. It is attested by two witnesses, none of whom has been examined. Nor the identifying witnesses have been examined. The reverse side of the first page of the document bears an endorsement that a sum of Rs.74,000 was paid in the presence of the Sub Registrar by the claimant to the executant. The third defendant has signed on that page on the footing that he paid the amount on behalf of the second defendant. As per the recitals of the document, the vendor had executed two mortgages, one in favour of Chengalpattu District Primary Land Development Bank for a sum of Rs.15,000 and another in favour of Tamil Nadu Small Industries Development Corporation, known as SIDCO, for a sum of Rs.1,00,000. According to the document, a sum of Rs.20,000 was due to the Chengalpattu District Primary Land Development Bank and a sum of Rs.31,000 was approximately due to

SIDCO, totalling to Rs.51,000. The recital relating to possession of the property reads thus:

"Whereas, shortly before the vendor left for Nagercoil to which station she left from Madras to begin with, she requested the Purchaser to be in occupation of the property as caretakers and that the purchasers are now holding possession of the property;"

This recital runs counter to the recitals in Exs.B-1, B-2, B-5 and B-8. As regards consideration, the total is shown to be Rs.1,25,000 out of which the purchasers are allowed to retain a sum of Rs.51,000 for discharging the two mortgages. The balance of Rs.74,000 is recited to be paid in the presence of the Registrar at the time of registration. The document does not make any reference whatever to Ex.B-8, the agreement dated 15.3.1982. There is no explanation therefor by the defendants.

14. D.W.1 has deposed that a sum of Rs.74,000 was paid in cash before the Sub Registrar. He also stated that with the balance of Rs.26,000 and some amount which the first defendant gave, the encumbrance of the Chengalpattu Co-operative Bank was discharged on 12.10.1982. In the cross-examination he has stated that a sum of Rs.25,000 was paid as advance under Ex.B-8 and another sum of Rs.18,000 was paid in between the dates of Exs.B-8 and B-11. According to him, the said amount was for purchase of stamp papers. It is his evidence that the first defendant's husband was in the hospital at the time of purchase of stamp papers and that was why the sale deed was not registered in June, 1982. He has also deposed that as on Ex.B-11 date there was no amount due to defendants 2 and 3 from the first defendant's husband and something was due on the date of registration from the first defendant and her husband and defendants 2 and 3 closed the same. According to him, it was about Rs.10,000 to Rs.15,000. He has stated that it did not occur to him that the advance of Rs.25,000 was not mentioned in the sale deed. In another place he has stated that the loan due to Chengalpattu Co-operative Bank was discharged from out of the amount of Rs.51,000 retained by him under the sale deed. In the end he has stated that so far he had paid only Rs.1,05,000 and a sum of Rs.20,000 is still with him.

15. D.W.2, who is said to have paid the sum of Rs.74,000 to the first defendant in the presence of the Sub Registrar has stated that he does not know the price of the suit property and he did not pay

any amount towards consideration before the payment of Rs.74,000. He has also not paid any amount subsequent thereto. He denies having received a sum of Rs.74,000 from the first defendant immediately after registration. He does not know whether the second defendant firm had paid any amount to the first defendant before the payment of Rs.74,000. Ultimately, he has confessed that he has slight idea about Ex.B-11 transaction and the endorsement in Ex.B-11 is his individual capacity and not as a partner of the second defendant firm.

16. D.W.1 was examined in April, 1983. D.W.2 was examined on 2.7.1983. Neither of them referred to the books of accounts of the second defendant firm. D.W.3, who was examined on 2.7.1983, produced the books of accounts of the second defendant firm, which are marked as Exs.B-20 to B-22. D.W.3 is the accountant of the firm; but the accounts have been written by one P.Singh, who has not been examined. Ex.B-20 is the daily cash book for the period February, 1982 to June 1983. The last entry is made on 2.6.1983. Exs.B-21 and B-22 are ledgers. According to D.W.3 their accounting year is from 1st July to 30th June. But, Ex.B-20 is from February, 1982 to 2nd June, 1983. It is stated that number of pages were available and defendants 2 and 3 did not want to waste the same. But, in Ex.B-20, pages 37 to 44 are left blank. There is no explanation as to why so many pages are left blank. Again, pages 128 to 199 are blank. There is no explanation therefor also. There is no explanation as to why there is no entry after 2.6.1983. Admittedly, the account books have not been submitted to Income Tax Authorities.

17. D.W.3 admits that he is not qualified to be an accountant and that he is a science Graduate. But he claims that he has three years' experience in maintaining accounts. In the daily cash book Ex.B-20, there is a lot of space in between each entry and further space between entry for one date and the next date. It should be noted that all the totals in the entire book are entered in pencil. At page 11 there is an entry on 15.3.1982 that a sum of Rs.25,000 is paid by way of advance to the first defendant for purchase of farm land. The total consideration is mentioned as Rs.1,25,000. The voucher number is 357/A. At page 30 there is an entry dated 3.6.1982 for payment of Rs.17,000 to the first defendant for purchase of stamp papers, typing charges, legal expenses etc., for preparing the sale deed of

Egattur lands. The voucher number is mentioned as 279/A. There is no explanation as to how the voucher number on a later date viz., 3.6.1982 could be earlier to the number of the voucher of an earlier date viz., 15.3.1982. The fact that the vouchers with respect to the first defendant alone are not given the serial numbers but are given numbers as 357/A, 279/A etc., is significant. There is an entry at page 33 dated 16.6.1982 for payment of Rs.1,000 to the first defendant and her husband for conveyance to and from Srivaikuntam. At page 70 there is an entry dated 7.10.1982 for withdrawal of Rs.74,000 from Chartered Bank for payment to be made to the first defendant before the Registrar. At page 71, the entry for payment of Rs.74,000 to the first defendant is made on 11.10.1982 under voucher No.153/A. At page 72, there is an entry dated 12.10.1982 for receipt of Rs.26,000 from the first defendant towards payment to be made to T.I.L.C. and the Chingleput Co-operative Bank. On the same day there is an entry for payment of Rs.31,350 in the account of the first defendant to the Indian Bank for taking a draft in favour of the Chingleput Co-operative Bank on her behalf for discharging mortgage. The voucher number is mentioned as 155. There is no other entry relating to the first defendant thereafter.

18. Ex.B-21 is a ledger book. The account of the first defendant is written at page 134. In that page it is entered that a sum of Rs.25,000 was paid on 15th March, a sum of Rs.17,000 on 3rd June and a sum of Rs.1,000 on 16th June, 1982. The total of Rs.43,000 is carried forward to the next ledger Ex.B-22. At page 112, the entries for payment of Rs.74,000 on 11.10.1982 and Rs.31,350 on 12.10.1982 are made. There is also an entry for receipt of Rs.26,000 from the first defendant on 12.10.1982. As per the entries on that page, a total sum of Rs.1,22,350 had been paid to the first defendant. That sum includes the sum of Rs.17,000 alleged to have been paid towards stamp charges and Rs.1,000 for conveyance. It is not the case of defendants 2 and 3 that the first defendant agreed to pay the stamp charges for the documents. According to the evidence of D.W.1, the first defendant's husband was in hospital in June, 1982. Hence, it is highly improbable that the first defendant would have accepted the responsibility of purchasing the stamp papers and preparing the sale deed. When it is admitted that the sale deed was prepared by Mr.S.A.Rajan, Advocate for

defendants 2 and 3, there was no necessity for paying the amount to the first defendant for purchasing stamp papers. A look at the books of account produced by defendants 2 and 3 shows that they must have been prepared at the time of the suit. We have already referred to the odd numbers found in the vouchers. D.W.3 has with reference to voucher No.279/A bearing the date 3.6.1982 deposed thus:

“பி.சா.ஆ.20-ல் பக்கம் 20-ல் வவுச்சர் நம்பர் 279க்குப் பிறகு 280 வரணும். 280 நம்பர் வவுச்சர் தயார் செய்தோம். ஆனால் 279-ஏ வவுச்சர் தயாரித்து எழுதினோம். நெ.280 வவுச்சரை 9.10.82ல் தயாரித்து எழுதினோம். அன்று 279-ஏ வவுச்சர் இருக்கவில்லை. அதாவது 9.10.82க்குப் பிறகு 279-ஏ வவுச்சரை தயாரித்தோம்.”

This admission clearly shows not only that the documents were prepared long after the dates they bear, but also that the entries in the account books were manipulated. There is no explanation as to why a transaction said to have taken place in June, 1982 should be entered in a voucher prepared in October, 1982.

19. Ex.B-12 is a letter dated 11.7.1982 written by the first defendant that her husband passed away on 7.7.1982. It is not known from the letter as to whom it is addressed. The date below the signature of the first defendant has been altered from 17.7.1982 to 11.7.1982. At the top of the letter, the name of the place and the date have been written in a different ink. According to D.W.1 the letter was addressed to him. But, there is nothing to support that version. A slip is stapled to the letter. The slip purports to be a copy of a message sent by phonogram expressing shock by Futnani over the death of the first defendant's husband. Ex.B-13 is the obsequies card pertaining to the first defendant's husband addressed to Mr.Mohanlal Futnani. Neither of the documents is in any way helpful to the present case. Ex.B-14 is an office copy of telegram issued by R.Murali, Advocate, who is admittedly a junior of Mr.S.A.Rajan. It is sent on behalf of defendants 2 and 3 to the first defendant calling upon her to register the sale. Ex.B-15 is a notice issued by the same advocate on the same day i.e., 11.9.1982. In that notice it is stated that a sum of Rs.25,000 was paid by way of advance and a further sale advance of Rs.18,000 was made to the first defendant. That averment in the notice is not supported by the entries in the accounts which

read that a sum of Rs.17,000 was paid for the purchase of stamp papers and a sum of Rs.1,000 was paid for travelling expenses. But neither the sum of Rs.25,000 nor the sum of Rs.18,000 paid as advance as alleged in the notice has been referred to in the sale deed Ex.B-11. It is also stated in the notice that by the time when the first defendant received further advance, defendants 2 and 3 were ready and the sale deed in original was prepared on stamp paper. That averment also runs counter to the case now put forward by defendants 2 and 3. Ex.B-17 is a telegram issued by the first defendant to Mohanlal Futnani on 2.10.1982 that she would be starting on 5th evening. Ex.B-18 is a receipt issued by the Chingleput Co-operative Primary Land Development Bank for a sum of Rs.31,320 by way of crossed draft from the first defendant. There is no reference therein to defendants 2 and 3. Ex.B-19 is a letter written by the first defendant's husband on 1.5.1982 from Dr.M.Mathias Hospital Nursing Home, Srivaikuntam. It is addressed to Madhusuthan Futnani, Director of Muralimal Santhram & Company. The addressee has not been examined in this case. As per the letter, the first defendant's husband fell down while entering the train and broke his left knee and he was undergoing treatment. According to the letter, he may not be able to walk in future and the only possibility of going to Madras was to travel in an ambulance for two days. The relevant part of it on which reliance is placed is.

“If you are in a hurry to finish the deal, we will all come in an ambulance on receipt of your telegram.”

That sentence does not in any way help defendants 2 and 3 to prove that what is referred to therein is the suit transaction. In the absence of any evidence by the addressee of the letter, it is not possible to accept the version of D.W.1 that the letter related to the suit transaction.

20. Ex.B-23, is a statement of account issued by the Chartered Bank. The account is that of the second defendant. As per the statement, a sum of Rs.74,000 was withdrawn on the 7th of October, 1982. Besides that, a sum of Rs.15,498.60 was also withdrawn. But, on the same day a sum of Rs.89,500 has been deposited in bank. D.W.3 has spoken to the entry. But he has not explained as to how the amount was deposited on the same day. As per the entries in the account book, the sum of Rs.74,000 was withdrawn for payment to the first defendant.

But, as seen from Ex.B-23, the amount was deposited in the bank itself. Ex.B-24, is the counter-foil of a challan for deposit of Rs.31,351 with the Indian Bank for issue of a draft on Chingleput branch in favour of the Special Officer, Chingleput Co-operative Primary Land Development Bank. Ex.B-25 is a certificate issued by the Indian Bank, Madras, that a demand draft was issued for Rs.31,320 in favour of the Chingleput Co-operative Primary Land Development Bank on 12.10.1982. But, as seen already, the entry in the account book of the defendants reads as if Rs.31,350 was paid to the Chingleput Land Development Bank.

21. There is a clinching circumstance to show that the books of account and the vouchers have been prepared by the defendants for the purpose of this case. We have already referred to one of the vouchers found in Ex.B-9. As per the Voucher, a sum of Rs.1,000 was paid on 25.5.1982 to the first defendant towards account. The voucher bears the number 249. But, there is no entry in Ex.B-20 on 25.5.1982 evidencing payment of Rs.1,000 to the first defendant. Even if the voucher relates to some other transactions, it should find a place in the Daily Cash Book. The numbers of the vouchers issued on 25.5.1982 are 270 and 271 as per Ex.B-20. The number of voucher issued on 22.5.1982 was 269. Voucher No.249 is entered in an entry dated 10.9.1982. As per the entry, it is for payment of Rs.76.25 made for vehicle's maintenance-purchase of diesel for van. There is no entry whatever in the ledger pages for the first defendant in Exs.B-21 and B-22 for payment of Rs.1,000 to the first defendant on 25.5.1982. Hence, we have no hesitation to reject the entries in the books of account and the vouchers relied on by defendants 2 and 3 in support of their case.

22. On the basis of the evidence analysed above, we proceed to consider the questions which arise in this case. The first question is whether Ex.A-1 executed in favour of the plaintiff by the first defendant is genuine. We have already referred to the evidence adduced by P.W.1 and the written statement of the first defendant. In the absence of any contrary evidence, we accept the case of the plaintiff and hold that Ex.A-1 is genuine and the recitals therein are true.

23. The next question is whether the plaintiff is in possession of the property. The evidence of P.W.1 is supported by the report of the Commissioner marked as Ex.C-1. It is argued that Ex.C-1 is

invalid as the Commissioner had not given notice to the defendants before inspection. Reliance is placed on the judgment of the Andhra Pradesh High Court in *Narayana Dosjee v. Board of Trustees*, A.I.R. 1959 A.P. 64: (1958)1 An.W.R. 427: 1958 An.L.T. 19, in support of the arguments. But the contention is based on a fallacy. The report of the Commissioner clearly says that he went to the premises of the second defendant in Sembudoss Street, George Town, Madras at 10.30 A.M. and Madhu Soodhan Futnani who was sitting in the office room refused to receive the notice given by him. According to the commissioner's report, it was represented that Mr.Kamalesh Futnani had left for Bombay and notice should be served only on him. It is admitted that Madhu Soodhan Futnani is a partner of the second defendant firm. He ought to have accepted the notice on behalf of the firm. When he has been chosen to refuse the notice, it is not open to the defendants to contend that no notice was served by the Commissioner before inspection. It is stated that objections have been filed to the report of the Commissioner and the contents of the report have been denied. That is not sufficient to establish the case of defendants 2 and 3. If defendants 2 and 3 wanted to deny the contents of the Commissioner's report, they should have examined Madhu Soodhan Futnani. There is no explanation for his non-examination. Hence, we accept the report of the Commissioner and hold that the plaintiff is in possession. D.W.1 has also admitted in the cross-examination that he has not carried out agricultural operation in the leased property. Hence, there is nothing to prove the possession of the suit property being with defendants 2 and 3. We have already referred to the material discrepancies in the documentary evidence with regard to possession. Hence, we hold that the plaintiff entered into possession pursuant to the agreement in his favour.

24. The next question is whether Ex.B-8 is anterior to Ex.A-1. No doubt Ex.B-8 bears the date 15.3.1982. But the evidence discloses that the document is ante-dated. There is no reference whatever to Ex.B-8 in any of the subsequent documents including the sale deed Ex.B-11. There is no explanation for the same. Taking also into account the fact that the vouchers and accounts have been fabricated by defendants 2 and 3, we hold that Ex.B-8 is ante-dated, but it came into existence only after Ex.A-1.

25. Even assuming that Ex.B-8 was prior to Ex.B-1 in date, that will not help defendants 2 and 3 to claim any precedence over the plaintiff. The time mentioned in Ex.B-8 expired on 14.9.1982. Defendants 2 and 3 never sought to enforce the said agreement Ex.B-8. Even the sale deed is not in pursuance of the said agreement. In these circumstances, no reliance can be placed by defendants 2 and 3 on Ex.B-8, even if true.

26. The next question is whether defendants 2 and 3 are transferees in good faith for value. On a perusal of the evidence, we have very grave doubts whether any consideration was paid for Ex.B-11 by defendants 2 and 3. We have referred to the circumstances that a sum of Rs.74,000 said to have been withdrawn from bank on 7.10.1982 was redeposited with the same bank on the very same day. It is not necessary for us to repeat what we had stated earlier while analysing the evidence. Suffice it to point out that different versions have been put forward at different stages and there is no explanation at all for the material discrepancies. The way in which defendants 2 and 3 have acted shows that there is no good faith whatever in them and they are not transferees in good faith for value.

27. In any event, it is admitted that the entire consideration has not been paid to the first defendant. Hence, defendants 2 and 3 are not entitled to claim the benefit of Sec.19(b) of Specific Relief Act. Dealing with the corresponding Section in the old Specific Relief Act viz., Sec.27(b), this Court has held in *Sinna Ponnu v. Singaru Udayar*, (1969)2 M.L.J. 358, that the transferee must have paid the entire consideration in order to claim the protection under Sec.27(b) of the Specific Relief Act and if for any portion of the price a security alone had been executed, the transferee cannot claim to be a transferee "who has paid his money". It was held that the words "who had paid his money" in the section are not equivalent to the words "who has agreed to pay his money either in whole or in part". That judgment applies on all fours to this case.

28. Learned counsel for the appellants places reliance on the following passage in the judgment in *Durga Prasad v. Lilawati*, A.I.R. 1972 All. 396: 1972 All.L.J. 945: 1973 Ben.C.R. 117.

"12. It was argued by the learned counsel for the respondent that the burden was on the appellants, who are the vendees, to prove that they were purchasers in good faith for value

and without notice. It is true that the initial burden is always on the vendee to show that he had no knowledge of the agreement. But the vendee has only to discharge this burden by leading a negative evidence. The negative evidence can only consist of his own statement denying the fact that he had no knowledge of the same. As soon as the vendee denies knowledge of the notice, the burden is discharged and then the burden shifts on the vendor to prove that the vendee had the notice of the earlier agreement. In my opinion this is a well settled principle of law and I do not think that any authority is needed in support of this proposition. However, *Ramchander Singh v. Bibi Asghari Begum*, A.I.R. 1957 Pat. 224 and *Kirta-rath Rai v. Sripat Rai*, A.I.R. 1928 All. 307 can be cited as authorities for this proposition."

29. In view of the findings of fact arrived at by us, the above ruling has no application to this case.

30. Before parting with the judgment, we wish to place on record our disapproval of the conduct of Sri S.A.Rajan, Advocate for the appellants. We have already referred to the written statement of the first defendant that she was persuaded by him to accept the terms and conditions of defendants 2 and 3 or else she would be put to trouble. She has also stated that the sale deed was prepared by him. We have noted that he has attested Ex.B-5. The evidence shows that he has taken a major part in bringing about these documents. He ought to have entered the witness box to speak to various aspects of the case. Instead of doing so, he appeared as counsel for defendants 2 and 3 in these proceedings. In our opinion, he ought not to have done so.

31. We do not find any reason to differ from the view taken by the trial court and we dismiss the appeal with costs of the respondent.

B.S

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT
MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No. 352 of 1988 15th September, 1993

Selvaraj alias Raju ... *Petitioner*
v.
Govindarajulu Padayachi and another ..*Respondents*

Limitation Act (XXXVI of 1963), Art.137 - Usufructuary Mortgage - Suit for redemption - Preliminary decree passed on 18.9.1978 - One month time granted for payment of the amount - Amount not deposited within one month - Application for passing final decree filed on 8.4.1986 - Petition for final decree - Whether barred by limitation - Civil Procedure Code, O.34, Rule 7(2).

Held: The outer limit beyond which payment under Rule 8, Sub-rule (i) cannot be made, is the passing of a final decree debarring the plaintiff from all right to redeem the mortgaged property or the confirmation of a sale held under Rule 8(3) of O.34 of the Code. In this case before me, the two contingencies, viz., passing of final decree debarring the plaintiff from all right to redeem the mortgaged property or the confirmation of a sale held under Rule 8(3) of O.34 of the Code could hold good, and hence on that ground the order of the Court below is liable to be set aside.

[Paras. 4 and 6]

Cases referred to:

Angammal v. V.K.M.Muhammad Sulaiman Lebbai,
(1945) 2 M.L.J. 239; A.I.R. 1946 Mad. 38; 58 L.W.
492; 1945 M.W.N. 578; 224 I.C. 543. [Paras. 4, 6]
Azim v. Sultan, I.L.R. 1945 Pat. 575. [Para. 5]
Sivan Pillai v. Anbayan, 89 L.W. 449. [Para. 5]
V.Raghavachari, for Petitioner.
V.Vivekanandan, for Respondents.

The Court made the following

ORDER: This civil revision petition is directed against the Order in I.A.No.816 of 1986 in O.S.No.319 of 1974 on the file of Subordinate Judge, Cuddalore.

2. Short facts are: The second respondent has unfructuarly mortgaged the suit property to the first respondent. Later, she sold the suit property to the revision petitioner subject to the usufructuary mortgage. The revision petitioner filed the suit

for redemption. Preliminary decree was passed on 18.9.1978 giving one month time for payment of the amount. One month time would come to end by 18.10.1978. The revision petitioner did not deposit the amount within the one month time. He filed I.A.No.816 of 1986 for passing final decree on 8.4.1986 and during the pendency of the same, he deposited the amount fixed under the preliminary decree in court on 19.9.1986. The petition filed by the revision petitioner was resisted by the first respondent on many grounds *inter alia* contending that the petition is barred by time. After enquiry, learned subordinate Judge had held that the petition is barred by time inasmuch as it was not filed within three years from the date of expiry of one month time, namely from 18.10.1978 and that Art.137 of the new Limitation Act is applicable to this case and taking that view of the matter has dismissed that petition. Aggrieved by this Order of dismissal, the petitioner in the court below has come forward with this civil revision petition.

3. Mr. V. Raghavachari, learned counsel appearing for the revision petitioner would submit that this is a usufructuary mortgage and that after passing of the preliminary decree and even after passing of the time fixed under the preliminary decree, still the plaintiff has got right to deposit the amount fixed under the preliminary decree till this claim was foreclosed and in this case this contingency had not occurred, and so, the petition cannot be dismissed on the ground of limitation. Per contra, Mr. V. Vivekanandan, learned counsel appearing for the respondents would submit that the revision petitioner had not prayed for extension of time under the provisions of O.34, Rule 7(2), Civil Procedure Code and while so, the period of three years fixed under Art.137 of the Limitation Act would come into play. The order of the court below rejecting the petition as time barred is correct.

4. I have carefully considered the submissions made by rival counsels, Mr. Raghavachari relied upon *Angammal v. V.K.M. Muhammad Sulaiman Lebbai*, (1945) 2 M.L.J. 239; A.I.R. 1946 Mad. 38: 58 L.W. 492; 1945 M.W.N. 578: 224 I.C. 543. The facts in that case are:

“A preliminary decree for redemption of a usufructuary mortgage was passed on the 15.10.1935, and the time fixed for payment was 15.1.1936. The plaintiff did not deposit the

amount on or before that date and did not ask for extension of the time under O.34, Rule 7(2). She deposited the amount towards the end of 1942 and filed I.A.No.93 of 1943 on the 2.2.1943, under O.34, Rule 8 of the Code of Civil Procedure asking the court to pass a final decree with a direction to the defendant to deliver the mortgaged property to her. The trial court dismissed the petition and on appeal the Subordinate Judge confirmed the decree of the trial court and so second appeal was filed."

This Court had held that the petitioner was entitled to remedy asked for by her in the petition. The outer limit beyond which payment under Rule 8, Sub-rule (i) cannot be made is the passing of a final decree debarring the plaintiff from all right to redeem the mortgaged property or the confirmation of a sale held under Rule 8(3) of O.34 of the Code. In this case before me, the two contingencies, viz., passing of final decree debarring the plaintiff from all right to redeem the mortgaged property or the confirmation of a sale held under Rule 8(3) of O.34 of the Code have not occurred. Those two contingencies were the outer limit as per the ruling of this Court in the said decision in *Angammal v. V.K.M.Muhammad Sulaiman Lebbai*, (1945) 2 M.L.J. 239: A.I.R. 1946 Mad. 38: 58 L.W. 492: 1945 M.W.N. 578: 224 I.C. 543.

5. Mr. Raghavachari would further rely upon *Azim v. Sultan*, I.L.R. 1945 Pat. 575, in which it was held that a preliminary decree in a suit for redemption of a usufructuary mortgage may, under Clause (c)(i) of Rule 7(1) of O.34, Code of Civil Procedure, 1908, fix a time for payment of the amount declared due under the decree. But default in making the payment of the amount declared under the decree within the time fixed does not operate to debar the plaintiff- mortgagor from all right to redeem the mortgaged property. He would further rely upon *Sivan Pillai v. Anbayan*, 89 L.W. 449. That was a case where no time limit was fixed in the preliminary decree for redemption.

6. I am in respectful agreement with the view expressed by this Court in *Angammal v. V.K.M.Muhammad Sulaiman Lebbai*, (1945) 2 M.L.J. 239: A.I.R. 1946 Mad. 38: 58 L.W. 492: 1945 M.W.N. 578: 224 I.C. 543. The facts of the case are almost similar. When that is applied, the order of the court below rejecting the petition as barred by

time because the petition for final decree was not filed within three years from the date of expiry of the time fixed under the preliminary decree, cannot hold good, and hence on that ground the order of the court below is liable to be set aside.

7. In view of the above, the civil revision petition is allowed setting aside the order of the court below in I.A.No.816 of 1986 and consequently, the I.A.No.816 of 1986 in O.S.No.319 of 1974 shall stand allowed. No costs.

R.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.No.749 of 1993

8th July, 1993.

D.Jeyaschelvi

... Appellant

v.

The Government of Tamil Nadu rep. by its Secretary, Education Department, Madras and others

... Respondents.

Tamil Nadu Recognised Private Schools (Regulation) Rules (1974), Rule 15(4) - Promotions to be made on grounds of merit and ability - Selection Committee selecting one person - Committee if to record reasons for selection.

It may be pointed out that sub-rule (4) of Rule 15 of the Tamil Nadu Recognised Private Schools (Regulation) Rules (1974) specifically states that promotions shall be made on grounds of merit and ability, seniority being considered only when merit and ability are approximately equal. Therefore, in order to satisfy or to act in accordance with sub-rule (4) of Rule 15 of the Rules, the committee must disclose that the selected candidate is more meritorious and is also superior in his ability than the one who is not selected. If the contention of the learned counsel for the appellant that the Selection Committee is not required to give any reasons for the decision is to be accepted, then, the court will be giving unbridled power to the

Selection Committee which can arbitrarily say of the two candidates appearing before it one is more meritorious and another is less meritorious without any basis whatsoever. Such arbitrary exercise of power cannot be permitted or upheld as Art.14 of Constitution strikes at such exercise of power. Therefore, it is necessary for the Selection Committee to record the grounds of merit and ability on the basis of which it has made the selection. This interpretation also accords with the very scheme of the Act and the Rules. It may be pointed out here that every decision of the Selection Committee is made appealable to the Appellate Authority of the Selection Committee is not required to state the grounds on which the selection is made, it is not possible to hold on what basis, the Appellate Authority should consider the validity of the order passed by the Selection Committee unless it be that Selection Committee gives the grounds for coming to the conclusion that the selected candidate is more meritorious and is superior in his ability than the one who is not selected. [Para. 4]

Cases referred to:

National Institute of Mental Health & Neuro Sciences v. Dr. K.Kalyanaraman, A.I.R. 1992 S.C. 1806; 1992 Lab.I.C. 1800: (1992)2 S.C.C. 481. [Paras. 3, 4]

R.S.Dass v. Union of India, 1986 Supp. S.C.C 617: A.I.R. 1987 S.C. 593. [Para. 4]

Union of India v. Mohan Lal Capoor, A.I.R. 1974 S.C. 87: (1974)1 S.C.R. 797. [Para. 4]

Appeal under Clause 15 of the Letters Patent against the order of the Janarthanam, J. dated 18.5.1993 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.16097 of 1991 presented under Art.226 of the Constitution of India to issue a writ of *certiorarified mandamus*, calling for the records relating to the order of the 3rd Respondent passed in his Proceedings Mu.Hu.No.78314/W8/91, dated 31.10.1991 and quash the same and direct the Respondents 1 to 4 herein to approve the promotion of the petitioner as Headmistress from 13.5.1991 and pay salary as Headmistress of Higher Secondary School from 13.5.1991.

A.L.Somayaji for P.Selvaraj and M.Baskar, for Appellant.

The Judgment of the Court was delivered by K.A.Swami, C.J.: This appeal is preferred against the order dated 18.5.1993 passed by a learned

single Judge in W.P.No.16097 of 1991. Learned single Judge has quashed the order of the Appellate Authority and the decision of the Selection Committee and remitted the matter for fresh consideration.

2. The facts of the case are as follows:- The appellant and the 6th respondent were considered for filling up of a post of Headmistress in the 5th respondent School. The Selection Committee selected the appellant. Consequently, the 6th respondent challenged the order of the Selection Committee before the Appellate Authority under the provisions of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 (hereinafter referred to as 'the Act'). The Appellate Authority set aside the decision of the Selection Committee and directed that the 6th respondent herein should be appointed as Headmistress of the 5th respondent School. Aggrieved by the order of the Appellate Authority, the appellant herein approached this Court under Art.226 of the Constitution. Learned single Judge has not only found fault with the decision of the Selection Committee, but has also held that the Appellate Authority is not justified in directing the School Committee to select the 6th respondent herein. Accordingly, learned single Judge has set aside the order of the Appellate Authority and also the decision of the Selection Committee and has remitted the matter to the Selection Committee for fresh consideration.

3. It is contended before us that learned single Judge is not justified in remitting the matter to the Selection Committee on the ground that the decision of the Selection Committee is devoid of reasons, therefore it is not valid in law. Reliance is placed on sub-rule (4) of Rule 15 of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974 (hereinafter referred to as the Rules) and also a decision of the Supreme Court in *National Institute of Mental Health & Neuro Science v. Dr. K.Kalyanaraman*, A.I.R. 1992 S.C. 1806: 1992 Lab.I.C. 1800: (1992)2 S.C.C. 481. It is submitted that as the Selection Committee while making selection neither acts as a judicial authority nor a quasi judicial authority, it is not required to give any reasons for its decision. It is further submitted that as per sub-rule (4) of Rule 15 of the Rules, promotion has to be made on grounds of merit and ability, seniority being considered only when merit and ability are approximately equal.

The Selection Committee has in its order stated that the appellant is superior both on merit and ability to that of the 6th respondent and therefore, the requirement of the Rule is satisfied. Hence, the learned single Judge ought not have interfered with the decision of the Selection Committee.

4. We have taken through the decision of the Selection Committee, which is produced at page 3 of the typed set of records of the writ appeal. Though the decision is in Tamil, my learned brother on going through the same points out that the decision contains nothing but the wordings contained in sub-rule (4) of Rule 15 of the Rules. We must point out that though the Selection Committee is not required to pass the order based on cogent reasons as is done in the court of law, nevertheless the records of the Selection Committee must show on what basis, it has come to the conclusion that between the two candidates, the one selected is superior both on merit and ability. Even the decision of the Supreme Court in *National Institute of Mental Health & Neuro Sciences v. Dr. K. Kalyanaraman*, A.I.R. 1992 S.C. 1806; 1992 Lab.I.C. 1800; (1992)2 S.C.C. 461 is relied upon by the learned counsel for the appellant does not state that the records of the Selection Committee need not contain even the basis on which the selection is made. What is stated in that decision is that the function of the Selection Committee is neither judicial nor adjudicatory, that it is purely administrative. It is also further observed that there is no rule or regulation brought to the notice of the Court requiring the Selection Committee to record reasons and that in the absence of any such legal requirement, the selection made without recording reasons cannot be found fault with. It is also further observed therein thus:-

“Administrative authority is under no legal obligation to record reasons in support of its decision. Indeed, even the principle of natural justice do not require an administrative authority or a Selection Committee or an examiner to record reasons for the selection or non-selection of a person in the absence of statutory requirement. This principle has been stated by this Court in *R.S. Dass v. Union of India*, 1986 Supp. S.C.C 617; A.I.R. 1987 S.C. 593 at pp.603, 604 in which *Union of India v. Mohan Lal Capoor*, A.I.R. 1974 S.C. 87; (1974)1 S.C.R. 797 was also distinguished.”

In this regard, it may be pointed out that Sub-rule

(4) of Rule 15 of the Tamil Nadu Recognised Private Schools (Regulation) Rules (1974) specifically states that promotions shall be made on grounds of merit and ability, seniority being considered only when merit and ability are approximately equal. Therefore, in order to satisfy or to act in accordance with sub-rule (4) of Rule 15 of the Rules, the committee must place on its records or the proceedings of the committee must disclose that the selected candidate is more meritorious and is also superior in his ability than the one who is not selected. If we have to accept the contention of the learned counsel for the appellant, then, we will be giving an unbridled power to the Selection Committee, which can arbitrarily say, of the two candidates appearing before it, one is more meritorious and another is less meritorious without any basis whatsoever. Such arbitrary exercise of power cannot be permitted or upheld as Art. 14 of Constitution strikes at such arbitrary exercise of power. Therefore, it is necessary for the Selection Committee to record the grounds of merit and ability on the basis of which it has made the selection. This interpretation of ours also accords with the very scheme of the Act and the Rules. It may be pointed out here that every decision of the Selection Committee is made appealable to the Appellate Authority. If the Selection Committee is not required to state the grounds on which the selection is made, it is not possible to hold on what basis, the Appellate Authority should consider the validity of the order passed by the Selection Committee, unless it be that Selection Committee gives the grounds for coming to the conclusion that the selected candidate is more meritorious and is superior in his ability than the one who is not selected. We have already re-produced the relevant portion of the Supreme Court's decision relied upon by the learned counsel for the appellant in *National Institute of Mental Health & Neuro Sciences v. Dr. K. Kalyanaraman*, A.I.R. 1992 S.C. 1806; 1992 Lab.I.C. 1800; (1992)2 S.C.C. 461. That decision proceeds on the basis that if there are no Rules, it is not necessary for the Selection Committee to pass a considered order and when the Rule provides that it must make the selection on the ground of merit and ability, the Selection Committee is required to state what are those grounds on which a candidate is selected in preference to the one who is not selected. It is also relevant to notice that the Supreme Court in the

aforesaid case was dealing with the case in which the decision of a Selection Committee was not made appealable. Therefore, we are of the view that the ultimate decision arrived at by the learned single Judge is just and proper and as such, it does not call for interference. Consequently, it follows that this writ appeal must fail. It is accordingly dismissed.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and S.M.Ali Mohamed, JJ.*

O.S.A.No.129 of 1984 8th July, 1993.

M/s.Carborandum Universal Ltd., Madras and another ...*Appellants*

The Trustees of Port of Madras ...*Respondent.*

(A) *Madras Port Trust Act (II of 1905), Secs.39 and 40 and bye-law 37 - Bye law whether violates the provisions of Act - Whether grants immunity to Port Trust from answering its responsibilities as bailee.*

On taking charge of and on receipt given for the goods taken charge under Sec.39(3) of the Madras Port Trusts Act, 1905, the Board (The Port Trust alone has the liability for any loss or damage which may occur to the goods. Its liability is that of a bailee under Secs.151, 152, omitting the words "in the absence of any special contracts" and 161 of the Indian Contract Act and the statute required that the board should be served with a notice of loss or damage within one month of the date of receipt given for the goods under Sub-sec.(3) of Sec.39. There can be little doubt to the proportion that nothing specifically granted, created or withdrawn by the act can be denied, destroyed or introduced by a subordinate legislation such as a bye-law which a statutory authority make to achieve the purposes of the act. In that sense, bye-law 31 may be found violating the express provisions

under Secs.39 and 40 of the act and accordingly in excess of the bye-law making power of the board. The court is inclined to hold that bye-law 31 is not a provision granting to the Port Trust immunity from answering its responsibilities as a bailee of the goods under Sub-sec.(3) of Sec.39 of the act or exempt it from its liability as a bailee. It is only an enabling provision and the bailor, owner as any other person entitled to the goods may take advantage of it, give to the Traffic Manager in writing to that the Traffic Manager may ascertain the loss or damage of deficiency and then give to the Port Trust its own information as to that truth or otherwise of the allegations of loss or damage or deficiency and such other matters. [Para. 11] (B) *Interpretation of Statutes - Legislation with some unreasonable parts which appear to render it ultra vires - Duty of court to protect such legislation.* The rules of interpretation of statute require the courts to protect as far as possible any legislation and allow, it to operate without infringing what is available under the provisions of the statute under which they are made and without such unreasonable parts thereof which appear to render it *ultra vires*. [Para. 11]

Cases referred to:

Trustees, Port of Madras v. Amimchand Pyarelal, A.I.R. 1975 S.C. 1935. [Para. 8]
Kruse v. Johnson, (1898) 2 Q.B. 91. [Para. 9]
Slattery v. Maylor, (1888) 13 A.C. 452. [Para. 9]
Trustees, Port of Bombay v. Premier Automobiles, A.I.R. 1971 Bom. 317: 73 Bom.L.R. 1. [Para. 10]
 Appeal under Clause 15 of the Letters Patent against the Order of Balasubramanyan, J. dated 18.2.1977 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S.No.109 of 1973 etc.

The Judgment of the Court was delivered by *Mishra, J.*: Second and third plaintiffs in C.S.No.109 of 1973 have preferred this appeal invoking Clause 15 of the Letters Patent of this Court, against a judgment by a learned single Judge of this Court, under which he has held that the plaintiffs have failed to prove their case. The first plaintiff in the suit Eriton Insurance Company Limited however, has not joined as a party in the appeal. The second plaintiff, it is not in dispute, placed an order with M/s.Carborandum Company, Niagara Falls, New York, for purchasing fused silicon carbide synthetic abrasive grains, silicon carbide and mullite grains and pursuant to the said order, 104 pellets,

containing 2078 bags of the said commodity were entrusted by the American company to the first defendant respondent, that is, American Export Inbrandtsen Lines INC for shipment from Newyork to Madras. The ship "S.S.Flying Cloud" belonging to the shipper-company, it is not in dispute, arrived at Madras port on 5.8.1971. The goods were discharged from the ship on 5.8.1971 and 6.8.1971. The condition of the goods and the bags in which the goods were discharged were duly recorded in the import manifest and the tally-sheets, the latter exhibiting discharge of a total number 1925 bags. Out of this number, 485 bags were noted in the tally-sheets as cover-torn and contents falling out. On 9.8.1971, sixty bags were cleared from the Port Trust godown in the wharf, where they were kept after discharge from the ship and taken to the warehouse of the American Company, which was situated in the harbour premises. On 10.8.1971 again 1120 bags were cleared and taken to the American Company's warehouse. According to the plaintiffs, the second plaintiff, who had the bill of entry noted with the customs authorities after complying with all prerequisite formalities, approached the second defendant, that is to say, the Port Trust for the delivery of the cargo, which was offered on 11.8.1971 and they found that the consignment was lying at the Madras Harbour in damaged condition. They applied for a ship survey of the consignment and got a survey held on 11.8.1971 and 12.8.1971 at N.1 warehouse, Madras Harbour, by the first defendant's surveyors M/s.Ericson and Richards. The surveyors certified that a total of 898 bags were damaged and gave the details of the damage in their survey report dated 21.8.1971. At the instance of the first plaintiffs a survey was also held by K.G.Massey, surveyor and after the survey, the bags were cleared to the second plaintiff's godown in Madras Harbour on 11.8.1971 and 13.8.1971. The result of the survey revealed that there were 115 empty bags and that there was a total shortage of 20820 kilograms of the silicon carbide.

2. The plaintiffs estimated the loss, and called for the remarks list relating to the landing of the suit consignment into the custody of the second defendant, who stated that the subject consignment was not receipted as pellets and 1925 under the marks were tallied, out of which 485 bags were noted as "cover torn" and "contents falling out". The second-plaintiffs preferred a claim with the first

defendant on 16.9.1971, which the first defendant repudiated. On 10.2.1972, a notice under Sec.110 of the Madras Port Trust Act, 1905 was issued claiming the loss suffered by the plaintiff, which notice the second defendant did not answer.

3. The plaintiffs thus have pleaded,

"The plaintiffs state that if it is proved that the said damage and loss occurred before landing then the same would be due to the negligence and misconduct on the part of the first-defendant and on account of their failure to take care of the said consignment as required of them by law. In that event, the first defendant would be absolutely liable to pay the above amount to the plaintiffs. Alternatively, if the damage had occurred subsequent to the delivery of the cargo into the custody of the second-defendant, they would be liable as if they were bailees under the provisions of the Madras Port Trust Act, 1905.

The plaintiffs further state that the condition of the cargo at the time of the delivery into the custody of the second-defendant and the manner in which the cargo was handled while it was in the custody of either of the defendants was entirely within their knowledge and the plaintiffs at this stage are not in a position to state which of the defendants are liable for the damage to the said consignment and hence both the defendants are impleaded so that their respective liability for the suit claim may be determined.

4. The second-defendant-respondent alone has contested the suit. It has stated in its written-statement that the cargo in question, there are circumstances stated in the written-statement, was damaged while it was on board the vessel before landing at Madras and before it reached the custody of the second-defendant; no notice of survey was given to this defendant and as such it was not aware of the survey conducted either by M/s.Erickson and Richards on 11.8.1971 and 13.8.1971 or by K.G.Massey on 18.8.1971; this defendants' specific plea, however, has been.

"This defendant states that before taking delivery of the consignment it is open to the plaintiff to have asked the Port Trust to hold a survey. The Plaintiff did not choose to make a request to this defendant to hold a survey. On the other hand, the plaintiff took delivery of the consignment without any protest or

objection. As no notice of loss or damage to the goods was brought to the notice of this defendant prior to the clearance of the cargo no responsibility for alleged loss or damage to the goods shall attach to this defendant in terms of bye-law 31 of the Port Trust bye-laws”.

5. Since the contesting defendant-respondent raised a plea of notice of loss or damage to the goods under bye-law 31 of the Port Trust Bye-Laws, the plaintiffs raised a question as to the *ultra vires* of the bye-law and it appears in the trial court that became the main contention of the contesting defendant. The trial court framed two issues with respect to bye-law 31, namely (1) Whether bye-law 31 of the Port Trust is *ultra vires* the Madras Port Trust Act, 1905? and (2) Whether the second-defendant is not liable under bye-law 31 of Bye-Laws of the port trust? The trial court has answered these issues by holding at one place that copies of Exs.P-13 and P-17 were marked to the Port Trust and received in the office of the Traffic Manager; but, according to it since it did not convey to the Traffic Manager the information about the survey, the time and the venue, it was not enough and the rule and bye-law accordingly was not complied with as well as that the bye-law was not *ultra vires* to the provisions of the act. On the proof of damage while goods were in the custody of the second-defendant, however, the trial court has said that the plaintiffs have failed to establish their basic claim that any number of bags were damaged while in the custody of the Port Trust. The trial court has also said.

“I would be acting wholly in the absence of evidence, if I were to hold that any part of the bags which were in the custody of the Port Trust after they were discharged from the ships side, did become empty or become otherwise damaged. There is no evidence, at all, in this regard. I must, therefore, reject the claim of the plaintiffs.....”

6. The Madras Port Trust Act, 1905 (Madras Act 2 of 1905), which has been amended from time to time has specific provisions as to works and services, one such provision being Sec.39 thereof, which reads as follows:

“39(1). The Board shall, according to its powers, provide all reasonable facilities for and shall have power to undertake the following services.

(a) Landing, shipping or transshipping passengers and goods between vessels in the port and the wharves, piers, quays or docks in possession of the board;

(b) Receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises;

(c) Carrying passengers by rail, tramway or otherwise within the limits of the port, subject to such restrictions and conditions as the Central Government may see fit to impose; and

(d) Receiving and delivering, transporting and booking and despatching goods originating in the vessels in the port and intended for carriage by the neighbouring railways, or *vice versa*, as a railway company or administration under the Indian Railways Act, 1890.

(2) The Board shall, if so required by any owner, perform in respect of goods all or any of the services mentioned in Clauses (a), (b) and (d) of Sub-sec.(1), provided that the board shall not be bound to perform any service which it has relinquished under the provisions of Clause (a) of Sub-sec.(1) of Sec.41-A.

(3) The board shall, if required, take charge of the goods for the purpose of performing the service and shall give a receipt in the form and to the effect prescribed from time to time by the Central Government.

After any goods have been taken charge of and a receipt given for them under his section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt shall have been given or to the matter or the owner of the vessel from which the goods have been landed or transhipped”.

After introducing the Board of the Trust for rendering services as to landing, shipping or transshipping passengers and goods between vessels in the port and the wharves, piers, quays or docks in possession of the board, receiving, remitting, shifting, transporting, storing or delivering goods brought within board's premises etc., when it has prescribed how the board shall take charge of the goods for the purpose of performing the services, it has specified that after any goods have been taken charge of and the receipt given for them, no liability for any loss or damage, which may occur to the goods, shall attach any person to whom a receipt shall have been given or to the matter or the owner of the vessel, from which the goods have

been landed or transhipped. The starting point of the liability of the Board of the Trust for any loss or damage, which may occur to the goods, therefore, is the time at which it gives a receipt in the form and to the effect prescribed from time to time by the Central Government that it has taken charge of the goods for the purpose of the services. Sec.40, however, is the provision that determines the character of the liability, saying.

"40(1). The responsibility of the board for the loss, destruction or deterioration of goods of which it has taken charge shall, subject to the other provisions of this Act and subject also in the case of goods received for carriage by railway to the provisions of the Indian Railways Act, 1890, be that of a bailee under Sec.151, 152 and 161 of the Indian Contract Act, 1872, omitting the words 'in the absence of any special contract' in Sec.152 of the last-mentioned Act, provided that, till the receipt mentioned in Sub-sec.(3) of Sec.39 is given by the Board, the goods shall be at the risk of the owner.

2. The board shall not be in any way responsible for loss of or damage to goods of which it has taken charge, unless notice of such loss or damage shall have been given within one month of the date of the receipt given for the goods under Sub-sec.(3) of Sec.39",

The liability of the board of the trust thus is that of a bailee under Secs.151, 152 and 161 of the Indian Contract Act omitting the words 'in the absence of any special contract' in Sec.152 thereof. It starts "when the receipt under Sub-sec.(3) of Sec.39 is issued and continues until delivery of the goods to the owner or to any person as directed by the owner. If by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. The bailor being the person delivering the goods, but if a person already in possession of the goods of another, contracts to hold them as a bailee, he becomes the bailee and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment. In other words, thus there can hardly be any doubt as to the liability of the respondent-port-trust as that of a bailee under Secs.151, 152 and 161 of the Indian Contract Act, omitting the words 'in the absence of any special contract' in Sec.152 thereof. But, Sub-sec.(2) of Sec.40 creates an obligation

that this liability of the board shall cease unless notice of loss or damage is given to it within one month of the date of the receipt given for the goods under Sub-sec.(3) of Sec.39. The Board's liability thus shall be limited to a period of one month from the date of the receipt given for the goods under Sub-sec.(3) of Sec.39, unless a notice of loss or damage is served upon it within the said period. After such notice is served, the liability will continue and the Board shall be answerable for the loss or damage to the goods in its custody from the date of the receipt under Sub-sec.(3) of Sec.39 of the Port Trust Act.

7. The Trustees of the port, who constitute the board and who, it is not in dispute, constitute a statutory authority, have a limited legislative function assigned to them under Chapter XI of the act. Sec.95 gives to the board the power to make bye-laws not inconsistent with the provisions of the Act or of the Indian Ports Act, 1905 generally for carrying out the purposes of the Act and for the guidance of persons employed by the board, for the safe and convenient use of the docks, wharves, quays, jetties, sheds, warehouses, railways, tramways, and other works constructed by the Board or vested in the board; for the use of the public landing places constructed by or vested in the Board; for the reception, portage, shortage and removal of goods brought within the premises of the Board and for the exclusive conduct of these operation by the Board or persons employed by the Boards; for keeping clean the harbour and basins and the works of the Board, and for preventing filth or rubbish being thrown therein or thereon; for the mode of the payment of the rates leviable under the Act; for regulating, declaring and defining the docks, wharves, quays, jetties, stages and piers vested in the board on which goods shall be landed from vessels and shipped on board vessels for regulating the lightage of cargo between ships or between ships and shore, between shore and ships; for the exclusion from its premises of disorderly or other undesirable persons and of trespassers. It is obvious that for none of the specified purposes for which bye-laws can be framed by the Board cover a notice by the bailors or the owner of the goods, except if it is shown that for carrying out the purpose of this act any such bye-law is framed. These bye-laws, Sec.96(1) lays down, are required to be approved by the Central Government and no bye-law or alteration

or revocation of a bye-law, Sub-sec.(2) to Sec.96 says, shall be approved by the Central Government until the same has been published for two weeks successively in the Official Gazette and until fourteen days have expired from the date on which the same had been first published in that Gazette. It seems to remove, however, doubts whether, in exercise of the subordinate legislative power, the board could prescribe penalties or not, Sec.97 of the act has a clear mandate that the Board may in such bye-law prescribe such penalties as it shall do fit for the infringement of the same, provided that no penalty for any one infringement of a bye-law shall exceed Rs.100 nor in case of a continuing infringement, shall any penalty exceed fifty rupees per diem for every day after the first during which such infringement continues. In exercise of the power to frame bye-laws, it is said, the Board has made a prescription as to liability of the Port Trust or the Board for loss or damage or deficiency in respect of the goods removed from its premises or ship, as the case may be, in these words 'liability of the Port Trust for the loss or damage in respect of premises or ships as the case may be, the Port Trust shall not be answerable or liable for any loss or damage or deficiency whatever unless the same is brought to the notice of the Traffic Manager in writing and is ascertained previous to the removal of the goods from the Harbour premises or shipment, as the case may be'. Learned counsel for the appellants has contended that the Board's framing a bye-law to the effect that unless a notice is given to the Traffic Manager in writing of loss or damage or deficiency and it is ascertained by him (the Traffic Manager) previous to the removal of the goods from the harbour premises or shipment, as the case may be, may be justified in the circumstances that the Board should identify some officer to receive intimations as to damage, loss or deficiency and that officer is authorised to ascertain the loss or damage or deficiency before the goods are removed from the harbour premises or shipment, as the case may be, but its assumption that it shall not be answerable or liable for any loss or damage or deficiency whatever unless the notice is given to the Traffic Manager in writing and unless he ascertained the loss or damage or deficiency of the goods previous to the removal from the harbour premises or shipment, as the case may be, is *ultra vires* the act, in particular Secs.39 and 40 thereof.

According to him, such a subordinate legislation introduced with the sole object of carrying out the purposes of the Act. cannot be used for creating any statutory limitations upon the bailors or the owner's right to sue the bailee for any loss or damage or deficiency a right which is duly recognised under Secs.151, 152 and 161 of the Indian Contract Act, 1872 and by Sec.40(1) it is applied to the Port Trust Board, subject to the provisions of the Act and subject also in the case of goods received for carriage by a railway to the provisions of the Indian Railways Act, 1890 and by omitting the words 'in the absence of any special contract' in Sec.152 of the Indian Contract Act, provided that, till the receipt, mentioned in Sub-sec.(3) of Sec.39, is given by the Board, the goods shall be at the risk of the owner and that a notice of such loss or damage is given within one month of the date of the receipt given for the goods under the subsection of Sec.39. Learned counsel for the contesting respondent has, however, stated that the notice to the Traffic Manager previous to the removal of the goods is introduced to provide to the Port Trust opportunity to examine whether any claim of loss or damage or deficiency is genuine and if it is genuine to honour the same. Traffic Manager, who has to ascertain the loss or damage or deficiency, must do so before the goods are removed from the harbour premises or loaded in the ship, it is only on such intimation of the claimant that the Port Trust can act. Nothing is taken away by the bye-law which has been given by the Act and nothing additional is introduced, which would suggest infringement of any of the provisions of the Act.

8. In *Trustees, Port of Madras v. Amimchand Pyarelal*, A.I.R. 1975 S.C. 1935, the Supreme Court has said,

"A bye-law has been said to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance.

This judgment has also noted, as stated in 'Craies on statute law' (7th Edition pages 325-326),

"bye-laws may be treated as *ultra vires* on the grounds, amongst others that they are repugnant to the statute under which they are made or that they are unreasonable".

9. In this judgment, the Supreme Court has particularly considered the Port Trust Rules and Bye-law making power and has said,

"In *Kruse v. Johnson*, (1898) 2 Q.B. 91 at pages 98, 99 as question was raised as to the validity of a bye-law made by a country council for regulation street music. Lord Russel of Kil-lours observed in that case:

'When the court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, accompanied by the checks and safeguards which I have mentioned. I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, benevolently interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered'.

The learned Chief Justice said further that there may be,

"cases in which it would be the duty of the court to condemn bye-laws made under such authority as these were made (by a county council) as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*'. But it is in this and in this sense only, as I conceive that the question of reasonableness or unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by an exception which some judges may think ought to be there'.

In *Slattery v. Maylor*, (1888) 13 A.C. 452 it was observed that when considering whether a bye-law is reasonable or not, the courts need a strong case to be made out against it and decline to determine whether it would have been wiser or more prudent to make the

bye-law less absolutely, nor will they hold that it is unreasonable because considerations which the court would itself have regarded in framing such a bye-law have been overlooked or rejected by its framers.

In the first place, port trusts are bodies of a public representative character who are entrusted by the legislature with authority to frame a scale of rates and statement of conditions subject to which they shall or may perform certain services. Port Trusts are not commercial organisations, which carry on business for their own profit. Sec.39(1) and (2) of the act cast on the Board an obligation, according to its powers, to provide all reasonable facilities, if so required by any owner, for various kinds of services mentioned in Clauses (a), (b) and (d) of Sec.39(1). Which include services in regard to landing of goods between vessels and docks in possession of the Board and receiving storing or delivering goods brought within the Board's premises. The Board under Sec.39(3) shall, if required, take charge of the goods for the purposes of performing the service. After the goods are thus taken charge of and a receipt given for them, no liability for any loss or damage which may occur to the goods attaches to any person to whom the receipt has been given or to the master or owner of the ship from which the goods have been landed. The responsibility of the Board for the loss, destruction or deterioration of goods of which it has taken charge is, under Sec.40 of the Act, that of a bailee under Secs.151, 152 and 161 of the contract act, subject to some modifications. Thus the rates which the Board levies are a consolidated charge for the various services it renders and the liability which it is compelled by statute to undertake.

The Board of Trustees is a representative body consisting of 21 Trustees out of whom eleven are elected. The Collector of Customs, the Municipal Commissioner, the General Managers of Railways, a representative each of the Mercantile Marine Department and the Defence Services of the Central Government, and two representatives of labour are the other members of the Board. Out of the eleven elected trustees, one is elected by the Municipal Corporation and the remaining by provincial or local bodies representing commercial

interests. The Board of Trustees is thus a broad based body representing a cross-section of a variety of interests. It is the Board thus constituted that frames the scale of rates and statement of conditions under which the services shall or may be performed by it. Every scale and every statement of conditions framed by the Board has to be submitted to the Central Government for sanction under Sec.44 and it is only when it is so sanctioned that it has the force of law. The requirement of sanction by the Central Government is a restraint on unwise, excessive or arbitrary fixation of rates. Sec.44(2) confers on the Board power, in special cases and for reasons to be recorded in writing, to remit the whole or any portion of rates or charges leviable according to any scale in force under Sec.44. Thus, the statute provides for the necessary safeguards, checks and counter-checks as an insurance against fixation and levy of harsh or unjust rates.

Sec.109 of the Act provides that nothing in the act shall affect any power vested in the Chief Officer of Customs under any law for the time being in force. Sec.49 of the Customs Act 1962 confers power on the Assistant Collector of Customs, if he is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, to permit that the goods may, pending clearance, be stored in a public warehouse and if such a facility is not available, then in a private warehouse. This provision together with Sec.44(2) of the Act constitutes a measure of mitigation. In face of these considerations, it is impossible to characterise the scheme for the levy of rates as arbitrary or unreasonable".

10. In *Trustees, Port of Bombay v. Premier Automobiles*, A.I.R. 1971 Bom. 317; 73 Bom.L.R. 1, a Bench of a High Court of Bombay considered somewhat similar provisions of the Bombay Port Trust Act, Secs.61-A and 61-B of the Bombay Act are couched in almost the same language as Secs.39 and 40 of the Madras Act. The bye-law making power is found in Sec.95 of the Madras Act and Sec.73 of the Bombay Act. The bye-law referred to in the Bombay case was bye-law No.80, framed under the Bombay Port Trust Act, which provided as follows:

"The Trustees will not be answerable or liable for any losses or deficiencies in the goods

unless they are acknowledged by the docks manager previous to the removal of the goods from the docks".

and another,

"the Trustees will accept no liability or responsibility whatsoever for loss or damages to goods unless notice of loss or of the damage alleged shall have been received prior to the shipment or delivery, as the case may be",

Kothaval, C.J., speaking for the court, upon this has said,

"The next point which would throw light upon its provisions is to inquire why was it necessary to enact Sec.61-B?

The Act was passed in 1879 and for the first 46 years of its existence the Act continued without any provisions such as Sec.61-B. The reason why that section came to be enacted is clear if one considers the provisions of Sec.61-A, Sub-sec.(1). That sub-section provides that the Board shall, immediately upon the landing of any goods, take charge thereof, except as may be otherwise provided in the bye-laws, and store such as are liable in their opinion to suffer from exposure in any shed or warehouse belonging to the Board. By Sec.61-A (1), therefore, the Board which is a statutory corporation is saddled with the authority duty to take charge of all goods as soon as they are landed in the Port of Bombay. It is curious that in the whole Act there is no provision for delivery of the goods to the proper parties and no obligation is cast upon the Port Trust Authorities to deliver the goods of which they take charge under Sec.61-A(1) except perhaps of implication. It is clear that Sec.61-A(1) was brought into force because it was necessary to legalise the possession of the Port Trust. Without Sec.61-A, the possession which the Port Trust takes of all goods which arrive in the Bombay Docks would be illegal and would make them liable as trespassers in respect of goods. Therefore, Sec.61-A(1) puts the seal of legality upon the possession of the goods by the Port Trust; but having given them legal possession it was also necessary to provide for the safety, care protection and preservation of the goods while they were in the possession of the Board and to circumscribe their liabilities. After all, the Board was in possession of something which belonged to third parties namely the consignees and the

law had given them the statutory power to take possession, compulsively. Therefore, the law had to provide that during the period of the statutory possession the goods should be safeguarded and also prescribe the limits of the Board's duty to safeguard. That is why Sec.61-B was brought into force. In simple terms Sec.61-B says that the responsibility of the Board for the goods shall be that of a bailee under Secs.151, 152 and 161 of the Indian Contract Act. Sec.151 provides that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. The standard of care imposed therefore is that of a man of ordinary prudence. Sec.152 says that the bailee in the absence of any special contract is not reasonable for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care described in Sec.151. Therefore, so long as he takes that care which a man of ordinary prudence would take, the bailee is exonerated from the liability for loss, destruction or deterioration of the goods bailed to him. Sec.152 reaffirms the same principle of liability but negatively. It says that if the bailee has taken that amount of care of the thing bailed as prescribed by Sec.151 then the bailee is not liable for loss, destruction or deterioration. But this limit of liability in Sec.152 is subject to the words 'in the absence of any special contract'. Thus, if the section by itself were to operate, the bailee may make a special contract, making himself liable for loss, destruction or deterioration of the goods even though he may have taken the same care as a man of ordinary prudence would, but in imposing the same liability upon the Port Trust Sec.61-B says that the words 'in the absence of any special contract' in Sec.152 shall be omitted. Therefore, the only meaning of that provision is that the Bombay Port Trust cannot make any special contract incurring greater responsibility than that of a bailee *i.e.* a man of ordinary prudence. They cannot for instance act as insurers of the goods of which they are enjoined to take charge. That appears to be the only effect of the last clause of Sec.61-B and counsel were agreed that, that would be the

effect. Fortunately so far as the points arising in this appeal are concerned, we are not concerned with that clause at all except to understand the full effect of Sec.61-B. Secs.151 and 152 are thus complementary. They lay down affirmatively and negatively the ambit of the duty of care which the bailee owes to the person who is the owner of the goods (we will not use the word 'Bailor' because under Sec.61-B there is no 'bailor').

Sec.161 of the Contract Act lays down the bailee's responsibility when goods are not duly returned and it says that if, by the fault of the bailee the goods are not returned, delivered or tendered at the proper time, he is reasonable to the bailor for any loss, destruction or deterioration of the goods from that time. This refers to the time when the bailee (in this case the Port Trust authorities) will have to deliver the goods to the true owner and it must be within a reasonable time if no exact time is specified.

The next thing to notice is that while these Secs.151, 152 and 161 of the Contract Act are bodily lifted from the Contract Act and applied with a minor modification to the Port Trust to indicate the ambit of their responsibility to the consignees of the goods of which they took charge, the Bombay Port Trust do not thereby become bailees themselves. Sec.61-B does not say that Sec.148, which defines who a 'bailee' is, is applicable to the Bombay Port Trust. Therefore though for the purpose of judging their responsibility Secs.151, 152 and 161 of the Contract Act will have to be referred to, the Bombay Port Trust is in no sense a bailee of the goods. Sec.61-B does not say they shall be deemed to be bailees or that they are bailees but only that their responsibility shall be that of a bailee as described in the stated sections of the Contract Act. Therefore, at the most of all that can be said of their responsibility or duty towards the goods or the owner of the goods is that they are under a statutory duty imposed by Sec.61-B and nothing more. The provisions of the Bombay Port Trust Act do not bring in the bailor as in the case of the Contract Act and its provisions are not made with reference to the owner of the goods at all. The provisions are unilateral and unilaterally the statute imposes on the Bombay Port Trust

alone the duties under Secs. 151, 152 and 161 of the Contract Act. Thus without making the Port Trust a bailee the statutory duties corresponding to the bailee are imposed upon them. The further point that therefore must be noted upon this analysis of the provisions of Sec. 61-B is that if these duties are not fulfilled or are broken by the Board, the board can be sued for damages by the person to whom the goods belonged but the board will be liable not as bailees or upon a contract but because a statutory duty has been imposed upon them by Sec. 61-B and there has been a breach of it. The claim is thus not founded upon any provisions of the Contract Act nor is it founded in tort. It is founded upon the breach of a statutory duty. Another and a very important point to note is that one and the same action whereby the statutory duty of the Port Trust imposed by Sec. 61-B is breached, may give rise to more than one cause of action. For instance, we have already shown that it gives rise to liability to pay damages for a breach of the statutory duty. It may also in given cases amount to a tort and if it amounts to a tort it may give rise also to a claim for damages. The same may also in certain circumstances give rise to a crime and may be punishable as such, but so far as Sec. 61-B is concerned, it does not speak of liability for a contract or a tort, much less for a crime. It only speaks of the statutory obligations which it prescribes and for the breach of which a suit may lie for damages. It is essential that this distinction must be clearly understood. It arises upon a clear provision of Sec. 61-B and it is upon the understanding of this distinction that the true scope and effect of paragraph 2 of Sec. 87 only will become clear".

.....
Then we turn to consider whether one or more of the bye-laws relied upon help the appellants to escape liability. the bye-laws relied on are bye-laws Nos. 80, 82 and 93. So far as bye-law No. 80 is concerned only the last sentence of it is relied on. 'The trustees will not be answerable or liable for any losses or deficiencies whatever, unless ascertained, pointed out to and acknowledged by the Docks Manager previous to the removal of the goods from docks'. Before the learned single Judge there was some dispute as to who the Docks

Manager was but then the definition in bye-law No. 2(5) was referred to where 'Docks Manager means the trustees, officer for the time being in charge of any Dock or Docks and includes the disputes and assistants to the Dock Manager and any other officer or officers acting under the authority of the Docks Manager. That is a very wide definition and includes any officer acting under the authority of the Docks Manager. The shed superintendent was present when the goods in the present case were unloaded from the ship and reloaded on the trolley for conveyance to the shed. Admittedly several other employees were also present. There is nothing to show who were officers and who were not. It is not disputed that the shed superintendent is an officer. They were all acting under the authority of the docks manager and therefore they would be included in the definition of 'Docks Manager' within the meaning of bye-law No. 80. The question only is whether the bye-law No. 80 is otherwise complied with.

The learned Judge held that the provision of the bye-law that the Board will not be answerable or liable for any losses or deficiencies in the goods unless they are acknowledged by the Docks Manager is inconsistent with the provisions of Sec. 61-B and therefore invalid. In that view, the learned judge did not consider whether the plaintiffs had or had not complied with the provisions of the bye-law No. 80. In our opinion, the view which the learned judge took upon the point he decided was correct because there is no point in Sec. 61-B making the trustees answerable for the loss, destruction or deterioration of goods if they do not take the same care that a bailee does namely the standard of care of an ordinary prudent man and the bye-law protecting them by saying that they will not be answerable or liable for any losses or deficiencies unless (1) ascertained, (2) pointed out to and (3) acknowledged by the Docks Manager previous to the removal of the goods from the Docks. These are additional conditions put upon the liability created by Sec. 61-B. Obviously, the bye-law lays down limitations to the parent section. To the extent that the liability under the section is being limited by the bye-law it must necessarily be declared inconsistent with Sec. 61-B and therefore

invalid”.

11. Once the functions and the purpose of the bye-laws are known, and the limitations under which they have to operate are ascertained, do we find that bye-law 31 afore-quoted is not inconsistent with the provisions of the Madras Port Trust Act? We have already noticed that on taking charge of and on receipt given for the goods taken charge of under Sec.39(3) of the act, the Board (the Port Trust) alone has the liability for any loss or damage which may occur to the goods, its liability is that of a bailee under Secs.151, 152, omitting the words ‘in the absence of any special contract’ and 161 of the Indian Contract Act and the statute requires that the board should be served with a notice of loss or damage within one month of the date of the receipt given for the goods under Sub-sec.(3) of Sec.39. There can be little doubt to the proposition that nothing specifically granted, created or withdrawn by the Act can be denied, destroyed or introduced by a subordinate legislation, such as a bye-law which a statutory authority make to achieve the purpose of the Act. In that sense, bye-law 31 afore-quoted may be found violating the express provisions under Secs.39 and 40 of the Act and accordingly in excess of the bye-law making power of the board. The rules, however, of interpretation of a statute require courts to protect as far as possible any legislation and allow it to operate without infringing what is available under the provisions of the statute under which they are made and without such unreasonable parts thereof, which appear to render it *ultra vires*. If we see bye-law 31 in this light, what appears offensive are the words that seem to give to the Port Trust immunity from the liability or answerability for any loss or damage or deficiency, unless a notice in writing is given to the Traffic Manager and unless the Traffic manager ascertains previous to the removal of the goods from the harbour premises or shipment, as the case may be. The words ‘the Port Trust shall be answerable or liable for any loss or damage or deficiency whatever’, thus have to be read as only enabling the Port Trust to base its defence upon the findings of the Traffic Manager, who may, on ascertaining loss or damage or deficiency, indicate that the port should discharge its liability or that he has found that the allegations of loss or damage or deficiency are exaggerated or are not the liabilities of the Port trust as a bailee. The provision as to the notice to the Traffic

Manager in writing is in one sense a help to the owner or the person entitled to delivery of the goods that at the first knowledge of the loss or damage or deficiency, he informed in writing the Traffic Manager and gave opportunity to the latter to ascertain the loss or damage or deficiency before the goods are removed from the harbour premises or put into the ships. Once such a notice in writing is given and it is before the removal of the goods from the harbour premises or shipment, as the case may be, it is for the Traffic Manager to ascertain and he must complete this duty of his before the goods are removed from the harbour premises or put into the ships. The bailor or the owner of the goods, however, cannot be made to suffer for any fault of the Traffic Manager, who, inspite of a notice in this behalf, failed to ascertain and report. No one can claim any premium on his own recalcitrance. The Port Trust cannot claim any advantage of any default of its agents or servants. Traffic Manager's failure thus will be a failure of the Port Trust and the Port Trust alone shall bear the consequences. We, however, do not see anywhere in this bye-law any requirement of the date, time and venue of the survey on behalf of the owner, bailor or any other person entitled to the goods to the Traffic Manager or that this bye-law required that any survey of the goods to assess loss or damage or deficiency should be done only in the presence of the Traffic Manager or any other officer of the Port Trust. It is one thing to say that no one can enter the port Trust premises without being duly authorised by the competent authority and another to say that no survey will be allowed by or on behalf of the owner, bailor or any other person entitled to the goods, except in the presence of the Traffic Manager. If any such provisions is made and its vires is questioned; different considerations may arise. In the bye-law afore-mentioned, however, there is no such requirement, except that the notice in writing should be given previous to the removal of the goods from the harbour premises or shipment, as the case may be, on the above premises. Thus, we are inclined to hold that bye-law 31 afore-mentioned is not a provision granting to the Port Trust immunity from answering its responsibilities as a bailee of the goods under Sub-sec.(3) of Sec.39 or the Act or exempt it from its liability as a bailee. It is only an enabling provision and the bailor, owner or any other person entitled to the goods, may take

advantage of it, give notice to the Traffic Manager in writing, so that the Traffic Manager may ascertain the loss or damage or deficiency and thus give to the Port Trust its own information as to the truth or otherwise of the allegations of loss or damage or deficiency and such other matters. The Traffic Manager, however, has to ascertain loss, damage or deficiency before the goods are removed from the harbour premises or are loaded on the ship. Whether Traffic Manager ascertains or not, it will be necessary before any loss or damage is claimed from the Board of the Port Trust to give notice to it within one month of the date of the receipt given by the Port Trust or on its behalf for the goods under Sub-sec.(3) of Sec.39 of the Act.

12. We have, however, seen that the trial court has also recorded a finding that the plaintiffs have failed to establish their basic claim that any number of bags were damaged while in the custody of the Port Trust and has also found that nothing was lost or damaged by the negligence of the Port Trust. This finding has been recorded mainly on the basis of the evidence that the goods were surveyed while in the custody of the Port Trust without any notice of date and time to the Traffic Manager of the Port Trust. The trial court has, on that basis, concluded almost *ex parte*. "I would be acting wholly in the absence of evidence. If I were to hold that any part of the bags which were in the custody of the Port Trust, after they were discharged from the ships side, did become empty or become otherwise damaged". Since we have taken the view that there is no mandate in bye-law 31, which will cause any impediment to the right of the bailor, the owner or any other person entitled to the goods, claiming from the Port Trust what according to it was its liability as a bailee evidence as to loss and damage will have to be ordered and considered unaffected by the said bye-law. We are, in the instant case, persuaded to think that a reappraisal of evidence on all counts is necessary and the trial court's endeavour in this behalf on the assumption that 96 empty bags and 317 damaged bags must be accounted for by the Port Trust will not meet the requirement of consideration of the evidence on such a question. We are inclined, for the above reasons, to interfere with the judgment of the trial court, we do not think we, sitting in appeal, should do a re-appraisal of evidence and form our own opinion in such a situation of the

fact and the law, when everything, in our opinion, has to be looked into fresh.

13. In the result, the appeal is allowed, the impugned judgment is set aside and the case is remitted to the trial court for a re-hearing and disposal in accordance with the law. In the circumstances of this case, there shall be no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *Bakthavatsalam, J.*

W.P.No.12288 of 1989

23rd June, 1993.

St.Marys Middle School represented by its Correspondent, Periyavarsceeli, Trichy District

...Petitioner

v.

The District Educational Officer, Lalgudi Range, Lalgudi and others

...Respondents.

Tamil Nadu Minority Schools (Recognition and Payment of Grant) Rules (1977), Rule 6(4)(a), (b), (c) - Power under Rule 6(4)(c) - Exercised without taking action first under R.6(4)(a) - No opportunity given to institution of being heard - Order, if can be sustained.

Under sub-rule (4)(c) of Rule 6 of the Tamil Nadu Minority Schools (Recognition and Payment of Grant) Rules, 1977, the District Educational Officer can resort to direct payment to the teachers till such time the falsification of account or misuse of amount of grant paid is set right. In the view of the court, the power under Rule 6(4)(c) can be exercised only after an action has been taken against the petitioner under Rule 6(4)(a). Nowhere in the matter, is it stated that any action has been taken against the petitioner under Rule 6(4)(a) of the Rules. No record has been produced to show that any notice has been issued to the petitioner exercising the power under Rule 6(4)(a). An action has to be taken by the Chief Educational Officer in

respect of minority schools like that of the petitioner school. This Court has not been shown any notice issued by the Chief Educational Officer under Rule 6(4)(a). It has not also been averred in the counter-affidavit that such an action has been taken. Only pending an action under Rule 6(4)(a), the power under Rule 6(4)(c) can be exercised. In so far as no action has been taken by the respondent against the petitioner Institution under Rule 6, the Court does not think that the impugned order can be sustained on any ground. It is true that after passing the order on 29.12.1988, the petitioner had approached the Chief Educational Officer and the Chief Educational Officer has stayed the order. Unfortunately, the Chief Educational Officer has himself changed his stand and has stayed his order unilaterally without notice to the petitioner. So looking at any angle, this is a case where the principle of natural justice has been violated and no opportunity has been given to the petitioner before passing the impugned order. On this ground alone, the impugned order is liable to be set aside. [Para. 5]

Cases referred to:

Neelima Misra v. Harinder Kaur Paintal, A.I.R. 1990 S.C. 1402. [Para. 5]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records of the first respondent order dated 29.12.1988 passed in Na.Ka.No.24691/Aa/4/88 and to quash the order of the first respondent dated 29.12.1988 and consequently ordering the first respondent to pay to the petitioner the monthly staff grant.

Bala Pazhanoor, Senior Counsel, for *M/s.R.Thirugnanam, V.Murali*, for Petitioner.
V.Raghupathy, Additional Government Pleader, for Respondents.

The Court made the following

ORDER: The petitioner challenges an order passed on 29.12.1988 by the District Educational Officer ordering direct payment of salary to the teachers of the petitioner Institution. Admittedly, the petitioner Institution is a minority institution. After the abovementioned order dated 29.12.1988 has been passed, the petitioner made a representation to the Chief Educational Officer on 5.1.1989 and the Chief Educational Officer by order dated 20.1.1989 stayed the order of the District

Educational Officer, Lalgudi, dated 29.12.1988 stating that the District Educational Officer can order direct payment only after getting an order from the Chief Educational Officer. Consequent to this order, the District Educational Officer informed the petitioner correspondent by proceedings dated 31.1.1989 stating that the salary for January, 1989 has already been disbursed the amount and the salary for future months also will be paid through the correspondent. However, on 14.2.1989, the District Educational Officer directed the petitioner correspondent to produce records with regard to the payment relating to the period from 1986 to 1988. The petitioner then replied to the District Educational Officer stating that the records have already been sent to the Chief Educational Officer on 17.2.1989 itself. On 20.2.1989, the Chief Educational Officer has passed an order unilaterally stating that the order passed by him on 20.1.1989 is kept under suspension. It is stated in that order, that such an order has been passed after perusing the records submitted by the petitioner Institution. This is followed by another letter of the District Educational Officer, Lalgudi dated 23.2.1989 directing payment of the salary to the Headmistress of the School. The petitioner challenges the original order passed by the District Educational Officer on 29.12.1988 by which he was aggrieved *i.e.* ordering payment directly to the teachers.

2. A counter-affidavit has been filed on behalf of the respondents. The counter-affidavit narrates some irrelevant fact which is an infight between the Headmistress and the Correspondent of the petitioner Institution is not necessary for the purpose of deciding the issue raised by the petitioner. In paragraph 4 of the counter-affidavit it is stated that even in the case of minority school direct payment to teachers may be ordered by the departmental authorities where there is falsification of accounts and misuse of government grant. It is also stated in the counter-affidavit that as there was falsification of accounts and misuse of Government grant on the part of the then correspondent of the school direct payment was ordered under Rule 6(4)(c) of the Tamil Nadu Minority Schools (Recognition and Payment of Grant) Rules, 1977 (hereinafter referred to as the "Rules"). It is also claimed in the counter-affidavit that records have been called for from the petitioner Institution and that no records were produced for

verification. It is also stated in the counter-affidavit that there is no interference in the internal administration of the petitioner institution. Two instances were stated in the counter-affidavit wherein in the first instance, the Headmistress of the school has stated that her pay for June, 1987 was paid only on 31.7.1987 and in the second instance one S.Susairaj, Assistant of the petitioner school has stated that his pay for April 1988 was disbursed to him only on 27.5.1988. On these allegations, the Counter-affidavit proceeds to state that it is proved that the petitioner has misused the Government grant and that the statement that there is no complaint from the staff members is false. It is also stated in the counter-affidavit that before arriving at conclusion to issue direct payment order, sufficient opportunity was given to the petitioner. It is also stated that in no way the fundamental rights of the petitioner are affected by issue of direct payment orders, and that by resorting to direct payment the fundamental rights guaranteed in the Constitution of India are not at all affected. It is also claimed in the counter-affidavit that direct payment orders were issued only after perusing the relevant records and only after giving sufficient opportunities to the petitioner.

3. Mr. Balapazhanoor, the learned Senior Counsel appearing for the petitioner contends that the impugned order has been passed without notice to the petitioner. Learned Senior Counsel also contends that even according to Rule 6 of the Rules, 1977 the power is conferred on the authorities to stop further grant if any falsification of account or misuse of the amount of grant paid to any minority school is found or reported and if, after due enquiry, a conclusion is arrived at. According to the learned senior counsel it has not been done so. Learned Senior Counsel also contends that though the power is conferred on the authority under Sub-rule (4)(c) of Rule 6 of the Rules which states that the District Educational Officer will resort to direct payment to the teachers till such time the falsification of account or misuse of the amount of grant paid is set right and the District Educational Officer found the account correct, on the facts and circumstances of the cases, though the impugned order has been passed in the year 1988, for the past 4 1/2 years nothing has been done so far. That apart, the learned senior counsel states that the Rule itself is liable to be challenged as it offends

Art.30 of the Constitution of India.

4. Mr. V. Raghupathy, the learned Additional Government Pleader confined his arguments on the basis of the counter-affidavit filed by the respondents.

5. Having considered the arguments of Mr. Balapazhanoor, the learned senior counsel appearing for the petitioner, I am of the view that the impugned order has to be set aside on the simple ground that it is violative of the principle of natural justice. I may immediately say that I do not want to go into the question with regard to the validity of the Rule, as it is not necessary to decide the issue on hand. On facts as stated by the petitioner and as found from the counter-affidavit it is very clear that the first respondent District Educational Officer has invoked the power under Sub-rule (4)(c) of Rule 6 which talks of payment of grant to the minority institutions. Rule 6(iv)(a)(b)(c) reads as follows:

“....If any falsification of account or misuse of the amount of grant paid to any minority schools is found or reported and if, after due enquiry by the Chief Educational Officer in respect of pre-primary/primary /middle schools or the Joint Director of School Education/Secondary Education in respect of high/training/ special/ Anglo-Indian Schools, it is found that falsification of account or misuse of the amount of grant is proved, then such minority school shall not be eligible for further grant.

(b) Before refusing further grant under Clause (a) the management of such minority school shall be given an opportunity of making its representation.

(c) The District Educational Officer will resort to direct payment to the teachers till such time the falsification of account or misuse of the amount of grant paid is set right and the District Educational Officer found the account correct....”

So it is seen that a power is conferred if a falsification of account or misuse of the amount is proved to stop the grant after due enquiry, but before passing any such order, under these Rules, mentioned above, an opportunity has to be given. Under Sub-rule (4)(c) of Rule 6, the District Educational Officer can resort to direct payment to the teachers till such time the falsification of account or misuse of amount of grant paid is set right. In my view, the power under Rule 6(4)(c)

can be exercised only after an action has been taken against the petitioner under Rule 6(4)(a) as extracted above. Nowhere in the matter, it is stated that any action has been taken against the petitioner under Rule 6(4)(a) of the Rules. No record has been produced to show that any notice has been issued to the petitioner, exercising the power under Rule 6(4)(a). An action has to be taken by the Chief Educational Officer in respect of minority schools, like that of the petitioner school. This Court has not been shown any notice issued by the Chief Educational Officer under Rule 6(4)(a). It has not also been averred in the counter-affidavit that such an action has been taken. Only pending an action under Rule 6(4)(a), the power under Rule 6(4)(c) can be exercised. In so far as no action has been taken by the respondents against the petitioner Institution under Rule 6, I do not think that the impugned order can be sustained on any ground. It is true that after passing the order on 29.12.1988, the petitioner has approached the Chief Educational Officer and the Chief Educational Officer has stayed the order. Unfortunately, the Chief Educational Officer has himself, changed his stand and has stayed his order unilaterally without notice to the petitioner. So looking at any angle, this is a case where the principle of natural justice has been violated and no opportunity has been given to the petitioner before passing the impugned order. On this ground alone, the impugned order is liable to be set aside. In *Neelima Misra v. Harinder Kaur Paintal*, A.I.R. 1990 S.C. 1402, the Supreme Court has clearly laid down that the shift now is to a broader notion of "fairness" or "fair procedure" in the administrative action, and that an administrative order which involves civil consequences must be made consistently with the rule expressed in the *Latin Maxim audi alteram partem* which means that the decision maker should afford to any party to a dispute an opportunity to present his case. Admittedly that has not been done here. If the principle laid down in *Neelima Misra v. Harinder Kaur Paintal*, A.I.R. 1990 S.C. 1402, mentioned above, is applied to the facts and circumstances of the case, I am of the view that the impugned order has got to be set aside and accordingly the impugned order is set aside and the writ petition shall stand allowed. However, there will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan and Thangamani, JJ.*

App.No.814 of 1982 and Memo of Cross Objections
7th July, 1993.

B.P.Samiappan (died) and others ...Appellants
v.

Arunthavaselvan and others ...Respondents.

(A) *Limitation Act (XXXVI of 1963), Art.54 - Suit for specific performance of a contract of sale - Period of limitation.*

So far as the limitation is concerned, Art.54 of the Limitation Act is very clear in its terms. The period of limitation fixed for a suit for specific performance of a contract is three years from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. In the present case, time was originally fixed in the agreement for a period of one year. Subsequently it was extended by endorsements upto 13th August, 1972. Thereafter there was no extension as such. [Para. 6]

Thus, there is absolutely no whisper in the plain that the parties either by express agreement or by implied agreement extended the time for performance of the contract. Hence, by the terms of Art.54 of the Limitation Act, the suit is filed beyond the period prescribed therefor. Admittedly it is beyond the period of three years from the date fixed for performance in the agreement. Hence, the suit is barred by limitation. The view taken by the court below that time is not the essence of the contract and, therefore, the suit is in time is unsustainable. If one thing to say that time is not the essence of a contract and it is another thing to say that the suit is barred by limitation. In the present case, the suit is governed by Art.54 of the Limitation Act and it is barred by limitation. [Para. 6]

(B) *Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), Sec.23 (as amended by Act XXXII of 1974) - Landholder having land in excess of ceiling limit - Entering into an agreement to sell some - Agreement whether invalid within of the provisions of the Act.*

The plaintiff seeks to have the agreement enforced by a court of law and get a sale deed in pursuance thereof. If the court grants a decree in

favour of the plaintiff and it leads to a sale deed in favour of the plaintiff, either by the party or by the court, that sale is automatically void and it is deemed to be void always as per the provisions of the Act. The court cannot be a party to a transaction which would be void in law. A provision in a statute declares a transaction to be void. It is a declaration in itself. The transaction is void for any purpose. It cannot be said that it is void only as against the Authorised Officer and valid as between the parties. The very purpose of the amendment is to declare the entire transaction as a nullity from the inception. The difference in the language between the section as it stood before the amendment and the section as it stands after the amendment is very significant. Before the amendment, the authorised officer shall not take into consideration certain transactions but after the amendment, the statute itself declares the transaction to be void from the inception and a condition is introduced that it is deemed to be always void. [Paras. 8 & 9]

Cases referred to:-

Mrs. Chandnee Vidya Vati Madden v. Dr. C.L. Katnal, I.R. 1964 S.C. 978; (1963) 2 S.C.R. 215; 66 Puri L.R. 38; (1964) 2 S.C.J. 824. [Para. 9]

Chankarlal v. V. Jagadishwar Rao, A.I.R. 1980 A.P. 31. [Para 10]

Navat Ullah v. Khali Ullah, A.I.R. 1938 All. 432. [Para. 12]

Mrs. Christine Pais v. K. Ugappa Shetty, A.I.R. 1966 Mys. 299; (1965) 2 Mys.L.J. 692. [Para. 19]

Sai Dosabai v. Mathurdas Govinddas, A.I.R. 1980 C. 1334. [Para. 20]

Mariamamma Varghese v. The Commissioner of Land Reforms, 1990 Writ L.R. 279. [Para. 21]

K. Singaram v. The Urban Land Ceiling Tribunal, Chempauk, Madras-5, 1992 Writ L.R. 389. [Para. 22]

Sethuratnam, Senior Counsel for

S. Venkatachalamoorthy, for Appellant.

Subramaniam, Senior Counsel for

M/s. R. Srinivasan and K. Raghunathan, for Respondent.

Appeal and the cross objections against the decree of the court of the Subordinate Judge, Gobichettipalayam, dated 6.7.1982 and passed in O.S.No.880 of 1980.

The Judgment of the Court was delivered by

Srinivasan, J.: This appeal arises out of a suit for specific performance instituted by the appellant herein. It is the case of the appellant that under Ex.A-1, dated 12.4.1971 defendants 1 and 2 agreed to sell the suit properties at the rate of Rs.4,500

per acre. A sum of Rs.10,000 was paid as advance on the date of agreement. The total consideration works out to Rs.66,040. Initially, it was agreed that the sale should be executed within a period of one year. On 5.4.1972, an endorsement was made extending the period for completion of the transaction till 5.5.1972. On 3.5.1972 another endorsement was made by which the period was extended to 15.5.1972. On 13.5.1972 an endorsement was made evidencing payment of Rs.10,000 by way of further advance and extending the time to 13.8.1972. Thereafter, there was no extension of time as such. On 3.8.1972 a sum of Rs.19,000 was paid and a receipt was executed by the second defendant in favour of the plaintiff. Thus, the plaintiff has paid a sum of Rs.39,000 in all. One Thirumalaiappa filed a suit O.S.No.1670 of 1971 for injunction restraining the plaintiff and defendants 1 and 2 from interfering with his alleged possession. He claimed to be a tenant of the suit properties. The fourth defendant herein, who is the son of the plaintiff, filed O.S.No.845 of 1972 for an injunction against Thirumalaiappa and the second defendant as well as the present plaintiff. The fourth defendant had purchased 1/4th share in the suit properties earlier. The plaintiff claimed that he was a tenant of the property even before the suit agreement was entered. The suit filed by Thirumalaiappa was dismissed and the suit filed by the fourth defendant was decreed. The appeals against the decrees were dismissed and the second appeals in this Court, viz., S.A.No.2001 of 1978 and S.A.No.2335 of 1978 were disposed on 10.8.1979. The second appeal which arose out of Thirumalaiappa's suit was dismissed, but the second appeal which arose out of the fourth defendant's suit was allowed and the decree was set aside with the result that O.S.No.845 of 1972 was also dismissed. 2. Soon after the disposal of the appeals in the first appellate court, the plaintiff issued notice to defendants 1 and 2 under Ex.A-15 dated 22.9.1972 calling upon them to execute the sale deed. They were received by the defendants on 26.9.1972 as evident from the postal acknowledgments. There was no reply thereto. The plaintiff issued another notice on 24.7.1978 under Ex.A-18. To that a reply was sent by defendants 1 and 2 on 31.7.1978 under Ex.A-20. They denied their liability to execute a sale deed in favour of the plaintiff. It is not necessary to go into the details of the reply notice. Thereafter, the present suit was filed by the plaintiff on 4.12.1980.

3. The third defendant claims under a prior agreement dated 19.2.1970 by which the second

defendant for herself and as guardian of the first defendant agreed to sell the suit properties to him. It is the case of the plaintiff that he was not aware of the alleged agreement in favour of the third defendant and in any event, it was not a valid one. According to the plaintiff, defendants 1 and 2 are bound to execute a sale deed in favour of the plaintiff after receiving the balance amount. It is the case of the plaintiff that he continues to be in possession as he was a tenant previously and even after the agreement he continues to be a tenant till the execution of the sale deed.

4. The defendants contested the suit on several grounds. It is again not necessary to set out the details of the defence. Suffice it to point out that the defendants contended that the plaintiff was aware of the earlier agreement in favour of the third defendant and his agreement was itself only on the footing that in case the third defendant fails to complete the transaction, the plaintiff could have a sale deed in his favour. A plea of limitation was raised by the defendants that the suit was barred. It was also contended that the suit agreement was hit by the provisions of the Tamil Nadu Land Reforms Act 58 of 1961 and it was not enforceable.

5. The trial court found on all factual issues in favour of the plaintiff and held that he was not aware of the agreement in favour of the third defendant. It was also held that the plaintiff had paid the sum of Rs.39,000 as claimed by him and he was liable to pay only the balance which had been deposited in court. On the question of limitation the trial court held that time was not the essence of the contract and the suit as such was not barred by limitation. However, the trial court held that the agreement was affected by the provisions of the Tamil Nadu Land Reforms Act (58 of 1961) and could not be enforced in a court of law as it was void. Consequently, the suit was dismissed.

6. After hearing counsel on both sides, we are of the view that it is not necessary to consider the various issues of facts, which were considered by the court below. We are taking up for consideration the two questions of law, one on limitation and the other on the provisions of the Tamil Nadu Land Reforms Act. In so far as the limitation is concerned, Art.54 of the Limitation Act is very clear in its terms. The period of limitation fixed for a suit for specific performance of a contract is three years from the date fixed for the

performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. In the present case, time was originally fixed in the agreement for a period of one year. Subsequently it was extended by endorsements upto 13.8.1972. Thereafter, there was no extension as such. Ex.A-5 is only a receipt for payment of Rs.19,000 and it does not extend the period for performance. In fact, that payment was made on 3.8.1972 before the expiry of the period fixed under the earlier endorsement dated 13.5.1972. It is not the case of the plaintiff in the pleadings that the time was extended as between the parties by implication. In paragraph 8 it is stated as follows:

"The plaintiff states, the time of one year for performance stipulated in the agreement to sell is not the essence of contract for on reason that the agreement is with regard to agricultural immovable properties and for the second that parties themselves never regarded or intended that time should be of essence of contract. The subsequent conduct of the parties and turn of events also will show that time was not regarded as essence of contract."

Again in paragraph 23 it is stated,

"The plaintiff states that the suit is in time. Performance of suit agreement was refused by defendants 1 and 2 only on 31.7.78 (i.e.) for the first time through their reply notice, which gives plaintiff cause of action to sue and hence the suit is not barred by limitation."

In the cause of action paragraph (paragraph 25) it is stated that the cause of action for the suit arose on 12.4.1971, the date of suit agreement to sell, on 15.5.1972 and 13.8.1972 when the time was extended, on 29.6.1978 when the plaintiff requested performance through a notice and on 31.7.1978 when defendants 1 and 2 for the first time disowned their duties under the contract and refused to execute the sale. Thus, there is absolutely no whisper in the plaint that the parties either by express agreement or by implied agreement extended the time for performance of the contract. Hence, by the terms of Art.54 of the Limitation Act, the suit is filed beyond the period prescribed therefor. Admittedly it is beyond the period of three years from the date fixed for performance in the agreement. Hence, the suit is barred by limitation. The view taken by the court below that time is not the essence of the contract and, therefore, the suit is in time is unsustainable. It is one thing

say that time is not the essence of the contract and it is another thing to say that the suit is barred by limitation. In the present case, the suit is governed by Art. 54 of the Limitation Act and it is barred by limitation.

The only ground on which the court below has dismissed the suit is that the agreement is void inasmuch as it is against the provisions of the Tamil Nadu Land Reforms Act (58 of 1961). Sec. 23 of the Act as it stood prior to the amendment in 1974 provided that the Authorised Officer shall not take into consideration any transfer, whether by sale or by gift, exchange, surrender, settlement or otherwise effected on or after the notified date and before the date of the publication of the final statement under Sec. 12 or 14. By Tamil Nadu Act 2 of 1974 the section was amended and after amendment it reads, in so far as it is relevant in this case, thus:

“(1) Subject to the provisions of Sec. 20 for the purpose of fixing, for the first time after the date of the commencement of this Act, the ceiling area of any person holding land on the date of the commencement of this Act in excess of 30 standard acres—

(a) any transfer, whether by sale (including sale in execution of a decree or order of a civil court of an award or order of any other lawful authority) or by gift (other than gift made in contemplation of death), exchange, surrender, settlement or otherwise; or

(b) any sub-division (including sub-division by a decree or order of a civil court or any other lawful authority) whether by partition or otherwise; effected on or after the notified date and before the publication of a notification under Sub-sec. (1) of Sec. 18 shall be, and shall be deemed always to have been, void and accordingly the authorised Officer shall calculate the ceiling area of such person as if no such transfer or sub-division had taken place.

Explanation: This sub-section shall, on and from the 15th day of February, 1970 have effect as if for the figures and words “30 standard acres” had been substituted.

(2) It shall be the duty of the authorised officer to include the land so transferred or sub-divided, within the ceiling area of the transferor or the person who held the land immediately before such sub-division, as the case may be, as if no such transfer or sub-division had

taken place.”

8. Learned counsel for the appellant contends that the provisions of the Act will invalidate only a transfer and will not affect an agreement of sale. According to him an agreement is not a transfer and, therefore, the section does not come into play. We are unable to accept this argument. The plaintiff seeks to have the agreement enforced by a court of law and get a sale deed in pursuance thereof. If the court grants a decree in favour of the plaintiff and it leads to a sale deed in favour of the plaintiff, either by the party or by the court, that sale is automatically void and it is deemed to be void always as per the provisions of the Act. The court cannot be a party to a transaction which would be void in law. Hence, there is no substance in the contention that the agreements are not affected by the provisions of the Act.

9. It is next argued that the agreement is valid as between the parties and it is only the Authorised Officer who is not bound by the transaction and who is entitled to ignore the same. In this connection reliance is placed upon the judgment of the Supreme Court in *Mrs. Chandnee Vidya Vati Madden v. Dr. C.L. Katial*, A.I.R. 1964 S.C. 978; (1963) 2 S.C.R. 215; 66 Punj.L.R. 138; (1964) 2 S.C.J. 824. In that case a contract of sale was entered with reference to a house belonging to the defendant on the plot granted by the Government. One of the terms of the contract was that the vendor shall obtain necessary permission of the Government for the same within two months of the agreement and if the permission was not forthcoming, it was open to the vendees to extend the date or to treat the agreement as cancelled. The vendor made an application for permission but for the reasons of her own, withdrew the same. The vendees filed a suit for specific performance of the contract or in the alternative for damages. The court found that the vendor had wilfully refused to perform her part of the contract and the vendees were entitled to get specific performance. The contention that unless the Government granted permission, the contract was unenforceable was negatived. The court pointed out that the stipulation in the agreement was not a condition precedent and that the contract was not a contingent one. Hence, the court held that the contract was binding as between the parties and enforceable as such. The ruling has nothing to do with the present case. Here a provision in a statute declares a transaction

to be void. It is a declaration in rem. The transaction is void for any purpose. It cannot be said that it is void only as against the Authorised Officer and valid as between the parties. The very purpose of the amendment is to declare the entire transaction as a nullity from the inception. The difference in the language between the section as it stood before the amendment and the section as it stands after the amendment is very significant. Before the amendment the Authorised Officer shall not take into consideration certain transactions, but after the amendment, the statute itself declares the transaction to be void from the inception and a fiction is introduced that it is deemed to be always void.

10. Reliance is placed upon the judgment of a Full Bench of the Andhra Pradesh High Court in *Shankarlal v. V Jagadishwar Rao*, A.I.R. 1980 A.P. 181. The case arose under the Hyderabad House (Rent, Eviction and Lease) Control Act and Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act. The question was whether an agreement of tenancy between the landlord and an individual was void because the landlord failed to give notice of vacancy to the authority under the Act. As per the provisions of the Act, every landlord was bound to give a notice of vacancy to the controller as soon as the building fell vacant. The Act also enabled the controller to allot the vacant premises to a person and such allottee could dispossess any unauthorised occupant. The contention before the court was that in as much as no notice of vacancy was given under the Act, the agreement of tenancy was void and it was against the public policy. That contention was negated by the court and it was held that as between the parties, the transaction was valid. It was pointed out that if and when the controller allots the premises to any person under the Act, such person could dispossess the tenant under the private lease and that does not invalidate the transaction as such between the parties thereto. The ruling has no application to the present case.

11. The question has been considered by a Division Bench of this Court in *Mariamamma Varghese v. K.V. Balasubramanian and others*, A.S.No.862 of 1981 dated 11.1.1990. The appeal was against a decree dismissing a suit for specific performance. The dismissal was on the ground that the agreement of sale was cancelled by the agreement-holders. The appeal was dismissed on the ground

that there was a legal impediment to the grant of specific performance. It was held that by virtue of Sec.6 of the Tamil Nadu Urban Land (Ceiling and Regulation) Act 24 of 1978, the agreement could not be enforced. The Bench observed thus:

"The impediment is that the transaction, assuming it could fructify through the hands of the court, will come within the mischief of Sec.6 of the Tamil Nadu Urban Land (Ceiling and Regulation) Act 24 of 1978, hereinafter referred to as the Act. That provision inhibits the coming into existence of any such transaction as the present one and further says that such transaction will be null and void. The court is not supposed to lend its hands for the purpose of arriving at this result, assuming that the plaintiff has got case on merits otherwise."

12. One of us sitting singly dealt with the question in detail in *Hansraj Bokaria v. Government of Tamil Nadu*, W.P.No.4807 of 1985 dated 13.1.1990. The relevant passage in the judgment reads thus:

18. It is contended by learned counsel for the petitioner that a sale in pursuance of a decree for specific performance is not a voluntary sale and it would not fall within the scope of Sec.6 of the Act. According to learned counsel, if a sale executed by the court and it cannot be governed by Section 6 of the Act. There is no merit in this contention. In *Enavat Ullah Khali Ullah*, A.I.R. 1938 All. 432, a Division Bench of the court held that decree for specific performance only declares the right of the decree-holder to have a transfer of the property covered by the decree executed in his favour and so long as the sale deed is not executed in his favour by the judgment-debtor in the suit or by the court the title to the property remained vested in the judgment debtor and till the execution of the sale deed the decree-holder has no right to possession of the property. It was further held that the sale deed executed by a court in pursuance of a decree for specific performance is a transfer by the court on behalf of the judgment-debtor and it is the title of the judgment-debtor to the property that is transferred by the sale deed executed by the court and if the judgment debtor is precluded by any enactment from transferring the property, the court cannot in violation of that provision execute a sale deed.

of that property. In that case, there was a decree for specific performance and an application was filed for execution. But, by that time, U.P. Encumbered Estates Act (25 of 1934) had come into force. Sec.7(3) of the said Act precluded any transfer by the owner of the property. The contention urged before the bench was that it prevented only the owner of the property and not the court from transferring the property. That contention was rejected by the court and it was observed that if the judgment-debtor was precluded from transferring the property, the court cannot in violation of that provision execute a sale deed of that property.

19. In *Mrs. Christine Pais v. K. Ugappa Shetty and another*, A.I.R. 1966 Mys. 299: (1965) 2 Mys.L.J. 692, the contention that the sale by a court under a decree for specific performance is an involuntary sale and not *inter vivos* was rejected. The court held that the sale deed based on a contract of sale, which came into existence pursuant to the decree was a transfer by the court on behalf of the judgment-debtor and the sale deed had all the characteristics of a transfer *inter vivos*. Reference was also made to the judgment of the Allahabad High court in *Enavat Ullah's case*, A.I.R. 1938 All. 432.

20. In *Bai Dosabai v. Mathurdas Govinddas and others*, A.I.R. 1980 S.C. 1334, the Apex Court held the events and changes in law occurring during the pendency of an appeal against decree in a suit for specific performance have to be taken into consideration and the decree has to be moulded accordingly. They gave effect in that case to the provisions of Bombay Tenancy and Agricultural Lands Act and Gujarat Vacant Lands in Urban Areas (Prohibition of Alienations) Act, 1972 besides the Urban Land (Ceiling and Regulation) Act, 1976.

21. A Division Bench of this Court refused to grant specific performance in *Mariamamma Varghese v. K.V. Balasubramanian and others*, A.S.No.862 of 1981 dated 11.1.1990. The appellant in that case was the plaintiff who prayed for specific performance. The trial court dismissed the suit and she preferred the appeal. But, the agreement of sale was dated 29.6.1978. The Division Bench held that there was a legal impediment to the grant of specific

performance in the provisions of the Act and consequently dismissed the appeal. On the same day, i.e., 11.1.1990, the Division Bench also dismissed a writ petition (W.P.No:1963 of 1984) preferred by the same person, reported in *Mariamamma Varghese v. The Commissioner of Land Reforms and two others*, 1990 Writ L.R. 279. Claiming right under the agreement dated 29.6.1978, the petitioner in the Writ petition wanted exclusion of the lands which were subject matter of the agreement in her favour from the proceedings under the Act and filed the Writ petition against the authorities under the Act. Taking note of the rigour of the language of Sec.6 of the Act, the Bench dismissed the writ petition.

22. In *T.K. Singaram v. The Urban Land Ceiling Tribunal, Chepauk, Madras-5 and others*, 1992 Writ L.R. 389. Another Division Bench of this Court had occasion to consider the provisions of Sec.43 of the Act. The Bench after extracting the section, observed as follows:

"As would be seen from a plain reading of the Section, the Urban Land Ceiling Act overrides the other laws for the time being in force or any custom, usage, or agreement or decree or order of a court, tribunal or other authority. In view of Sec.43 of the Urban Land Ceiling Act, the Urban Land Ceiling Act has to be given a full play and any proceedings which are pending on the date when the Urban Land Ceiling Act comes into force would have to cease in case the Urban Land Ceiling Act applies to those proceedings, to the extent of such application and declaration of the excess land. A provision similar to S.43 of the Urban ceiling Act is available in Sec.4 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961."

13. In the present case, there is no dispute that defendants 1 and 2 have lands in excess of the ceiling limit. The plaintiff as P.W.1 has admitted in his deposition that the defendants had lands in excess of the ceiling limit. It is also brought to our notice that the agreement in favour of the third defendant which is marked as Ex.B-3 was subject matter of proceedings initiated under the Tamil Nadu Land Reforms Act. The Authorised Officer had taken the view that it was hit by the Act and was a void transaction. That view was affirmed by this Court in C.R.P.Nos.1491 and 1502 of 1983 by

its judgment dated 2.4.1983. It is stated by learned counsel for the respondents that the special leave petition filed against that judgment was dismissed by the Supreme Court. Thus, there is no dispute that the provisions of the Land Reforms Act would apply to the present case and it goes without saying that the agreement in favour of the plaintiff is as much hit by the provisions of the Act as the agreement in favour of the third defendant. In fact, the agreement in favour of the plaintiff is much later than that of the third defendant and, therefore, it is automatically hit by the Act. We have no hesitation in holding that the agreement is void and the plaintiff cannot get any relief in this suit in view of the provisions of the Tamil Nadu Land Reforms Act. The view taken by the court below in this regard is correct.

14. In the result, we confirm the judgment and decree of the trial court and the appeal is dismissed. There will be no order as to costs.

15. The memorandum of cross-objections filed by defendants 1 and 2 is against the refusal of the trial court to grant costs. We do not find any merit therein. Having regard to the facts and circumstances of the case, we affirm the conclusion of the trial court in the matter of costs. Hence, the memorandum of cross-objections is dismissed. No costs.

16. It is represented by learned counsel for the appellants that the deceased plaintiff deposited the balance of consideration in court and it has been invested in fixed deposit in State Bank of India, Bangalapur as per directions of this Court. Now that the dismissal of the suit is confirmed, the plaintiff will be entitled to get back the amount deposited. The plaintiff is no more and his legal representatives have already come on record. The legal representatives of the plaintiff, viz., appellants 2 to 5 are permitted to withdraw the amount deposited in court towards balance of sale consideration.

B.S. ---- *Appeal and memo of cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan and Thangamani, JJ.*

C.M.P.Nos.9360 to 9362 of 1993 in
App.S.R.No.55107 of 1987 21st July, 1993.

M.Subramania Mudaliar ...*Petitioner*
v.

K.Janardhanam and others ...*Respondents.*

Civil Procedure Code (V of 1908), O.7, R.10 - Suit value of below Rs.30,000 filed in the City Civil Court - Appeal presented in High Court - Returned for rectification of defects - Represented - Registry returning the appeal papers - Deputy Registrar making endorsement that papers returned for representation to proper court - Direction, if proper.

An appeal against the decree and judgment in O.S.No.3262 of 1978 on the file of the VII Assistant Judge, City Civil Court, Madras was presented in the High Court on 6.7.1987. The papers were returned on 18.9.1987 by the Registry for rectification of certain defects. The papers bear the seal of 25.6.1993 as if they were represented on that date. There was no endorsement by the counsel at the time of the alleged representation. The papers were returned by the registry and the concerned appeal examiner had made an endorsement on that date itself. One of the returns questioned as to how the appeal could be filed in the High Court when the value of the suit was less than Rs.30,000. The Deputy Registrar initialled the return and made an endorsement 'Time 10 days for representation to proper court'.

Held: The Deputy Registrar has no jurisdiction to make that order. The return was only to enquire the advocate as to how this Court was the proper forum. After the advocate gave his answer, the matter should be placed before the court for appropriate orders. Moreover, there was a delay of nearly six years by that time in representation and without posting the matter before court to decide the question whether the delay in representation should be condoned, the Deputy Registrar should not have directed representation to proper court.

[Para. 2]

Petitions praying that in the circumstances stated therein and in the respective affidavits filed

therewith, the High Court will be pleased to: (i) condone the delay of 2,092 days in representing the appeal papers in App.S.R.No.55107 of 1987, etc.

V.R.Gopalan, for Petitioner.

The Order of the Court was made by *Srinivasan, J.*: *C.M.P.No.9360 of 1993*: This petition is for condonation of delay of 2,092 days in representing the appeal in A.S.S.R. No.55107 of 1987. The appeal is directed against the decree and judgment in O.S.No.3262 of 1978 on the file of the VII Assistant Judge, City Civil Court, Madras. The appeal was originally presented in this Court on 6.7.1987. The papers were returned on 18.9.1987 by the Registry for rectification of certain defects. The papers bear the seal of 25.6.1993 as if they were represented on that date. There is no sort of endorsement by the counsel at the time of the alleged representation. The papers were returned by the registry and the concerned Appeal Examiner has made an endorsement of return on that date itself. One of the returns raised a query as to how this Court is the proper forum to entertain the appeal when the value of the suit is Rs.26,585 that is below Rs.30,000. The Deputy Registrar had initialled the return and made an endorsement.

"Time 10 days for representation to proper court".

2. The Deputy Registrar has no jurisdiction to make that order. The return was only to enquire the advocate as to how this Court was the proper forum. After the advocate gave his answer, the matter should be placed before court for appropriate orders. Moreover, there was a delay of nearly six years by that time in representation and without posting the matter before court to decide the question whether the delay in representation should be condoned, the Deputy Registrar should not have directed representation to proper court.

3. The papers were presented in the City Civil Court, Madras, on 30.6.1993. The City Civil Court returned the papers on 5.7.1993. One of the endorsements was that the delay in representation should be condoned by the High Court, under the Appellate Side Rules. Again the papers were presented in this Court on 8.7.1993 for condonation of delay in representation. The Deputy Registrar returned the papers on the ground that the value of the subject matter being below Rs.30,000, it is only the City Civil Court which is having jurisdiction. The papers were represented on

15.7.1993 in the City Civil Court once again.

4. The suit out of which the appeal arose was heard and disposed of by a common judgment along with O.S.No.2353 of 1981. Against the judgment and decree in the said suit, an appeal was filed in this Court and numbered as A.S.No.387 of 1987. That appeal was posted in the list for final hearing. It came before us on 15.7.1993. When the appeal was taken up for hearing and the appellant's counsel stated the facts, learned counsel for the respondents raised an objection that the appeal is barred by *res judicata* as there was no appeal against the judgment in the connected suit O.S.No.3262 of 1978 against which the present appeal is filed. Learned counsel for the appellant then submitted that the appeal was presented wrongly in this Court earlier and after return of the papers, it was represented in the City Civil Court. He gave the stamp register number of the appeal as well as the stamp register number of the civil miscellaneous petition filed by him in the City Civil Court for condonation of delay in representation. We passed an order on 15.7.1993 adjourning the said Appeal No.387 of 1987 to this date and withdrawing the papers in the present appeal from the City Civil Court. We directed the City Civil Court to send all the records to this Court on or before 19.7.1993. Thus, the papers in this appeal have come before us today.

5. The petition for condonation of delay is supported by an affidavit filed by a junior counsel. It is stated in the affidavit that the two appeals were filed in time against the judgment in both the suits and in one of them an urgent application for stay was filed and moved and therefore, that appeal got numbered earlier. In so far as the present appeal is concerned, it is stated in the affidavit that the papers were returned by the office on 18.9.1987 to rectify certain defects, but unfortunately they were not represented in time. Paragraph 2 of the affidavit reads thus:

"I submit for a long time, the appeal papers were being searched by the office but they could not be traced or located. In fact we did not even know originally that the appeal papers were returned by the office on 18.9.1987. When the connected appeal A.S.No.387 of 1987 was posted in the ready list, we again made an extensive search both in our law chambers, our senior's residence and even in the High Court Office. In fact we made a thorough

and elaborate search during the summer recess this year but still we could not locate the papers. We then decided to reconstruct the papers and apply to this Hon'ble court for necessary permission. It was at that juncture our senior office clerk Sri V.S.Viswanathan died on 2.6.1993, just before the re-opening of the courts. After the ceremonies were over, his son brought to us certain files, papers and records from his house, pertaining to our office. It was then that we located the returned appeal papers kept in a big file which contains very many earlier records of the party. In fact the appellant is living only at Purasawalkam and is well known to our late clerk who also lived in Purasawalkam. This bundle was in a big file containing unnecessary and old papers of the party. Immediately we have made arrangements to represent the appeal papers".

6. This application for condonation of delay is opposed by the respondents. A counter affidavit has been filed by the first respondent. Along with the counter affidavit, a typed set of papers has been filed. In the typed set of papers, we find a letter written on 24.6.1988 by the then advocates for the respondents. That letter is addressed to the counsel for the appellant. In that letter, it is stated as follows:

"It is stated in the affidavit of your client in C.M.P.No.8234 of 1987 in A.S.No.387 of 1987 that an appeal has been filed against the judgment and decree in O.S.No.3262 of 1978. But strangely our clients have not received any notice of appeal as yet though it is more than a year since the appeal should have been filed. We shall thank you to let us know the number of the appeal to enable us to file vakalat therein as we have instructions to do so".

7. In the typed set of papers, a copy of the affidavit filed by the first respondent herein in C.M.P.No.14325 of 1990 in which he was the petitioner is also included. That was a petition for appointment of an Advocate Receiver to collect the rents and profits from the suit property. Paragraph 10 of the affidavit reads thus:

"I may add that though more than three and a half years have elapsed even I have not been served with any notice of appeal alleged to have been filed by the appellant against O.S.No.3262 of 1978 by the same judgment dated 13.5.1986 with the said plan of causing

further delay".

8. Thus in 1988 and again in 1990, the attention of the appellant as well as his counsel was specifically drawn to the fact that this appeal had not been served on the respondents. That would have certainly put on notice the appellant as well as his counsel and prompted them to represent the appeal. The failure to do so indicates a deliberate design to delay the matters. We are not convinced with the explanation given in the affidavit of the junior counsel that the records could not be traced in spite of diligent search. Even according to the affidavit, the senior clerk who had the records was living in Purasawalkam, which is also the place of the appellant himself. It is also seen from the affidavit that all the records of the appellant were with the senior clerk. That shows that both of them were moving closely and the senior clerk was in charge of the affairs of the appellant. It is but natural to infer that the appellant and the senior clerk would have been meeting very often. Particularly when the application for appointment of receiver was filed by the respondents, the appellant would have met not only the senior clerk but also the counsel. There is no explanation as to why even at that time the papers were not represented. It is stated in the affidavit that the counsel decided to reconstruct the papers and apply to the court for necessary permission in 1993. If the version that papers could not be traced even after an extensive search is true, the decision to reconstruct the papers would have been taken in 1988 or at least in 1990. The inaction for over three years on the part of the appellant remains unexplained.

9. In the circumstances, there is no valid explanation for the inordinate delay in representation. Even if the facts stated in the affidavit are true, they prove gross negligence and callous indifference on the part of the appellant and his counsel. Even assuming that there is negligence only on the part of the counsel, it is not a valid ground for condoning such a long delay of six years in representation of the appeal. Hence, this petition for condonation of delay is dismissed.

10. *A.S.S.R.No.55107 of 1987*: In view of the dismissal of the petition to condone the delay in representation (C.M.P.No.9360 of 1993), the appeal is rejected. The appellant will be entitled to get refund of half of the court fee paid on the appeal memorandum.

11. *C.M.P.No.9361 of 1993*: In view of the

dismissal of C.M.P.No.9360 of 1993, the petition for condoning the delay in representation, this petition is dismissed.

12. C.M.P.No.9362 of 1993: In view of the dismissal of C.M.P.No.9360 of 1993, this petition is also dismissed.

B.S. ----- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.No.868 of 1993 17th August, 1993.

S.A.Ponnuswami ...Appellant
v.

The Deputy Commissioner, H.R. and C.E. (Admn.)
Department, Coimbatore and others
...Respondents.

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.69(1) - Deputy Commissioner passing order - No evidence as to publication of the order - Aggrieved persons not preferring appeal - Commissioner, if can exercise revisional jurisdiction suo motu.

There is no material placed before that the order passed by the Deputy Commissioner was either published or served upon the parties concerned. Sec.69(1) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 says that the aggrieved party can prefer an appeal against the order of the Deputy Commissioner within 60 days from the date of the publication of the order or of the receipt thereof by him. In the absence of any such material placed before the court, it is not possible to presume that the other persons had come to know of this order. Therefore, the contention of the learned counsel for the appellant that the aggrieved persons were entitled to prefer an appeal under Sec.69(1) within 60 days to the Commissioner and as they have failed to prefer an appeal, the Commissioner could not have exercised, *suo motu*, the revisional jurisdiction is without

merit. [Para. 4]

(B) *Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.69(2) - Suo motu revisional power of Commissioner of Hindu Religious and Charitable Endowments - Exercise of - Limitation for - Exercise of jurisdiction after a lapse of 10 years, held justified on facts.*

Sec.69(2) of the Act does not prescribe any period of limitation. The statute has purposely not prescribed the period of limitation in order to ensure that if the original authority commits any mistake in the matter of passing an order which touches the public interest because the temples under the Act are open to general public as such the public are entitled to visit, such mistake can be corrected by the revisional authority i.e., the Commissioner. No doubt, the statute does not prescribe any time limit for exercising *suo motu* power but nevertheless, the Commissioner is expected to exercise the *suo motu* power within a reasonable time. The question as to, in a given case whether revisional jurisdiction has to be exercised *suo motu* within a reasonable time would depend upon the facts and circumstances of each case. As such, no criteria or time limit for *suo motu* exercise of revisional jurisdiction can be laid down. As far as the facts of this case are concerned, the various grounds enumerated by the Commissioner for exercising the *suo motu* revisional jurisdiction would go to show that he is justified in exercising the *suo motu* power.

[Paras. 5 and 6]

Case referred to:

Gurbaksh Singh v. Union of India, (1976)37 S.T.C. 425. [Paras. 2, 5]

Appeal under Clause 15 of the Letters Patent against the order of Bakthavatsalam, J., dated 3.8.1993 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.14364 of 1993 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* to call for the records relating to the impugned order dated 19.1.1993 in S.M.R.1/92 from the file of the Commissioner, H.R. & C.E.(Admn.) Department, Madras-34 and to quash the same as *ultra vires*.

R.M.Krishna Raju, for Appellants.

The Order of the Court was delivered by K.A.Swami, C.J.: This appeal is preferred against the order dated 3.8.1993 passed by the learned single Judge in W.P.No.14364 of 1993. The petitioner/ appellant sought for quashing the order

dated 19.1.1992 bearing S.M.R.1/92 passed by the Commissioner, H.R. & C.E. (Admn.) Department, on the ground that the Commissioner has passed the aforesaid order in exercise of his *suo motu* powers after a lapse of 10 years from the date of the order passed by the Deputy Commissioner. Learned single Judge has rejected the contention of the petitioner that the exercise of *suo motu* power by the Commissioner is arbitrary and he should not have exercised it after a lapse of 10 years. Learned single Judge has held that there is no time limit prescribed by Sec.69(2) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as 'the Act') and as such, it cannot be said that the Commissioner has acted without jurisdiction in exercise of *suo motu* jurisdiction under Sec.69(2) of the Act. It has also been pointed out by the learned single Judge that the matter has now been remanded without any condition, and the Deputy Commissioner has been directed to render a fresh finding as to whether the petitioner can be recognised as a hereditary trustee, no harm or prejudice can be held to have been caused to the petitioner/appellant by reason of the order passed by the Commissioner. Accordingly, Learned single Judge has rejected the writ petition. Hence, the petitioner has come up in appeal.

2. It is contended before us that the Deputy Commissioner passed an order on 9.9.1983 on taking into consideration several documents and the oral evidence adduced in the case and recognised the petitioner/appellant as the hereditary trustee of the Temple in question, that no person aggrieved by the order of the Deputy commissioner preferred an appeal against the order dated 9.9.1982, that after a lapse of 9 years, the Commissioner has chosen to exercise power of Revision *suo motu* under Sec.69(2) of the Act and has passed an order on 19.1.1993, that it is not permissible for the Commissioner to exercise the power of revision *suo motu* after a lapse of 10 years. In support of the last contention, learned counsel has placed reliance on a decision of the Supreme Court reported in *Gurbaksh Singh v. Union of India*, (1976)37 S.T.C. 425.

3. The *suo motu* proceedings were started by the Commissioner on 14.3.1992. He issued a notice to the petitioner/appellant and afforded him an opportunity and considered all the contentions urged before him. In the course of the order dated

19.1.1993, the Commissioner has pointed out the deficiencies in the order of the Deputy Commissioner. The grounds stated by the Commissioner for exercising the *suo motu* power in his order are as follows:

"(i) The 7th respondent herein was never holding office as hereditary trustee within the meaning of Sec.6(ii) of the Act.

(ii) The 7th respondent herein was only a servant of the temple and was also writing accounts and his father Ayyamperumal was never trustee in the institution in question.

(iii) The 7th respondent herein did not file the agreement dated 4.12.1921 between the then trustees of the temple in the year with that of the poojari of the temple. That the document dated 4.12.1921 filed in this case clearly indicates that in the year 1921, the 7th respondent's family was not in management as trustees in the temple much less as hereditary trustees so as to attract Secs.6(2) and 63(b) of the Act.

(iv) The Deputy Commissioner without properly analysing Exs.A-1 to A-16 had erroneously granted the declaration. The petitioner/7th respondent herein has not established the management of his family for the last 3 generations in an unbroken line of succession from father to son.

(v) The Deputy Commissioner has failed to see that the budget sanction orders produced as exhibits in this case no doubt related to the temple since the 7th respondent has come into possession as a person writing accounts of the temple in question.

(vi) So also, as an accountant of the temple, the 7th respondent was in possession of contribution receipts which he has filed as documents in that case and obtained the declaration.

(vii) The Deputy Commissioner has failed to see that the agreement dated 4.3.1915 etc., filed as Exs.A-1 to A-11 do not relate to the institution in question."

Therefore, it is not possible to hold that the Commissioner has arbitrarily exercised the *suo motu* power. He has given full opportunity to the petitioner/appellant and has also given the reasons for interfering with the order of the Deputy Commissioner. The matter relates to a temple. The question is as to whether the petitioner/appellant should be recognised as a hereditary

trustee or not. In the scheme of the act, the hereditary trustee of a temple plays an important role. Therefore, one of the objects of the Act is to ensure that hereditary trustees are recognised only on due inquiry and based upon proper and acceptable evidence. In addition to this, in order to ensure that the right of a person claiming to be a hereditary trustee is not easily taken away, a right to suit has also been given against the order of the Commissioner passed under Sec.69(2) of the Act. Therefore, it is open to the petitioner/ appellant even now to file a suit to establish that he is a hereditary trustee of the Temple/or else to appear before the Deputy Commissioner and establish that he is hereditary trustee. Therefore, there are two courses open to the appellant/petitioner. As such, it cannot be held that the right of the appellant to establish that he is hereditary trustee, has been taken away by the order passed by the Commissioner.

4. The next question for consideration is as to whether the Commissioner can be held to have acted without jurisdiction in exercising power of revision *suo motu* after a lapse of 9 years. As already pointed out, the Deputy Commissioner passed the order on 9.9.1983. There is no material placed before us that the order passed by the Deputy Commissioner was either published or served upon the parties concerned. Sec.69(1) says that the aggrieved party can prefer an appeal against the order of the Deputy Commissioner within 60 days from the date of the publication of the order or of the receipt thereof by him. In the absence of any such material placed before us, it is not possible to presume that the other persons had come to know of this order. Therefore, the contention of the learned counsel for the appellant that the aggrieved persons were entitled to prefer an appeal under Sec.66(1) within 60 days to the Commissioner and as they have failed to prefer an appeal, the Commissioner could not have exercised *suo motu*, the revisional jurisdiction is without merit.

5. Now, the question is whether the Commissioner could have exercised the revisional power. Sec.69(2) reads thus:

"Any order passed by the Deputy Commissioner in respect of which no appeal has been preferred within the period specified in Sub-sec.(1) may be revised by the Commissioner *suo motu* and the Commissioner may call for

and examine the records of the proceedings to satisfy himself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed by the Deputy Commissioner. Any such order passed by the Commissioner in respect of an order passed by the Deputy Commissioner shall be deemed to have been passed by the Commissioner on an appeal referred to him under Sub-sec.(1)."

It does not prescribe any period of limitation. The statute has purposely not prescribed the period of limitation in order to ensure that if the original authority commits any mistake in the matter of passing an order which touches the public interest, because the temples under the Act are open to general public as such the public are entitled to visit, such mistake can be corrected by the Revisional authority i.e. the Commissioner. No doubt, the statute does not prescribe any time limit for exercising *suo motu* power, but, nevertheless, the Commissioner is expected to exercise the *suo motu* power within a reasonable time. The question as to in a given case whether revisional jurisdiction has to be exercised *suo motu* within a reasonable time, would depend upon the facts and circumstances of each case. In fact, the very decision relied on by the learned counsel for the appellant in *Gurbaksh Singh v. Union of India*, (1976)37 S.T.C. 425 states thus:

"What is a reasonable time, however, will depend upon the facts of each case."

As far as the facts of this case are concerned, the various grounds enumerated by the Commissioner for exercising the *suo motu* revisional jurisdiction would go to show that he is justified in exercising the *suo motu* power. The grounds we have already re-produced. However, it is contended before us that the Deputy Commissioner has also passed a well considered order and therefore, there was no reason for the Commissioner to interfere with it. The Commissioner has pointed out, how the Deputy Commissioner has erred in the matter. We do not consider it necessary to go into this question, because the matter has now been remitted to the Deputy Commissioner for fresh consideration. Any observation made by us in this regard is likely to affect the interests of the petitioner/ appellant. Hence, we refrain from going into the merits of the case. We are satisfied that in the facts and circumstances of the case, the Commissioner is justified

and has acted properly in *suo motu* exercising the power of revision.

6. Lastly, it is contended that if the order of the Commissioner passed after a lapse of 9 years is allowed to remain and is approved, the Commissioner will take up each and every case and exercise *suo motu* the power of revision even after a lapse of considerable time. We have not stated that it is open to the Commissioner to exercise the *suo motu* power in every case after a lapse of considerable time. The exercise of revisional power *suo motu* after a lapse of considerable time is reasonable and proper would depend upon the fact and circumstances of each case. As such no criteria or time limit for *suo motu* exercise of revisional jurisdiction can be laid down. Every such case has to be judged on the facts and circumstances of each such case.

7. For the reasons stated above, we see no ground to admit the appeal. It is accordingly rejected.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.No.517 of 1993 and C.M.P.Nos.5501 and 5502 of 1993
21st September, 1993.

Sumitha Srinivasan ...Appellant
v.

The Registrar, Anna University, Madras and another ...Respondents.

Education - Admission to first year B.Tech. (Industrial Bio Technology) - Scheduled Caste candidate not securing sufficient marks to be admitted in first round - First semester course commenced on 5.8.1992 - Vacancy arising in seats reserved for Scheduled Castes on 7.11.1992 - Candidate, if can be admitted at the close of the first semester - Direction if can be issued to admit candidate to the first semester of same course in next academic year.

It may be relevant to notice that it is a technical course leading to B.Tech. in Industrial

Bio-technology. More or less under similar circumstances when the High Court issued a direction to admit a student to a medical course, the Supreme Court interfered with such a direction in *Anupam Gupta's case*, A.I.R. 1992 S.C. 932. That being so, it is not possible to hold that the learned single Judge is not justified in refusing to grant the relief. It is contended that, atleast, a direction be issued to admit the petitioner in the first semester of the same course during the academic year 1993-94. It may be pointed out that every year, the admission is made on the results of the entrance-examination held for that purpose. Accordingly, it is stated that this year also, the petitioner appeared for the examination but she has not been able to secure the marks sufficient to admit her in the quota reserved for scheduled castes. Moreover, such a direction can be made only on coming to a conclusion that the denial of admission to the appellant is not justified in law. As already pointed out, the denial cannot be held to be illegal, having regard to the fact that the seat fell vacant only in the month of November, 1992 when the first semester was to come to a close. Therefore, the court finds it difficult to issue a direction to the respondents to admit the appellant in the first semester of the same course during the academic year 1993-94. [Paras. 5 and 6]

Cases referred to:

Subodh Nautiyal v. State of U.P., A.I.R. 1991 S.C. 1131. [Paras. 3, 5]

State of U.P. v. Anupam Gupta, A.I.R. 1992 S.C. 932 [Paras. 3, 5]

Appeal under Clause 15 of the Letters Patent against the order of Bakthavatsalam, J. dated 22.12.1992 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.19289 of 1992 presented under Art.226 of the Constitution of India, to issue a writ of *mandamus* directing the respondents to admit the petitioner to the B.Tech. (Industrial Bio-Technology) Degree Course for the academic year 1992-93 in the Anna University, Madras-25.

C.M.P.No.5501 of 1993: Petitioner presented to grant interim direction to the respondents to admit the appellant/petitioner to the B.Tech. (Industrial Bio Technology) Degree Course, for the academic year 1992-93 in the Anna University, Madras, pending W.A.No.517 of 1993 on the file of this Court, etc.

A.S.Narasimhan for M/s.S.Krishnasamy,

S. Udayakumar and S. Manikumar, for Appellant.
P. Subbaye for M/s. Row and Reddy, for Respondents.

The Judgment of the Court was delivered by K.A. Swami, C.J.: Though C.M.P. Nos. 5501 and 5502 of 1993 filed in the writ appeal have come up for orders, as the arguments in both the C.M.Ps. and the writ appeal are going to be one and the same, we have heard the writ appeal itself for final disposal.

2. This appeal is preferred against the order dated 22nd December, 1992 passed by the learned single Judge in W.P. No. 19289 of 1992. Learned single Judge has rejected the writ petition. Therefore, the petitioner has come up in writ appeal.

3. In the writ petition, the petitioner has sought for issue of a writ in the nature of *mandamus* directing the respondents to admit her to the first year of B.Tech. (Industrial Bio-Technology) Degree Course in Anna University, Madras, for the year 1992-93. The admissions were made on the basis of the results of the entrance examination. The petitioner belongs to scheduled caste category. She did not secure marks sufficient to be admitted in the first round itself. Therefore, she was to wait till the vacancy arose in the seats reserved for Scheduled Castes. Such a vacancy arose only on 7th November, 1992, whereas the first semester course commenced on 5.8.1992. Therefore, the University pleaded its inability to admit her, because the first semester was to come to a close. As per the programme, produced at pages 89 to 92 of the typed set of pages, the first semester course commenced on 5.8.1992 and the last working day of the first semester was 1.12.1992. The second semester was to commence on 30th December, 1992 and the last day of the terms was 18.6.1993. As already pointed out, the vacancy in the seat reserved for Scheduled Castes to which the petitioner was entitled, arose only on 7.11.1992 a few days prior to the closure of the first semester. Learned single Judge following the two decisions of the Supreme Court in *Subodh Nautiyal v. State of U.P.*, A.I.R. 1991 S.C. 1131 and *State of U.P. v. Anupam Gupta*, A.I.R. 1992 S.C. 932, has declined to grant the relief.

4. The contention urged before us is that if only the petitioner/ appellant would have been admitted in November, 1992 to the first semester course, when vacancy in the seat arose, she could have very well attended the summer course and earned

sufficient successful credits for promotion to the second semester and would have been able to continue the course.

5. The question for consideration is as to whether at the close of the first semester, the appellant could have been admitted. It may be relevant to notice that it is a technical course leading to B.Tech. in Industrial Bio Technology. More or less, under the similar circumstances, when the High Court issued a direction to admit a student to a medical course, the Supreme Court interfered with such a direction and held in *Anupam Gupta's case*, A.I.R. 1992 S.C. 932, as follows:

"Considering from this point of view, to maintain excellence the course have to be commenced on Schedule and to be completed within the schedule, so that the students would have full opportunity to study full course to meet their excellence and come at par excellence. Admission in the midstream would disturb the courses and also works an handicap to the candidates themselves to achieve excellence. Considering from this pragmatic point of view we are of the considered opinion that vacancies of the seats would not be taken as a ground to give admission and direction by the High Court to admit the candidates into those vacant seats cannot be sustained".

Similarly, in *Subodh Nautiyal v. State of U.P.*, A.I.R. 1991 S.C. 1131, the Supreme Court held that even though the course had started in September, the course being a technical course, to admit a student 4 months after the commencement of the course, would not at all be correct. That being so, it is not possible to hold that the learned single Judge is not justified in refusing to grant the relief.

6. It is contended that, atleast, a direction he issued to admit the petitioner in the first semester of the same course during the academic year 1993-94. It may be pointed out that every year, the admission is made on the results of the entrance-examination held for that purpose. Accordingly, it is stated that this year also, the petitioner appeared for the examination but she has not been able to secure the marks sufficient to admit her in the quota reserved for scheduled castes. Moreover, such a direction can be made only on coming to a conclusion that the denial of admission to the appellant is not justified in law. As already pointed out, the denial cannot be held to be illegal, having regard to the fact that seat fell vacant only in the

month of November, 1992 when the first semester was to come to a close. Therefore, the court finds it difficult to issue a direction to the respondents to admit the appellant in the first semester of the same course during the academic year 1993-94.

7. For the reasons stated above, the appeal fails and the same is dismissed. However, there will/shall be no order as to costs. Consequently, no order is necessary in the civil miscellaneous petitions.

B.S. --- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Srinivasan, J.

W.P.No. 371 of 1985 25th October, 1993.

T.Rajagopalan ... Petitioner
v.

State of Tamil Nadu represented by the Commissioner and Secretary to Government, Department of Education, Science and Technology, Madras and another ... Respondents.

Constitution of India (1950), Art.14 - Madras Educational Subordinate Service - "Equal pay for equal work" - Teachers holding same posts in 'A' wing schools and 'B' wing schools or aided schools - Discrimination in pay scales - Held not justified.

There is no basis whatever to contend that the teachers employed in 'B' wing or aided schools will stand on a different footing from the teachers employed in 'A' wing schools. The work done by Agricultural Instructors in Government schools is the same as the work done by Agricultural Instructors in other schools. The principle of parity of equal pay for equal work will undoubtedly apply to this case as the Supreme Court in *Haryana State Adhyapak Sangh v. State of Haryana*, A.I.R. 1988 S.C. 1663, has pointed out that there should be no discrimination between the teachers who are doing the same kind of work in different schools. Hence the petitioner, who is employed as an Agricultural

Instructor in an aided school, is entitled to the same scales of pay as applicable to Agricultural Instructors in 'A' wing schools. [Para. 12]

Case referred to:

Haryana State Adhyapak Sangh v. State of Haryana, A.I.R. 1988 S.C. 1663. [Para. 11]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the first and second respondents to fix the scale of pay to the petitioner in the range Rs.600-30-750- 35-890-40-1050 forthwith. K.Chandru, for Petitioner.

P.Shannmugham, Special Government Pleader, for Respondents.

The Court made the following

ORDER: The writ petitioner passed intermediate with Agriculture as subject at Annamalai University. He was working for two years in a temporary post as Agricultural Instructor at Thiruporaithurai Vivekananda High School. He was appointed temporarily by order dated 10.2.1960 at Thavasumuthu Nadar High School, Porayar. Subsequently, he was appointed permanently by an order dated 30.5.1960 in the scale of pay of Rs.75-5- 125-10-175. The school is an approved and aided school. By order dated 22.10.1968 in G.O.Ms. No.1645, Education Department, the State of Tamil Nadu issued *ad hoc* rules for the holders of permanent post as well as temporary posts under the Madras Educational Subordinate Service. The rules were made with retrospective effect from 7.4.1948. One of the posts covered under the rules was the post of Instructor for Agriculture. The qualifications for the post of Instructor for Agriculture are B.A. (Agriculture) or B.Sc. (Agriculture) as well as pass in the Intermediate Examination of the Madras or Annamalai University under the Old Regulations with Agriculture as subject. The Scale of pay was before 1.6.1960 Rs.75-5-125-10-175 and from 1.6.1960 it was Rs.140-5-180-10-250.

2. The order of the Government was given effect only with respect to the Government Schools usually known as 'A' wing schools. It should be mentioned at this stage that the schools which were conducted by the District Boards and taken over later by the Government are known as 'B' wing schools. In so far as the petitioner is concerned, he does not belong to either category and

the school in which he is working is an aided school.

3. When the First Pay Commission revised the scales of pay for Agricultural Instructors from 1.6.1960 the scales were equalised with regard to 'A' wing and 'B' wing schools. The petitioner also got the benefit thereof. But subsequently when the pay scale was revised under G.O.Ms.No.1645, Education, dated 22.10.1968 with effect from 1.6.1960, the revision was given effect only with regard to 'A' wing schools but not given effect with regard to 'B' wing or aided schools. Similarly 'B' wing schools were left out when the second pay commission recommended to revise the scale of pay. In 1971, amendments were brought in by G.O.Ms. No.1457, Finance (Pay Commission) under which the scale of pay was revised for 'B' wing schools and aided schools from 2.10.1970 to Rs.250-10-400. It should be noted that even at that stage, the pay scale was lesser than the pay scale for 'A' wing schools. When the pay structure was revised again in 1972 for 'A' wing schools, other schools were left out. Selection Grade was introduced from 1.4.1973 at the scale of Rs.400-15-430-20-550-25-650. But that was given effect with regard to 'A' wing schools. With reference to 'B' wing and Aided Schools, Selection Grade was given only from 1.4.1975 at the scale of pay of Rs.300-15-420-20-500. When the Third pay commission recommended the revision of pay scales from 1.4.1978 the scale of pay for 'A' wing school became Rs.500-30-750-35-890-40-1050. But with regard to 'B' wing and Aided Schools, it was only Rs.450-20-590-25-740-30-800.

4. Thus after 1.6.1960, the petitioner and the teachers in the 'B' wing schools and aided schools were ignored while the increments and the revision of scales of pay were being given to the staff of 'A' wing schools.

5. The petitioner has also stated in the affidavit that with regard to other posts like pandits and other Language Teachers, the first respondent standardised the scale of pay for all the schools belonging to the three wings. Similarly, with respect to other teachers also uniformity has been brought out with regard to pay scales. But Agriculture Instructors who has passed Intermediate qualifications with Agriculture as subject have not had the benefit of revised scales of pay. It is stated in the affidavit that hardly 10 in number in the whole of State of Tamil Nadu have such qualified

Agricultural Instructors.

6. It is further averred in the affidavit that one Thiru Crystyl John who had possessed Intermediate with Agriculture as subject and who was holding the post of Instructor in Agriculture in the Government Higher Secondary School, Bhoothapandi, K.K. District was given the benefit of revised scale of pay as prescribed in G.O.Ms.No.1645, Education, dated 22.10.1968 and subsequent revision in the pay scales were also given to him. But, on a representation made by people like the petitioner, the Government chose to reduce it and equalise it with that of 'B' wing schools, but later the Government restored the higher scale of pay for the said person.

7. On the above averments, the petitioner has prayed for issue of a writ of mandamus directing the respondents herein to fix the scale of pay of the petitioner in the range Rs.600-30-750-35-890-40-1050.

8. Learned counsel for the petitioner urges that the duties of Agricultural Instructor in the schools belonging to all the three wings are the same and there should be parity in the scales of pay. Even in the case of person who has had the same qualification as that of the petitioner, he has been given a higher scale of pay just because he is working in the Government School which belongs to 'A' wing. It is therefore contended by learned counsel that the petitioner is discriminated and such discrimination is unconstitutional and violates the provisions of Art.14 of the Constitution. It is then contended that as per the new rules which came into force in December 1974, the qualifications for Agricultural Instructors are prescribed as B.Sc. Agriculture, B.A. or B.Sc. with Agriculture as a subject in a degree course or B.Sc., with Agriculture as a subject in the intermediate or B.A. or B.Sc. (Botany or Zoology) with Higher Grade Certificate in Agriculture. If persons possessing the qualifications prescribed above are not available any of the qualification specified therein may be deemed as sufficient. The said qualification are licentiate in Agriculture (Mysore) or S.S.L.C. eligible or completed with Agriculture Higher Grade and T.T.C. in Agriculture or S.S.L.C. eligible or completed with Agriculture under the diversified course (from 1976). It is submitted by learned counsel that the petitioner is having a higher qualification than S.S.L.C. as he has passed Intermediate with Agriculture as subject. Thus even in

the present rules, if graduates are not available, the petitioner will be eligible for appointment. In the present case, however, the petitioner has been in service even before the new rules as well as the new act came into force. The Act came into force on 1.12.1974. Section 20 of the Act reads thus:

“(1) Appointment of teachers and other employees in private Schools: (1) No person who does not possess the qualifications prescribed under Sec.19 shall on or after the date of the commencement of this Act, be employed as teacher or other employee in any private school. (2) Nothing contained in this section or any rule made thereunder shall apply to any person who, on or before the date of the commencement of this Act, is employed as teacher or other employee in any private school”.

9. As per the said provision, the rules or provisions of the Act will not affect any person who is already in service as a teacher. The petitioner having been a teacher even before the Act came into force in undoubtedly qualified under the old rules and he will not be affected by the new rules prescribing higher qualifications. In the circumstances, he should have been treated on par with graduates and the same scales of pay should have been fixed.

10. It is pointed out by learned counsel for the petitioner that the school in which he is working is getting 100% aid from the Government and on that footing also it should be treated on the same lines as the Government Schools and the teachers should be paid the same scales of pay.

11. Finally learned counsel relies upon the fact that with regard to all the other courses like pandits and other language teachers uniformity in scales of pay has been already fixed by the Government. Learned counsel places reliance on the judgment of the Supreme Court in *Haryana State Adhyapak Sangh v. State of Haryana, A.I.R. 1988 S.C. 1663*. The petitioners in that case are teachers employed in various recognised aided private schools in the State of Haryana. The Schools are maintained under private management which receive financial aid from the State Government. The complaint by the petitioners is that they should get their pay on the same scales as the teachers who are employed in Government Schools. They also claimed that all other emoluments such as Dearness Allowance, House Rent allowance, City compensatory allowance, etc. should be paid to them on the same basis. The said contention was

accepted by the Supreme Court. The court said, “In our opinion, the teachers of aided schools must be paid the same pay scale and Dearness Allowance as teachers in Government Schools for the entire period claimed by the petitioners, and that the expenditure on that account should be apportioned between the State and the Management in the same proportion in which they share the burden of the existing emoluments of the teachers.”

12. Learned Special Government Pleader urges that the schools in the ‘B’ wing shall not be treated on par with the ‘A’ wing schools. According to him, the teachers in the said schools were absorbed by the Government only in 1970 or 1978 and they cannot get the same scales of pay as the teachers in ‘A’ wing schools. It is also contended by him that aided schools cannot be treated on the same footing as ‘A’ wing schools and the discrimination is a valid one as it is based upon a reasonable classification. It should be pointed out that the respondents have not filed any counter affidavit in this matter though this petition has been pending from 1985. I am not able to accept the contentions put forward by the Special Government Pleader. The ruling of the Supreme Court will squarely apply to this case. There is no basis whatever to contend that the teachers employed in ‘B’ wing or aided schools will stand on a different footing from the teachers employed in ‘A’ wing schools. The work done by the Agricultural Instructors in Government schools is the same as the work done by the agricultural Instructors in other schools. The principle of parity of equal pay for equal work will undoubtedly apply to this case as the Supreme Court has pointed out that there should be no discrimination between the teachers who are doing the same kind of work in different schools. Hence, the petitioner is entitled to have same pay scales as applicable to the teachers in ‘A’ wing schools.

13. The Special Government Pleader makes a statement that from 1.10. 1984 the Fourth Pay Commission fixed a scale of pay with reference to B.Sc. (Agriculture) Graduates at Rs.905-1545 in all schools and with regard to others, it fixed at Rs.780-1385. But even according to his own statement, private schools were left out in that pay commission report. It is stated that by one Man Commission, the scales were revised and equalised from 1.4.1986 with regard to those schools

also. It is also submitted that the difference in pay prior to that date between non-graduates and graduates was only Rs.50 per mensem. But, learned counsel for the petitioner disputes the correctness of the statement and also submits that there is no warrant for making a distinction between B.Sc. (Agriculture) graduates and the Agricultural Instructors who have got other qualifications. In the circumstances of the case, I am unable to act upon the statement made by the Special Government Pleader. If the Government has already paid salary to the petitioner on a basis equal to that of others, it is open to the Government to bring it to the notice of the petitioner. When the orders of fixation of scale of pay are passed pursuant to my directions in these writ petitions, it will also be open to the petitioner to challenge the same, if he is aggrieved thereby.

14. In the circumstances, I accept the contentions of the petitioner and hold that he will be entitled to have the scales of pay fixed at Rs.600-30-750 - 35-890-40-1050. The Third Pay Commission recommended that scale of pay for teachers in 'A' wing schools with effect from 1.4.1978. The petitioner will also be entitled to the same scales of pay from that date viz., 1.4.1978.

15. The respondents shall work out the arrears of pay due to the petitioner on that basis and pay the same to the petitioner within four months from this date. The writ petition is ordered in the above terms. In the circumstances of the case, there will be no order as to costs.

V.K. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: *Bakthavatsalam, J.*

W.P.Nos.19248 and 19293 to 19295 of 1993
28th October, 1993.

Saraswathi Ammal Educational Trust represented by its Chair-Person and others ... *Petitioners*
v.
University of Madras ... *Respondent.*

All India Council for Technical Education Act (LII of 1987), Sec.10(I) and (K) - Madras University Act (1923), Sec.19(JJ) and Statute 44-A - Private Engineering College - Starting of - Land required for - If falls under Sec.10 of A.I.T.E. Act - Madras University resolution requiring 150 hectares of land for starting the Engineering College if sustainable - If can override Sec.10 - Institution not satisfying requirements - It can be denied - Provisional affiliation.

If sub-clauses (I) and (K) of Sec.10 of the All India Council for Technical Education Act are read together, the court has no hesitation to hold that the requirements of land will fall under the specific provisions for starting the Engineering College under Sec.10 of the Act. While that being so, the Court does not think that the respondent University can still cling on to the resolution which was passed prior to the passing of the Central Act 57 of 1987 and contend that the petitioners require 150 hectares of land for starting the Engineering College. The said requirement is wholly unnecessary. Therefore, the condition imposed by the University with regard to the land requirement is unreasonable when the A.I.C.T.E. has already fixed the norms stating lesser extend of land than that fixed by the University in its resolution. Just because the petitioner institute does not satisfy one of the conditions viz., land requirement, it is not open to the University to reject even provisional affiliation to the Institutions on that score by ignoring Statute 44-A. [Para. 7]

Cases referred to:

Adhiyaman Educational and Research Institutions v. State, A.I.R. 1991 Mad. 246. [Paras. 3, 4, 6, 7]
Noorul Islam Education Trust v. Government of Tamil Nadu, A.I.R. 1991 Mad. 141. [Paras. 4, 7]
Unni Krishnan v. State of A.P., (1993) 1 S.C.C. 654. [Para. 7]

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorarified mandamus* calling for the 1) Proceedings of the respondent made in No.A.II/MVS/ Arunai Engg./93-94 2310 dated 18.10.1993 and quash the said proceedings of the respondent dated 18.10.1993 and consequently direct the respondent University to grant affiliation to the petitioner's college viz. Arunai Engineering College, Mathur for the B.E. Degree course in

Mechanical Engineering B.E. Electrical and Electronics Engineering and B.E. Computer Science Engineering from the academic year 1993-94, (W.P.No.19248 of 1993), etc.

R. Krishnamoorthy, Senior Advocate, for *M/s.R.Muthukumaraswamy A.Jinesen and S.Wilson*, for Petitioner, in W.P.No.19248 of 1993.

Ganguli, Senior Advocate for *K.Govindarajan, Ravindranath, and S.Kadarkarai*, for Petitioner in W.P.Nos. 19294 of 1993.

K.Govindarajan, for Petitioner in W.P.19293 of 93 and 19295 of 1993

Jothimani, for Respondent P.Shanmugham Special Government Pleader (Education).

The Court made the following

ORDER: All the above writ petitions have been filed by certain trusts and another person who had started Private Educational Institutions against the orders of the respondent/University, refusing to grant affiliation.

2. The petitioner in W.P.No.19248 of 1993 is an educational trust established for furthering the educational needs of the people in the rural areas. The said trust desired to establish an Engineering College at Mathur, Thiruvannamalai and acquired about 25 acres of land in Mathur, Thiruvannamalai. The petitioner trust also made necessary arrangements for equipping the college with necessary facilities and took a premises in Thiruvannamalai to campus the first year course in Engineering for the academic year 1993-94. The petitioner seems to have made an application to the respondent for the grant of affiliation for the three year Degree Courses in Mechanical Engineering, Electrical Engineering, Electronics Engineering and Computer Science and Engineering with an intake of sixty students in each of the aforesaid courses. The petitioner obtained an order from this Court directing the All India council for Technical Education (hereinafter called an AICTE) to consider the claims of the petitioner on merits without insisting upon the orders of the State Government. Accordingly AICTE deputed an expert committee to inspect the petitioner's college for the purpose of ascertaining the facilities provided in the institution. The said committee after inspection submitted a report, on the basis of which AICTE passed an order on 19.7.1993 granting approval for the establishment of Aruna Engineering College by the petitioner for the Degree Courses in Mechanical Engineering, Electrical

and Electronics Engineering and Computer Science and Engineering from this academic year 1993-94 with an intake of sixty students in each one of the aforesaid courses. The respondent - University was requested to grant necessary affiliation for the said courses from this academic year (1993-94). Thereafter the University appointed a committee to inspect the petitioner institute. It is seen that the committee members of both AICTE and the respondent university have recommended for the starting of the courses in the petitioner's college from this academic year 1993-94. However, by the impugned order the petitioners have been informed that the syndicate as its meeting held on 15.10.1993 has resolved not to grant affiliation as the proposed institution does not satisfy the University's requirements and as such it is not feasible of compliance with affiliation to the proposed institution. It was under those circumstances, writ petition No.19248 of 1993 came to be filed challenging the order dated 18.10.1993 passed by the respondent- University. Almost identical orders that were passed by the respondent- University are challenged in the other writ petitions also, except the fact that the respective colleges have to be established at different places and in different names by different petitioners.

3. A detailed counter affidavit has been filed by the respondent- university stating that the petitioners are not entitled to get affiliation as they do not satisfy the norms as formulated by the University with regard to the requirement of land. It is stated in the counter affidavit that under Madras University Act of 1923 (Chapter XXVI, Statute 25) every college shall satisfy the syndicate on the points of suitability and adequacy of accommodation and equipments for teaching and that it was in accordance with the powers conferred on the syndicate under Sec.19(JJ) of the Madras University Act. The syndicate of the University of Madras at its resolution passed on 10.3.1986 has approved the recommendations of the Endowment committee stating that in respect of the engineering College for starting of fresh colleges, the campus of the college in urban area recognised as such by the University should have a total extent of 100 acres of land and the campus for a college situated in a rural area recognised as such by the University should have a total extent of 150 acres of land. It is further stated in the counter affidavit that even though the committee appointed by the

University was satisfied about the other requirements, the syndicate in its meeting held on 15.10.1993 having found that the petitioner was not having the land requirements has resolved not to grant affiliation to the petitioner college, which is well within its power. It is also stated in the counter affidavit that the resolution of the syndicate in deciding not to grant affiliation to the petitioner's college was not based on any of the recommendations of the State Government, but was only based on the decisions of the syndicate as approved by the Senate, prescribing the land requirement that the norms formulated by the executive committee of the AICTE is not having any statutory effect, but the resolution passed by the University under its statutory power is still in existence and as such the orders impugned in all these writ petitions are valid in law. Taking me through the decision of a Division Bench of this Court reported in *Adhiyaman Educational and Research Institutions v. State*, A.I.R. 1991 Mad. 246, Mr. Jothimani learned counsel appearing for the University submitted that it is for the University to grant affiliation or withdrawal of the affiliation already granted, however, on grounds which will not have any relation to co-ordination and determination of the standards. It is also stated in the counter-affidavit that it was only in accordance with the powers of the University, as laid down by the Divisional Bench of this Court, the Syndicate has passed the resolution refusing to grant affiliation on the ground of want of land requirement, which is certainly not relating to co-ordination and determinant on standards which are purely the powers of the authority and that the 'powers' of the University are not taken away by the provisions of All India Council for Technical Education Act 52 of 1987 (hereinafter called as Act 52 of 1987).

4. Mr. R. Krishnamoorthy, learned senior counsel appearing for the petitioner in W.P.No.19240 of 1993 has also invited my attention to the decision of the Division Bench of this Court in *Adhiyaman Educational and Research Institutions v. State*, A.I.R. 1991 Mad. 246. Wherein it has been held that the power either to grant affiliation or withdrawal of the affiliation already granted vests only with the AICTE and that the University or the State Government are not competent to do it. Learned Senior Counsel also referred to the above decision A.I.R. 1991 Mad. 246 cited supra in support of his contentions, where it has been held as follows:

"....in my view, after the Cental Act 52 of 1987 came into force, the duty is imposed only on the AICTE for recognising or derecognising any technical institution in the country and it is not open to the State Government or the University to give approval or disapproval to any technical institution. If it is allowed, in my view, each university will be following different yardstick and each State Government will have its own yardstick in deciding the suitability of any technical institution for being approved and this will be against the object and very purpose of the Act 52 of 1987 and it will defeat the object and very purpose of the Act."

Learned senior counsel for the petitioner also relied on the Norms and standards for Engineering Colleges (Degree Programmes) prescribed by the All India Council for Technical Education, New Delhi and pointed out that with an annual intake of 300 students for 60 students each in the branches/ disciplines of the various courses, the total minimum area of land in 7.0 hectares, though the desirable extent of land required is 17.0 hectares. According to the learned senior counsel for the petitioner, when once the AICTE has fixed the extent of land with regard to the establishment of the Engineering Colleges. It is not open to the University to fix another extent of land and if the extent of land is refixed by the university, it will be violative of the principles laid down by the Division Bench of this Court in the decision referred to supra. Learned Senior counsel for the petitioner also relied on the order of Srinivasan. (Who is a party to the Division Bench) in writ petition Nos.14820 and 15108 of 1989, dated 30.1.1990. The said order of the learned single Judge is reported in *Noorul Islam Education Trust v. Government of Tamil Nadu*, A.I.R. 1991 Mad. 141. Learned senior counsel for the petitioner therefore contends that the orders impugned in these writ petitions have got to be set aside only on the ground that the same have been passed on the only footing that the petitioners do not satisfy the land requirement as prescribed by the respondent-University. Virtually, what the learned senior counsel for the petitioner states is that when once the AICTE has taken over the co-ordination and determination of standards in institutions for higher education on research and scientific and technical institutions, it is not open to the university to rely

upon the guidelines which have been fixed prior to the coming into force of the Central Act 52 of 1987 under a pre constitutional enactment. According to the Learned senior counsel for the petitioner, the resolution passed by the University cannot be held to be valid, after coming into force of the Central Act 52 of 1987 and as such, the impugned orders are liable to be set aside. Further, learned senior counsel for the petitioner pointed out that a power is vested with the respondent University under Statute 44-A to grant provisional affiliation, if the only objection of the University is with regard to the extent of land and that even assuming that the said objection is valid in this case, the respondent-University could have very well granted provisional affiliation to the petitioner under Statute 44-A framed under the Madras University Act. That apart, learned senior counsel for the petitioner states that the orders impugned in these writ petitions are cryptic and no reasons are stated in these impugned orders and even on the ground they are liable to be set aside.

5. Mr. Ganguli, learned senior counsel appearing for the petitioner in W.P.No.19294 of 1993 and Mr. Govindarajan, learned counsel for the petitioner in W.P.Nos.19293 of 1993 and 19295 of 1993 took me through the relevant portions of the Statute of the University (at page Nos.241, 249 and 250) and argued that the University is expected to act strictly in accordance with the Statute and the University cannot encroach upon the legislative field, which is left open to the Parliament, when specially the parliament has enacted with the Act 52 of 1987 which came into force only in 1988. Further, the learned senior counsel for the petitioners pointed out that neither the State Government nor the University is entitled to give approval or disapproval for the starting of the college., after the Central Act 52 of '1987 came into existence and that the principle laid down by this Court in both the decisions (cited supra) support the claim of the petitioners in this regard and that on that ground the impugned orders are liable to be quashed. Learned counsel for the petitioners further pointed out that the requirement of land either 150 acres or 100 acres has no bar at all with regard to the starting of an institution or granting affiliation to the Engineering College and that the impugned proceedings which reject the claims of affiliation is based on extraneous and irrelevant considerations which are

beyond the purview or jurisdiction of the respondent University and on that ground the impugned orders are liable to be set aside. Learned counsel for the petitioners also referred to the Circular dated 14.11.1990, wherein it is stated that the All India Council for Technical Education has approved the norms and standards for the conduct of the courses and programmes in the Engineering Colleges. The norms as framed under the Act clearly shows the extent of land which is required for starting of the Engineering College. According to the learned counsel for the petitioners, the requirement of land has nothing to do with the co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions and under such circumstances the respondent University is not empowered to fix their own norms, with regard to the grant of affiliation to the institutions, especially the Engineering Colleges.

6. *Per contra*, Mr.Jothimani, learned counsel appearing for the respondent University contends that the guidelines as framed by the AICTE are not statutory in character and that such of these provisions of the Madras University Act which will not fall under the head co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions will be operative and as such, it is open to the respondent- University to fix their own norms for granting affiliation to the petitioner institutions. According to the learned counsel for the respondent University, the independent decision of the syndicate prescribing land requirement, which is not in any way related to the co-ordination and determination of standards, but only to ascertain the safeguard and financial stability of the institution cannot be challenged by the writ petitioners and when the University has passed a resolution in 1986 prescribing the extent of land, it is not open to the writ petitioners to question the same, as if the Central Act 52 of 1987 has taken away the powers of the University with regard to the affiliation as a whole. According to the learned counsel for the University the requirement of land will not in any way take away the scope of any of the sub clause of Sec.10-A of the Central Act 52 of 1987 and as such, even though the AICTE has granted approval for affiliation to the petitioner institution and the committee members appointed by the University recommended

the grant of affiliation to the petitioner institutions, it is open to the University to impose conditions for affiliation which will not have bearing on co-ordination and determination of standards. When a question as to why the University should not grant provisional affiliation under the Statute 44-A learned counsel for the University relied on the Judgement of the Division Bench of this Court reported in *Adhiyaman Educational and Research Institutions v. State*, A.I.R. 1991 Mad. 246 and pointed out that the Division Bench of this Court has heavily come down on the University with regard to the exercise of power under the Statute 44-A.

7. I have considered the rival submissions made by the learned counsel appearing for either side. The short question that arises for consideration in all these cases is whether the impugned orders can stand scrutiny of this Court in the light of the provisions of the Central Act 52 of 1987 and the judgements of this Court in the two decisions cited supra. It is worthwhile to refer to the observation at this stage made by Mohan.J. in the decision reported in *Unni Krishnan v. State of A.P.*, (1993) 1 S.C.C. 654, wherein it has been held as follows:

"Therefore, as on today it would be unrealistic and unwise to discourage private initiative in providing educational facilities, particularly for higher education. The private sector should be involved and indeed encouraged to augment as such progress as possible in achieving

the constitutional goals in this respect. It could be concluded that the private colleges are the felt necessities of time. That does not mean one should tolerate the so called time. Colleges run in thatched huts with hardly any equipment, with no improvised laboratories, scarce facility to learn in an unhealthy atmosphere, far from conducive to education..... There are institutions which have attained great reputation by devotion and by nurturing high educational standards. They surpass the colleges run by the Government in many respects. They require encouragement."

So, the Supreme Court has recognised that importance of starting of private institutions and has also approved in principle that private institutions have to co-exist along with the other Government institutions. The other question to be considered is with regard to the land requirement as asked for by the University and whether the requirement of the University in this regard can be held to be valid in the light of the guidelines fixed by the AICTE. It is seen from the guidelines fixed by the AICTE that the total extent of land required for an Engineering College with an annual intake of 300 students is as follows:

Total land area : Minimum : 7.0 hectares.

Desirable: 17.0 hectares.

It is also seen from table 10.6 with regard to the land area which is as follows:

Land Area.

S.No	Particulars	Area in Sq.m.		Remarks
		Minimum	Desirable	
1.	Land required to Construct buildings	2 x (13664 + 200 + 1580 + 4410)		
	2 to 3 times plinth area	= 39708		
2.	Playgrounds	22000		
3.	Land for future expansion.	5,956		
	(0 x 0.3 x Plinth area)			
	67664 Sq.mt (say 7 hectares)			
	** (Desirable)			
1.	3 x (17256 + 12805 + 8820)	= 116643		
2.		30000		
3.		19440		
	(0.5 x Plinth area)			
	166083 sq.m. (say 17 hectares).			

As against these guidelines, according to Mr. Jothimani, learned counsel for the University, the resolution passed by the University in 1986 has got to be enforced, which I do not think is correct in law. When especially after the Central Act 52 of 1987 and in view of Sec. 10 of the Act as defined by the Council. If sub clauses (I) & (K) of Sec. 10 are read together, I have no hesitation to hold that the requirement of land will fall under the specific provisions for starting the Engineering College under Sec. 10 of the Act. While that being so, I do not think that the respondent University can still doing on to the resolution which was passed prior to the passing of the Central Act 52 of 1987 and contend that the petitioners require 150 hectares of land for starting the Engineering College. In my view, the said requirement is wholly necessary. Yet another reason given by the University for not granting the affiliation to the petitioner on the ground of financial stability is an interesting feature to be noted. It is stated in the counter affidavit that as far as the land requirements are meant for ascertaining the financial stability of the institution apart from the requirements of the institution to create endowment, which are done by the Universities. According to the University that though the syndicate in the local enquiry has found that the petitioner institutions satisfied the requirements in respect of class rooms, drawing halls, laboratory and workshop, library, staff and hostel etc., the petitioner institutions were not having the land requirement, which in my view has been come down by the Division Bench Judgement of this Court in the decision cited supra *A.I.R. 1991 Mad. 246*. Further the Division Bench of this Court in the said decision has also observed as follows:

“The fact that the Union has not legislated, or refrained from legislating to the full extent of its power does not invest the State with the power to legislate in respect of a matter assigned by the Constitution to the Union. It does not, however, follow that even within the permitted relative fields there might not be legislative provisions in enactments made each in pursuance of separate exclusive and distinct powers which may conflict.”

If there be Union legislation in respect of co-ordination and determination of standards, that would have paramountcy over the State law by virtue of the first part of Art. 254(1) even

if that power be not exercised by the Union Parliament the relevant legislative entries being in the exclusive lists, a state law trenching upon the Union field would still be invalid”. It has been held in *Noorul Islam Education Trust v. Government of Tamil Nadu*, *A.I.R. 1991 Mad. 141* that conditions which may be laid down by the University have to be such other than imposed by the Council. It is worthwhile to extract paragraph 16 of the said decision:

“The Division Bench in the Judgement referred to already, has pointed out that the University can impose only such conditions as will have no relevance to coordination and determination of standards. As laid down by the Bench, it is open to the University to grant or refuse to grant affiliation on grounds which will not impinge upon co-ordination and determination of standards. Hence, it is necessary for the All India Council to lay down the norms which fall within the scope of co-ordination and determination of standards. That will enable the Universities to prescribe such other conditions as may be required for grant of affiliation. It cannot be disputed that the grant of approval or permission by the All India Council is not sufficient to enable any person to start a technical institution. If such person wants the students of the Institution to be examined by any university, the institution has to get affiliation from the University. Such affiliation can be granted only if the conditions laid down by the University are fulfilled. *No doubt the conditions which may be laid down by the University have to be such other than those imposed by the All India Council.*” [*Italics is mine*].

Therefore the condition imposed by the University with regard to the land requirement is unreasonable when the AICTE has already fixed the norms stating lesser extent of land than that fixed by the University in its resolution. I am unable to appreciate the stand taken by the learned counsel for the University in this regard. That apart, the impugned orders do not contain any specific reasons. On the other hand, they simply say that the petitioner institutions do not satisfy the condition as prescribed by the University and is very cryptic. I am of the view, the University ought to have passed reasoned orders. I do not think that the learned counsel for the university can take shelter

under the observations made by the Division Bench of this Court with regard to the grant of provisional affiliation under Statute 44-A. It cannot be said that it is not open to the University to grant provisional affiliation to the petitioner Institutions under Statute 44-A at all in view of the the Division Bench judgment of this Court cited supra. Each case has to be decided on the facts and circumstances of that case. Just because the petitioner Institutions do not satisfy one of the conditions viz. land requirement, it is not open to the University to reject even provisional affiliation to the Institutions on that score by ignoring Statute 44-A. Even assuming that the petitioner institutions do not satisfy the land requirement condition, the University got every power to grant provisional affiliation to the institutions in question under Statute 44-A which specifically provides for such contingencies.

8. Thus, on a careful consideration of the entire materials placed before this Court, this Court is of the view that the orders impugned in these writ petitions are liable to be set aside. Accordingly, the impugned orders in all these writ petitions are set aside and these writ petitions shall stand allowed. However, taking into consideration the peculiar circumstances of these cases and the orders passed by the Supreme Court with regard to the admission of candidates to the professional courses for this academic year, the respondent- University is directed to consider the grant of provisional affiliation to the petitioner Institutions and pass appropriate orders to the said effect on or before 30th October, 1993. I am of the view that taking note of the special features in these cases, the University will pass suitable orders by applying Statute 44-A with regard to the granting of at least provisional affiliation to the petitioner Institutions. No costs.

B.S. ----- *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan and Thangamani, JJ.*

App.Nos.745 of 1983 and 370 of 1984

30th June, 1993.

M.Sethuramalingam ...Appellant
v.

K.Ramalakshmi and others ...Respondents.

Hindu Law - Hindu undivided family - First defendant sole surviving co-parcenar - Three sisters of 1st defendant Executing a release of their interest in ancestral property - Another Sister plaintiff not joining in release - Family not divided at any time - Release; if enures in favour of first defendant only or in favour of the co-owner.

The plaintiff and defendants 2 to 5 are sisters of the 1st defendant. Their father *M* died on 7.11.1968 and the mother in 1980. *M* had left some ancestral properties. Some other items of properties were alleged to have been purchased from the earnings of some business carried on by the plaintiff and her husband. Defendants 2 to 5 delinquished their interests in the properties. The plaintiff filed a suit for partition. The trial court negatived. In appeal, *Held:* It is admitted that the releasee and the releasors are having joint interest in the property and it is not in dispute that there is no other person who is entitled to and having interest in the property besides them. Unless the releasors conveyed their interest in the property in favour of the releasee, a mere release will enure in favour of the estate as such. The releasors are only abandoning their interest in the property. In this case *M* died in 1968 and his wife died in 1980. There is no dispute that the parties continued to be joint and there was no divisions at any time. Hence the release deed enures in favour of the remaining co-owners, namely, the first defendant and the plaintiff.

[Para. 6]

Cases referred to:

Srinivas Krishnarao Kango v. Narayan Devji Kango, (1954)1 M.L.J. 630: A.I.R. 1954 S.C. 379: 1954 S.C.A. 878: 1954 S.C.J. 408: (1955)1 S.C.R. 1: 57 Bom.L.R. 678: 67 L.W. 515. [Para. 15]
Appalasami v. Suryanarayanamurthy, (1947)2 M.L.J. 138: A.I.R. 1947 P.C.189 : 1948 M.W.N. 211: 50 Bom.L.R. 628: 52 C.W.N. 505: I.L.R. 1948 Mad.

440. [Para. 15]

Mudigowla Gowlappa Sankh v. Ramachandra Revgowda Sankh, A.I.R. 1969 S.C. 1076. [Para. 16] Appeals against the decree of the Court of the First Additional Subordinate Judge, Madurai, dated 12.4.1983 in O.S.Nos.123 of 1981 respectively. The Judgment of the Court was delivered by *Srinivasan, J.*: These two appeals arise out of a suit for partition. The earlier appeal is filed by the first defendant in the suit and the later appeal is filed by the plaintiff. The plaintiff and defendants 2 to 5 are the sisters of the first defendant. Their father Mahalingam Chettiar died on 7.11.1968. His wife died in 1980. It is the case of the plaintiff that Mahalingam Chettiar had some ancestral properties in the shape of lands described as item 4 in the plaint schedule, but the income therefrom was not sufficient for maintaining the family. According to her, she carried on business with the help of her husband and with the aid of the income from the business acquired items 1 to 3 which are house properties. In the plaint as originally filed, there were only four items. But, subsequently, by an amendment, two more items were introduced, one being cash of Rs.43,600 and the other being jewels worth Rs.53,000. The amendment was only with respect to the schedule by introducing two more items, but no part of the body of the plaint was amended. No recital was included in the plaint as regards the said cash and jewels. The plaintiff also said that defendants 2 to 5, her sisters had already relinquished their interests in the property on 30.3.1981 under Ex.B-1 and thereafter, the properties were owned in common by the plaintiff and the first defendant only. The plaintiff claimed one half share in items 1 to 3 and 1/4th share in the remaining properties.

2. The suit was contested by the first defendant. According to him, the release by defendants 2 to 5 enured only in his favour and the plaintiff cannot claim the benefit thereof. He contended that items 1 to 3 were also acquired with the aid of joint family nucleus and all the items 1 to 4 were only joint family properties. He also contested the claim of the plaintiff for items 5 and 6, denying the existence thereof. He raised a plea that some of the lands shown in the plaint had already been sold and they were not available for partition.

3. The trial court held that items 3, 7 and 11 to 14 in item No.4 of plaint Schedule had already been sold and they were not available for partition. It

was held that the suit was not barred by limitation and that items 1 to 3 were all acquired with the joint family nucleus. It was found that item 1 was a family dwelling house in which the first defendant resides and the plaintiff cannot claim any share till the first defendant continues to reside there. The claim with reference to items 5 and 6 was negatived. The court granted a decree for accounting with regard to the income. On that basis, a preliminary decree was passed.

4. The plaintiff is aggrieved by the refusal of the court below to grant one half share in items 1 to 3 of the suit properties and is challenging the finding that the properties are all joint family properties. The plaintiff is also challenging the dismissal of the suit with reference to items 5 and 6 and the decree with reference to item No.1. According to the plaintiff, Sec.23 of the Hindu Succession Act will not apply as item No.1 is not a joint family house and the first defendant is dwelling elsewhere. The first defendant is aggrieved by the decree inasmuch as the court below has negatived his claim that the release by defendants 2 to 5 enures only in his favour.

5. In so far as the release is concerned, Ex.B-6 is the document under which defendants 2 to 5 relinquished their interest in the property. No doubt the preamble to the document reads that it is executed in favour of the first defendant and at the end also it is recited that the releasors have no objection whatever to the releasee enjoying the property with absolute right. But, the body of the document does not contain any clause whatever conveying the interest of the releasors to the releasee as such. What all the releasors have done is to abandon their interest in the property. The relevant portion of the document reads thus:

“நீங்களும் நாங்களும் உடன் பிறந்தவர்கள். நம்முடைய தகப்பனார் ராமமகாலிங்கம் செட்டியார் 7.11.68 தேதியிலும் நம் தாயார் மீனாட்சியம்மாள் 1.4.80லும் காலமாகி விட்டார்கள். அன்னார்களுடைய சகல சொத்தும் ஐவேசகளுக்கும் ஆஸ்திகளும் நீங்கள் ஆண் வாரிசுகளாக இருந்து அனுபவித்து வருகிறீர்கள். பெண் வாரிசுகளான எங்களை ஆதரித்தும் விருப்படியும் போஷித்தும் நன்மையும் ஒத்தாசையும் செய்து வந்திருக்கிறீர்கள்... நாங்கள் தினம் 1க்கு ரூ.10,000/- வீதம் ரூ.40,000/-மும் நேரில் ரொக்கம் பெற்றுக் கொண்டுவிட்டபடியால் நம் தகப்பனாருடையவும் தாயாருடையவும்

சகலவித ஐவேஜிகளிலும் சகல சொத்துக்களிலும் எங்களுக்கு கிடைக்கக்கூடிய பாத்தியங்கள் அனைத்தையும் இழந்து இதன்மூலம் விலக்கி தங்கள் கைவசமுள்ள எல்லா ஆஸ்தியில் எங்களுக்கும் எங்கள் வாரிசுகளுக்கும் யாதொரு பாத்தியமும் பின் தொடர்ச்சியில்லை என இவ்விடுதலை எழுதிக் கொடுத்திருக்கிறோம்.”

6. A perusal of the above recitals shows that the releasors relinquished and abandoned their interest, but did not convey it to the releasee. It is also admitted by the first defendant as D.W.1 that the sum of Rs.40,000 paid by him to the four sisters as consideration for obtaining the release was taken from out of the family funds. Hence, there is no substance in the contention of the first defendant that the release would enure only in his favour. It is argued by learned counsel that if a release is executed by a coparcener in favour of another coparcener, then it may enure in favour of the entire joint family, but the said principle would not be applicable when there is a sole surviving coparcener and in this case the first defendant is the only surviving coparcener and the sisters are not coparceners. We do not agree. It is admitted that the releasee and the releasors are having joint interest in the property and it is not in dispute that there is one other person who is also entitled to and having interest in the property besides them. Unless the releasors conveyed their interest in the property in favour of the releasee, a mere release will enure in favour of the estate as such. The releasors are only abandoning their interest in the property. In this case, Mahalingam Chettiar died in 1968 and his wife died in 1980. There is no dispute that the parties continued to be joint and there was no division at any time. Hence, the release deed enures in favour of the remaining co-owners, namely, the first defendant and the plaintiff. We reject the contention of the first defendant as regards the effect of the release deed.

7. Before considering the main question argued by the plaintiff as regards the character of properties in items 1 to 3, we will dispose of the other minor contentions. Items 5 and 6 are, as stated earlier, cash of Rs.43,600 and jewels worth Rs.53,000. There is no averment whatever in the plaint that the said items are in existence and available for division. The evidence adduced on the side of the plaintiff is absolutely worthless. There is nothing on record to prove that cash of Rs.43,600 was available at the time of the suit. According to the

plaintiff, the cash was invested by the first defendant in the business run by him under the name 'Madurai Sakthi Calendar Company'. But, the books of account relating to the said company do not show cash balance of Rs.43,000 and odd. In any event, it should be noted that the first defendant has paid a sum of Rs.40,000 to the other sisters from the joint funds. In those circumstances, we cannot accept the case of the plaintiff that a sum of Rs.43,600 was available for partition among the parties.

8. As regards jewels, the position is equally worse. There is no evidence to show that the jewels were ever in existence. P.W.1, the husband of the plaintiff, has given evidence that his mother-in-law told him about the weight and the nature of the jewels. It is purely hearsay. The plaintiff has not chosen to go into the witness box to speak about the jewels which were available in the family. If really the jewels were in existence, it is for the plaintiff to prove the same. In this case, the plaintiff has miserably failed to prove the existence of the jewels for division. Hence, that case is rejected.

9. As regards item No.1, the court below has taken the view that Sec.23 of the Hindu Succession Act would apply as it is a family house in which the first defendant is dwelling. The evidence on record shows that the first defendant is not living in item No.1. There is no evidence to hold that the said item is treated as family dwelling house and that the first defendant is living therein. Hence, we are of the view that the court below is wrong in holding that Sec.23 of the Hindu Succession Act would apply. The court below has taken the view that this item was obtained by Mahalingam Chettiar in the partition between him and his brother in 1930. The said property was purchased only in 1963 under Ex.B-2. It was not one of the properties which Mahalingam Chettiar got in the family partition in 1930. Hence, the decree of the court below with regard to item No.1 is unsustainable and we hold that item No.1 is also divisible and the plaintiff will be entitled to a share therein.

10. The only question that remains to be considered is whether items 1 to 3 are joint family properties or self-acquired properties of Mahalingam Chettiar. It is the case of the plaintiff that Mahalingam Chettiar was doing business along with her husband as the family properties did not yield sufficient income, even to maintain the family. There is no evidence to prove the business which

is said to have been carried on by Mahalingam Chettiar and P.W.1. There is not even a whisper as to when the said business was commenced. The only witness who has spoken about the business is P.W.1 who deposed that he was carrying on business with Mahalingam Chettiar. According to him, they used to purchase old jewels and sell the same for higher price. But, no scrap of paper has been produced to show that any business was conducted by Mahalingam Chettiar and P.W.1. No account has been maintained. Admittedly, P.W.1 was employed in other shops under strangers. In the absence of any acceptable evidence, we are not prepared to believe the evidence of P.W.1 that he was carrying on business with Mahalingam Chettiar.

11. As regards the income from the lands, which were admittedly ancestral properties and obtained by Mahalingam Chettiar in the family partition, P.W.1 has stated in the chief-examination that the yield from the lands was 100 to 120 bags per year. He adds that it was not sufficient for family maintenance. In the cross-examination he has stated that the yield was 125 bags per year. Thus, the only evidence adduced on the side of the plaintiff itself shows that the lands were yielding not less than 125 bags per year. The version of P.W.1 that it was not sufficient for the maintenance of the family is hardly acceptable. It is not in dispute that the family initially comprised of only eight members including Mahalingam Chettiar and his wife when all the daughters were round. For eight members in a family, it is impossible to visualise that 120 bags of paddy was not sufficient for maintaining the family. There would have been sufficient surplus even if the members of the family were used to consume more than the normal quantity.

12. Apart from that, the evidence shows that the first two daughters, viz., defendants 2 and 3 were married long before 1945. The third daughter, viz., the plaintiff was married in 1950. The fourth daughter was married in 1960-61. The first defendant was married in 1971 and the fifth daughter was married in 1976 i.e., after the death of Mahalingam Chettiar. It is proved in evidence that some lands of the family were sold for meeting the expenses of the marriage of defendants 4 and 5. Thus, even by 1950, three members of the family had gone out and the yield of 125 bags per year would have been much more than sufficient for their sustenance and there would have been

considerable surplus.

13. We have positive evidence in Ex.B-4 which is a compromise decree in O.S.No.460 of 1927 on the file of the court of District Munsif, Madurai. The decree is dated 13.2.1930. Under that decree, Mahalingam Chettiar was allotted items 12 to 22 and 42 to 50 of part I of 'A' Schedule and items 9 to 17 of Part III of 'A' Schedule. The decree gives the value of those properties as Rs.57,000. One can easily appreciate if the value of the properties in 1927, which was the year in which the suit was filed was Rs.57,000 such value would have certainly multiplied and increased several folds even by 1950 or so. The three items which are now in dispute were purchased only in 1957 and 1963. Item No.2 was purchased under Ex.B-3 on 11.9.1957 for a sum of Rs.7,250. Item No.3 was purchased for a sum of Rs.4,750. The document of purchase is not marked in court. However, the agreement for the sale is marked as Ex.A-1. That is dated 27.12.1956. The agreement stands in the name of P.W.1. According to the agreement, the sale should be completed within a month therefrom and it can be inferred that the sale was completed somewhere in 1957. That is clear from the address of P.W.1 found in Ex.A-2 dated 23.8.1957. It is stated that P.W.1 is residing in item No.3. Hence, it can be inferred that item No.3 was purchased before 23.8.1957. Item No.1 was the last of the items purchased under Ex.B-2 dated 12.12.1962. The total consideration is Rs.10,000 out of which Rs.8,500 went in discharge of an 'Othi' dated 13.6.1962. It should be noted that the vendors under Ex.B-2 were P.W.1, his father and other members of his family. The othi was executed on 13.6.1962 and the principal amount of Rs.8,500 was shown as part of sale consideration. A sum of Rs.1,000 was paid by way of adjustment as against rent payable by the vendors on a leaseback arrangement. Only a sum of Rs.500 was paid in cash at the time of sale. Thus, in 1962 Mahalingam Chettiar had spent Rs.8,500 for the purchase of item No.1. Therefore, it is clear that money for all the three items had been paid out between 1957 and 1963 and the evidence on record is sufficient to infer that at that time the income from the family properties was more than sufficient for being utilised for such purchases.

14. Learned counsel for the plaintiff has invited our attention to the following passage in Mulla's Hindu Law, 16th Edition, Paragraph 233 at pages

259-260:

"(2) No presumption that a joint family possesses joint property. --There is no presumption that a family, because it is joint, possesses joint property or any property. When in a suit for partition, a party claims that any particular item of the property is joint family property, or when in a suit or a mortgage, a party contends that the property mortgaged is joint family property the burden of proving that it is so rests on the party asserting it.

To render the property joint the plaintiff must prove that the family was possessed of some property with the income of which the property could have been acquired or from which the presumption could be drawn that all the property possessed by the family is joint family property or that it was purchased with joint family funds, such as the proceeds of sale of ancestral property or by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognizance of a court in the same way as any other fact, namely, by evidence. There is at times indiscriminated use of the expression 'presumption' in this context. It is to be understood to indicate those presumptions of fact which may be said to arise in considering whether the burden of proof has or has not been discharged by a party. It is not as there is any general solvent for all cases.

Where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition to establish affirmative that the property was acquired without the aid of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired."

15. He has also relied on the judgment of the Supreme Court in *Srinivas Krishnarao Kango v. Narayan Devji Kango*, (1954)1 M.L.J. 630: 1954 S.C.J. 408: (1955)1 S.C.R. 1: 57 Bom.L.R. 678: 67

L.W. 515: 1954 S.C.A. 878: A.I.R. 1954 S.C. 379 and referred to the following passage:

"(10) Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may well form the foundation of the subsequent acquisitions. There are not abstract questions of law, but questions of fact to be determined on the evidence in the case.

In *Appalaswami v. Suryanarayanamurthi*, (1947)2 M.L.J. 138: I.L.R. 1948 Mad. 440: 1948 M.W.N. 211: 50 Bom.L.R. 628: 52 C.W.N. 505: A.I.R. 1947 P.C. 189, the nucleus of Rs.7,220 included 6/16th share in a rice mill and outstandings of the value of Rs.3,500, and as the acquisitions in question were made during a period of 16 years it was possible that the joint family income might have contributed therefor. But in the present case, the finding of the court is that the income from the lands was not sufficient even for the maintenance of the members, and on that, they were right in holding that the plaintiff had not discharged the initial burden which lay on him. But even if we are to accept the contention of the appellant that on proof of the existence of the watan lands the burden had shifted on to the defendants to prove that the acquisitions were made without the aid of joint family funds, we must hold on the facts that that burden had been discharged."

16. Again he relied on the judgment of the Supreme Court in *Mudigowda Gowdappa Sankh v. Ramachandra Revgowda Sankh*, A.I.R. 1969 S.C. 1076 and the following observation at page 1080:

"The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint,

possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate."

17. There is no doubt that the proposition of law is well settled. But the only question is whether it is applicable to the present case. We are not applying any rule of presumption in this case. The evidence available on record has been referred to by us. The evidence shows that the only source of income which Mahalingam Chettiar had was the ancestral lands which were allotted to him in the family partition. There is no evidence to show that he had any other source of income. The case of business set up by the plaintiff had been negated. There is also evidence available to prove the income from the properties. We have held that the said income is more than sufficient for the maintenance of the family and there would have been sufficient surplus. Apart from that, the evidence also shows that most of the lands which were allotted in the family partition to Mahalingam Chettiar were available at the time of suit and only a few items had been sold by Mahalingam Chettiar during his life time and some items were sold by the first defendant at the instance of his mother after the death of Mahalingam Chettiar for the purpose of meeting the expenses of the marriage of his sister. It is seen from the evidence that Mahalingam Chettiar had sold some properties which were allotted to him in the family partition and purchased house properties with the aid thereof. P.W.1 has himself admitted that his marriage was performed in a property situated in North Avani Moola Street which was later sold by Mahalingam Chettiar. Hence, the version of P.W.1 that when Mahalingam Chettiar came to Madurai in 1940 he had no property in the town of Madurai is not

acceptable. Thus, the evidence on record is more than sufficient to draw the only inference possible that the family had sufficient nucleus with the aid of which items 1 to 3 could have been purchased. We also hold that items 1 to 3 could not have been purchased with the aid of any other fund. Hence, we affirm the finding of the trial court that items 1 to 3 joint family properties and the plaintiff will be entitled only to 1/4th share therein.

18. In the result, Appeal No.745 of 1983 is dismissed. Appeal No.370 of 1984 is partly allowed with reference to item No.1 of the suit properties. Consequently, clause (1) of the preliminary decree passed by the trial court shall be substituted by the following clause:

"It is declared that the plaintiff will have 1/4th share in items 1,2 and 3 of the plaint schedule and items 1, 2, 4 to 6 and 8 to 10 in item 4 of the plaint Schedule."

Clause (2) shall be modified by including plaint item No.1 therein in addition to the items mentioned therein. The other clauses shall remain as they are and the decree passed by the trial court stands confirmed. The parties will bear respective costs.

B.S. ---- *App.No.745 of 1983 dismissed/
App.No.370 of 1984 partly
allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and S.M.Ali Mohamed, JJ.*

O.S.A.No.248 of 1986 8th July, 1993.

Aravind Laboratories ...Appellant
v.

V.A.Samy Chemical Works ...Respondent.

*Trade and Merchandise Marks Act (XLIII of 1958),
Sec.106 - Suit for infringement of trade mark or for
passing off - Reliefs in - Court finding that there has
been an infringement of trade mark - Preliminary
decree for accounting, if should follow - Rule for
accounting of profits - Rule as to substantial*

damages - Onus of proof - When shifts to defendant to show that he was unaware that the trade of mark of plaintiff was on the register.

The court does not find any force in the contention in a suit for infringement and for accounting of profits that on a finding that there has been an infringement of plaintiff's trade mark, a preliminary decree for accounting should follow as a matter of course. The rule, will require, for accounting of profits, the plaintiff should establish that profits were made by the defendant knowing that it was transgressing the plaintiff's right. The rule as to substantial damages is that the plaintiff must lay foundation that on account of the defendant's trade, it has suffered substantial injury in its trade and it has become entitled to the substantial damages. In other words, the plaintiff may lay the foundation of actual damage and give proof of it before a decree for any substantial damages is given to it. True, the onus will be on the defendant to satisfy the court that he was unaware and had no reasonable ground of believing that the trade mark of the plaintiff was on the register or that the plaintiff was the registered user or that the trade mark of the plaintiff was in use and that when he became aware of the existence and nature of the plaintiff's right in the trade mark, he immediately stopped to use the trade mark complained of. But this onus will shift on the defendant only after the plaintiff discharged his burden by establishing that the defendant made profits by using a trade mark in violation of the plaintiff's right. This the plaintiff has to do before the defendant is asked to establish that he was unaware and had no reasonable ground for believing at the time when he commenced using the trade mark that the trade mark of the plaintiff was on the registers or that the plaintiff was the registered user or that the trade mark of the plaintiff was in use from before and that he had stopped using the trade mark complained of, when he came to know of the existence and nature of the plaintiff's trade mark.

[Paras.11 & 12]

Cases referred to:

Juggi Lal Kamalapat v. Swadeshi Mills Company Limited, (1929) I.L.R. 51 All. 152. [Para. 6]
Draper v. Trist and Tristbes Tos Brake Linings Ltd., (1939) 61 R.P.C. 429. [Para. 7]
Marzetti v. Williams I Barnewall and Alderson, 415. [Para. 7]
Rollin v. Steward, 14 Common Bench 595. [Para. 7]

Gujarat G. and M. Co. v. Swadeshi Mills Company, A.I.R. 1939 Bom. 118: 41 B.L.R. 182: 181 I.C. 17. [Para. 8]

Juggi Lal Kamalapat v. Swadeshi Mills Company Limited, A.I.R. 1929 P.C. 11. [Para. 8]

Colebeam Palmer Limited v. Stock Affiliates Private Ltd., 1972 R.P.C. 303. [Paras. 9 & 10]

Edelsten v. Edelsten, (1863) De.C.J. and S. 185. [Para. 9]

Slazenger and Sons v. Spalding and Brothers, (1910) 1 Ch.D. 257. [Para. 9]

Moet v. Couston, (1864) 33 Beav. 578. [Para. 9]

O.S. Appeal under Clause 15 of the Letters Patent against the order of Sengottuvelan, J. dated 8.7.1986 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S.No.434 of 1984.

The Judgment of the Court was delivered by *Mishra, J.*: The appellant herein filed C.S.No.434 of 1984 for (1) a permanent injunction restraining the defendant/respondent from manufacturing and selling and offering for sale the offending trade mark "Rani Eyevix" which is deceptively similar to the plaintiff's registered trade 'Eyetex'; (2) directing the defendants to render a true and faithful account of the profits earned by the defendant through the manufacture and sale of the offending trade mark "Rani Eyevix" and directing such profits to be paid to the plaintiff by way of damages for the infringing and passing off committed by the defendant, and (3) directing the defendants to surrender to plaintiffs all the cartons, labels and any other printed matters containing or consisting of the offending "Rani Eyevix" trade mark together with the blocks used for the purpose of printing the same for destruction.

2. The trial court has granted the relief of injunction and directed the defendants to surrender to plaintiffs all the cartons, labels and other printed materials containing the offending trade mark "Rani Eyevix" together with the blocks for destruction, but has however declined to grant any damages for the infringing and passing off committed by the defendants as it has found,

"But the plaintiff has not let in any evidence regarding the extent of sales made by the defendant. Further, the plaintiff has also not let in any evidence with reference to the damages though he prayed for such a relief in the plaint. In the absence of such evidence the plaintiff is not entitled to any relief in this regard."

The present appeal is accordingly preferred against the above finding and rejection of the prayer for accounting and recovery of profits earned by the defendant by way of damages, on account of infringement and passing off.

3. The Trade and Merchandise Marks Act, 1958 (hereinafter referred to as 'the Act'), has made a provision under Sec.106, thereof as to reliefs in suits for infringement or for passing off, Sec.106(1) says that,

"The relief which a court may grant in any suit for infringement or for passing off referred to in Sec.105 includes an injunction (subject to such terms, if any, as the court thinks fit) and at the option of the plaintiff, either damages or an account of profits, together with or without any order for the delivery up of the infringing labels and marks for destruction or erasure".

The Sub-sec.(2) of Sec.106 of the Act provides that:

"Notwithstanding anything contained in Sub-sec.(1), the Court shall not grant relief by way of damages (other than nominal damages) or on account of profits in any case--

(a) Where in a suit for infringement of a trade mark, the infringement complained of is in relation to a certification of trade mark; or

(b) Where in a suit for infringement the defendant satisfies the court--

(i) that at the time when he commenced to use the trade mark complained of in the suit he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was on the register or that the plaintiff was a registered user using by way of permitted use; and

(ii) that when he became aware of the existence and nature of the plaintiff's right in the trade mark, he forthwith ceased to use the trade mark in relation to goods in respect of which it was registered; or

(c) Where in a suit for passing off the defendant satisfies the court--

(i) that at the time when he commenced to use the trade mark complained of in the suit he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was in use; and

(ii) that when he became aware of the existence and nature of the plaintiff's trade mark, he forthwith ceased to use the trade mark

complained of."

4. The plaintiff/appellant is the registered owner of 25 different types of products known in the market by the trade mark "eyetex", registered as early as 1946, under the Trade and Merchandise Marks Act, 1940. The defendant/respondent has been found to have manufactured and sold its products under the trade mark "Rani Eyevix" deceptively similar to the registered trade mark of the plaintiff "eyetex". It was in order when the appellant/plaintiff instituted the suit and asked for an injunction, he had an option either to ask for damages or an account of profits together with or without asking for delivery of infringed labels and printing materials for destruction and erasure. In its opinion, however, the plaintiff asked the court to direct the defendant to render a true and faithful account of profits earned by the defendant through the manufacture and sale of the offending goods and to direct such profits to be paid to it, by way of damages for infringement and passing off by the defendant asked for the delivery of infringing labels and marks and other printing materials consisting of the offending trade mark "Rani Eyevix" together with the blocks for destruction.

5. Before the 1940 Act, the Trade Mark violation suits for injunction, damages or accounts of profits were entertained under the common law. The courts invariably accepted the principles applied in granting the relief by way of damages or accounts of profits in the case of torts and other kind of infringements and action for passing off and that the plaintiff at his option should seek damages or an account of profits but not both, the distinction between an account of profits and damages being that by the former the infringer is required to give up his ill-gotten gains to the party whose rights he has infringed, by the latter he is required to compensate the party wronged for the loss he has suffered.

6. In *Juggi Lal Kamalapat v. Swadeshi Mills Company Limited*, (1929) I.L.R. 51 All. 152, the Privy Council had an occasion to consider a case of a milling company, who dealt with largely in Indian cloth and who in connection with the sale of that Indian Cloth used certain trade marks, which were infringed by another trader and who filed a suit for injunction and for accounting or profits, but at the trial, the claim for accounting of profits was given up, and instead the claim for damages, was made.

The Privy Council found that the evidence was not satisfactory to show any act of infringement and thus affirmed the relief of injunction. Turning to the question of damages, their Lordships observed that it cannot be said that there is any cut and dried rule which can be laid down by a Court of Law for the estimation of damages in case like this.

7. In *Draper v. Trist and Tristbes Tos Brake Linings Ltd.*, (1939) 61 R.P.C. 429, in the Court of Appeal, Goodard, L.J. in his concurring judgment with Clauson, J., said:

"We are concerned in this case only with a claim for damages, which is essentially a legal notice, a claim at law. This class of action was well-known to the Common Law and Precedents have been cited in the course of the case, from works on Pleading, as showing what it was necessary to plead.

I find it of some assistance in coming to a conclusion in this case, to analyse in my own mind what exactly is the cause of action and the right of action which are two different things. The action is one of that case which is known as an action on the case, a kin to an action of deceit. In an action on the case, the cause of action is the wrongful act or default of the defendant. The right to bring the action depends on the happening of damage to the plaintiff. A man for instance, may be negligent; and the consequence of his negligence may not cause damage for twelve months. The cause of action is the breach of duty; the right to bring the action depends upon the happening of the damage. But this class of case forms an exception, or an apparent exception, to the ordinary action of deceit; because, in an ordinary action of deceit, the plaintiff's cause of action is false representation, but he cannot bring the action until the damage has accrued to him by reason of that false representation.

But, in passing-off cases, the true basis of the action is that the passing off by the defendant of his goods as the goods of the plaintiff injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business. The law assumes or presumes, that if the goods will of a man's business has been interfered with by the passing off of goods, damage results therefrom. He need not wait to show that damage has resulted, he can bring his action as soon as he can prove the passing

off; because it is one of the class of cases in which the law presumes that the plaintiff has suffered damage.

It is in fact, I think, in the same category in this respect as an action for libel. We knew that for written defamation a plaintiff need prove no actual damage. He proves his defamation. So, with a trader; the law has always been particularly tender to the reputation and goodwill of traders. If a trader is slandered in the way of his business an action lies without proof of damage. That does not mean that the plaintiff cannot give evidence showing that he has suffered damage in fact. The more he can show that he has suffered damage in fact, the larger of damages he can recover. The more the defendant can show that he has suffered no damage in fact, the less he will recover. In the case of a libel published to a person who knew the true facts, and to him only, although the plaintiff would have a cause of action, the damage would probably be small. In the case of a libel published in a newspaper with a large circulation, the damages would naturally be larger.

The class of case to which I have referred in argument, which is very nearly akin to this class of case, is one which is an exception to the law of damages for breach of contract; that is to say, the action by a trader for the wrongful dishonour of his cheque. In the case of *Marzettgi v. Williams, I Barnewall and Alderson*, 415, it was decided that a person could bring an action for the wrongful dishonour of a cheque without proving actual damage. But it was later decided in the case of *Rollin v. Steward*, 14 *Common Bench* 595, that in the case of a trader substantial damages could be given for the wrongful dishonour of a cheque; because the act of a bank in dishonouring a cheque must be detrimental to a trader. The proper direction to the jury, as laid down by Lord Campbell in that case, was this: The jury ought not to "limit their verdict to nominal damages, but should give such temperate" damages as they may judge to be reasonable compensation for the injury the "plaintiff must have sustained from the dishonour of his cheque."

8. In *Gujarat G. and M. Co. v. Swadeshi Mills Company*, A.I.R. 1939 Bom. 118: 41 B.L.R. 182: 181 I.C. 17, a Division Bench of the Bombay High Court had an occasion to consider the question as

to when injunction and damages, nominal or substantial, are granted in a case of infringement of trade mark. Relying upon the decision of the Privy Council in *Juggi Lal Kamalapat v. Swadeshi Mills Company Limited*, A.I.R. 1929 P.C. 11, the Bombay High Court has observed that:

"As held in 1896 A.C. 199 and in the other cases cited in 18 Bom.L.R. 206, it is sufficient if the plaintiffs show that the defendants have put into the hands of an unscrupulous retailer the means of deceiving the ultimate purchasers. In my opinion, the evidence does establish this.

There is also the other point which I have already mentioned. It may well be that putting the No.24,410 on the defendants' 36" dhoties is only the first step in their campaign to capture the plaintiff's trade. If the same number were put on dhoties of the same size as plaintiff's it cannot be disputed that the damage to plaintiffs' trade might be extremely serious. If there is any risk of damage as things are and I am satisfied that there is—the plaintiffs are entitled to protection on once and need not wait until the position gets worse. I think the trial court is right in granting the injunctions prayed for. The position is different as regards the plaintiffs' claim for an account. An injunction may be granted and nominal damages awarded merely on proof of infringement of a trade mark and reasonable probability of damage to the plaintiffs' trade. But substantial damages can only be awarded on proof of actual damages. The plaintiffs have asked in the plaint for an account of the defendants' profits. It has been conceded in this case however that in view of the decision of the Privy Council in 51 All. 182, the criterion is whether there has been any falling off in the plaintiffs' own sales of these dhoties by reason of the defendants having printed their number. But no serious attempt has been made to show by evidence that so far there has been any falling off at all. It is not even alleged by any witness, except Ex.92, whose testimony is obviously worthless since he has never handed either the plaintiffs' goods or the defendants'. The record does not support the suggestion of the learned counsel for the respondents that the evidence on the issue of damages was reserved. It is possible and on the whole I think rather probable, that the action

taken by the plaintiffs was in time to prevent their trade being materially affected. But however, that may be they are not entitled to an account for the purpose of assessing substantial damages because their evidence does not lay the foundation for that form of relief. They are entitled to nominal damages only which we assess at Rs.100. In the result, the decree of the trial court will be confirmed so far as the injunctions are concerned, but the order directing an account will be set aside and instead the plaintiffs will be awarded Rs.100 nominal damages".

9. The circumstances under which the relief of accounting is granted and what are the principles therefor are stated in a judgment of the High Court of Australia in *Colebeam Palmer Limited v. Stock Affiliates Private Ltd.*, 1972 R.P.C. 303. In the said judgment it is observed:

"Damages or an account of profits are forms of relief which ordinarily are to be had in a trade mark case only as ancillary to an injunction...."

"The distinction between an account of profits and damages is that by the former the infringer is required to give up his ill-gotten gains to the party whose rights he has infringed, by the latter he is required to compensate the party wronged for the loss he has suffered. The two computations can obviously yield different results, the plaintiffs' loss is not to be measured by the defendants' gain nor a defendants' gain by the plaintiffs' loss. Either may be greater, or less, than the other. If a plaintiff elects to take an inquiry as to damages the loss to him of profits which he might have made may be a substantial element of his claims. See *Mayne on Damages*, 11th Edition, 1946, p. 71. But what a plaintiff might have made had the defendant not invaded his rights is by no means the same thing as to what the defendant did make by doing so.

It can hardly be said that a registered trade mark is not a species of property of the person whom the statute describes as its registered proprietor and which it permits him to assign. Griffith, C.J., spoke of a trade mark as: "the visible symbol of a particular kind of incorporeal or industrial property consisting in the right of a person engaged in trade to distinguish by a special mark goods in which he deals, or with which he has dealt, from the

goods of other persons.”

The remedy of injunction now provided by statute to prevent the infringement of a registered trade mark, reflects the history of the way in which equity protected and established a property in trade marks before they were recognised by statute. And the account of profits retains the characteristics of its origin in the Court of Chancery. But a defendant is made to account for, he is then stripped of profits he has made which it would be inconceivable that he retain. These are profits made by him dishonestly, that is, by his knowingly infringing the rights of the proprietor of the trade mark. This explains why the liability to account is still not necessarily co-extensive with acts of infringement. The account is limited to profits made by the defendant during the period when he knew of the plaintiffs' rights. So it was in respect of common law trade marks. So it still is in respect of registered trade marks. *Edelsten v. Edelsten*, (1863) *De.C.J. and S.* 185, *Slazenger and Sons v. Spalding and Brothers*, (1910) *1 Ch.D.* 257, *Moet v. Couston*, (1864) *33 Beav.* 578. I think that it follows that it lies upon a plaintiff who seeks an account of profits to establish that profits were made by the defendant knowing that he was transgressing the plaintiffs' rights.”

10. We are not required, in this case, to work out as to what is meant by profits and how are they to be ascertained or when a decree for accounting for profits is passed and how the courts will ensure that accounts are properly held and profits are accordingly determined. The law as to damages, as we understand, is that on proof of infringement of a trade mark and reasonable probability of damage to the plaintiffs' trade, the court can grant injunction and award nominal damages, but substantial damages can only be awarded on proof of actual damages. The plaintiff in such a case will be required to lay a foundation by showing the extent of damages. The plaintiff may not have a case for the grant of substantial damages in case he is found to have taken action well in time to prevent his trade being materially affected. The accounts of profits retains the characteristics of its origin in the Court of Chancery as an absolute one in the case of *Colebeam Palmer Limited v. Stock Affiliates Private Ltd.*, 1972 *R.P.C.* 303. But if a defendant is made to account for, he is then stripped of

profits he has made which it would be inconceivable that he retain, but it will be required in such a situation, that the plaintiff shows that the defendant made profit dishonestly and knowingly infringed the plaintiffs' right in the trade mark. The account is limited to profits made by the defendant during the period when he knew of the plaintiffs' rights. In such a case it will be for the plaintiff who seeks an accounting of profits to establish that profits were made by the defendant knowing that he was transgressing the plaintiffs' rights.

11. The contention of the learned counsel for the appellant, is that the trial court was in error in saying that the plaintiff has not let in any evidence regarding the extent of sales made by the defendant to deny to the plaintiff the prayer for accounting of profits by way of damages. We do not find any force in this contention in a suit for infringement and for accounting of profits that on a finding that there has been an infringement of plaintiff's trade mark, a preliminary decree for accounting should follow, as a matter of course. There is no evidence on record in this case to show that the defendant made any profit after it was subjected to notice by the plaintiff that it was violating its (plaintiff's) trade mark. The learned single Judge has found:

“According to P.W.1, after notice Ex.P-6 the defendant has stopped marketing the product in the carton with the mark “Eyevix” but prefixed the mark with the syllable “Rani” and began to market his products with the mark “Rani Eyevix”. The case of P.W.1, is that after the issue of Ex.P-6 the defendant's product was not available in the market for sometime and had reappearance only prior to the suit. Under the circumstances, there is no proof adduced by the defendant that he had been adopting the marks for a considerable period. Further, the defendant has not shown that by adopting the mark “Rani Eyevix” for considerable period he had made such progress in the business and that if he is prevented from using such mark he will be put to irreparable loss”.

12. It, therefore follows that when it was brought to the notice of the defendant that the plaintiffs' trade was allegedly violated by it, it had stopped marketing its product and when it reappeared again, the plaintiff immediately came to this Court. The rule, that we have noticed will require for accounting of profits, the plaintiff should

establish that profits were made by the defendant knowing that it was transgressing the plaintiff's right. The rule as to substantial damages is that the plaintiff must lay foundation that on account of the defendant's trade, it has suffered substantial injury in its trade and it has become entitled to the substantial damages. In other words, the plaintiff may lay the foundation of actual damage and give proof of it before a decree for any substantial damages is given to it. We are, however, satisfied that the view, which we have taken is also supported by the provisions in sub-sec.(2) of Sec.106 of the Trade and Merchandise Marks Act, 1958 as extracted above. True, the onus will be on the defendant to satisfy the court that he was unaware and had no reasonable ground of believing that the trade mark of the plaintiff was on the register or that the plaintiff was the registered user or that the trade mark of the plaintiff was in use and that when he became aware of the existence and nature of the plaintiff's right in the trade mark, he immediately stopped to use the trade mark complained of. But this onus will shift on the defendant only after the plaintiff discharged his burden by establishing that the defendant made profits by using a trade mark in violation of the plaintiff's right. The plaintiff is required accordingly to establish that the defendant made profits knowing that he was transgressing the plaintiff's right. This the plaintiff has to do before the defendant is asked to establish that he was unaware and had no reasonable ground for believing at the time when he commenced using the trade mark that the trade mark of the plaintiff was on the registers or that the plaintiff was the registered user or that the trade mark of the plaintiff was in use from before and that he had stopped using the trade mark complained of, when he came to know of the existence and nature of the plaintiff's trade mark. 13. No one has appeared for the respondent in this appeal. We are satisfied that the plaintiff has substantially succeeded in this appeal. Consequent to the finding recorded by the trial court that the defendant has infringed the plaintiff's trade mark, there will be a decree by way of nominal damages amounting to Rs.500. Except the modification in the decree for nominal damages, as indicated above, the appeal is dismissed. Since no one has appeared for the respondent, there will be no order as to costs in this appeal.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Natarajan and Thanikkachalam, JJ.*

C.M.A.Nos.546 and 547 of 1985

2nd September, 1993.

Minor Humera Bhanu, represented by her mother and next friend Sirajunnissa and others

...Appellant

v.

M/s.Cholan Roadways Corporation by its Managing Director, Kumbakonam. *...Respondent.*

Civil Procedure Code (V of 1908), O.41, Rule 22 - Appeal - Respondent not filing cross-objections - If can canvass for reduction of the quantum of compensation awarded by Motor Accident Claims Tribunal - Appellate court - If can maintain decree appealed from on ground which had been raised but not accepted by trial court.

The learned counsel for respondent submitted that in view of the provisions contained in O.41, Rule 22 of Civil Procedure Code it is open to the respondent to ask for reduction of compensation without filing a cross-objection. The learned counsel further submitted that it is open to the court of appeal to maintainable the decree appealed from the ground which had been raised but not accepted by the trial court even though the respondent did not take any cross-objection. This contention raised by the learned counsel for the respondent is tenable in view of the decisions in the cases of *Union Co-operative Insurance Society Limited v. Lazarammal*, (1974) 2 M.L.J. 160, *Haridas Mundhra v. India Cable Company Limited*, A.I.R. 1965 Cal. 369 and *Gadden Chinna Venkata Rao v. Koralla Satyanarayanamurthy*, A.I.R. 1943 Mad. 698. [Para. 13]

Cases referred to:

Union Co-operative Insurance Society Limited v. Lazarammal, (1974) 2 M.L.J. 160: A.I.R. 1974 Mad. 379: 87 L.W. 322. [Para. 13]
Haridas Mundhra v. India Cable Company Limited, A.I.R. 1965 Cal. 369. [Para. 13]
Gadden Chinna Venkata Rao v. Koralla Satyanarayanamurthy, (1943) 2 M.L.J. 336: A.I.R. 1943 Mad. 698: I.L.R. 1944 Mad. 147: 56 L.W. 527: 1943 M.W.N. 557: 209 I.C. 479. [Para. 13]
National Insurance Company Limited v.

M/s. Swarnalata Das, A.I.R. 1993 S.C. 1259. [Paras. 18, 19, 22, 23]

Prerna v. Madhya Pradesh State Road Transport Corporation, 1993 A.C.J. 254. [Paras. 20, 21, 24]

Principal, Tamil Nadu Theological Seminary, Madurai v. A. Saraswathi, 1991 A.C.J. 310.

[Paras. 20, 21]

New India Assurance Company Limited v. K. Chandra, 1991 A.C.J. 386. [Paras. 20, 21]

Nirmala Thirunavukkarasu v. Tamil Nadu Electricity Board, 1984 A.C.J. 210. [Para. 20]

Gobald Motor Service Limited v. R. K. Veluswami, 1958 A.C.J. 179. [Para. 20].

Nand Kaur v. Sukh Rai, A.I.R. 1981 Delhi 319; 1981 A.C.J. 320. [Para. 20]

Jaikumar Chhangar Lal Patni v. Mary Jerome D'Souza, A.I.R. 1978 Bom. 239; 1978 A.C.J. 28; 1978 Mah. L.J. 164. [Para. 20]

Gobald Motor Services Limited v. Veluswami, A.I.R. 1962 S.C. 1 [Para. 20]

Sankaran National Insurance Company Limited v. Valliammal, 1987 T.L.N.J. 1984. [Para. 20]

Manjushri Raha v. B. L. Gupta, (1977) 2 S.C.R. 944; A.I.R. 1977 S.C. 1158; 1977 A.C.J. 134; (1977) 2 S.C.C. 174; (1977) 1 A.P.L.J. 33. [Paras. 17, 26]

Madhya Pradesh State Road Transport, Bairagarh Bhopal v. Sudhakar, (1977) 3 S.C.R. 627; A.I.R. 1977 S.C. 1189; (1977) 3 S.C.C. 64. [Para. 26]

Mahaboob Sheriff, for Appellant.

R. Balasubramaniam, for Respondent.

The Judgment of the Court was delivered by *Thanikkachalam, J.*: C.M.A.No.546 of 1985 is directed against the Award passed in M.C.O.P.No.170 of 1984, whereas C.M.A.No.547 of 1985 is directed against the Award passed in M.C.O.P.No.173 of 1984, on the file of the Motor Accident Claims Tribunal, Tiruchirappalli. The appellants in C.M.A.Nos.546 and 547 of 1984 are minor daughter and wife and minor children of the deceased respectively.

2. The brief facts which are necessary for the disposal of these appeals are as under:

On 14.2.1984 at about 6.00 p.m. one Syed Ghouse was riding on his motorcycle, bearing Registration No. TNJ.2592 with his daughter Humera Bhanu (appellant in C.M.A.No.546 of 1985) as pillion rider. They were proceeding towards East on the left side of the road. At that time, the bus bearing registration No. TMN. 4749, belonging to the respondent- Corporation, was coming behind the motorcycle. The bus was driven by the driver in

a rash and negligent manner. The motorcycle was going in a normal speed on the left side of the road with a margin of 2 feet. While so, the bus which was driven in a rash and negligent manner came behind the motor cycle grazed it and on account of that the body of the bus came into contact with the motorcycle and hit the right side handle bar of the motorcycle. The deceased, who was riding the motorcycle, lost his control and fell down on his right side and the bus ran over him. The daughter of the deceased, who was riding on the pillion, fortunately fell on her left side and she sustained simple injuries.

3. At the time of the accident, the deceased was employed as a Co-operative Sub-Registrar and was drawing a monthly salary of Rs.1,412 in the scale of Rs.525-25-675- 30-855-35-925. The deceased was aged 47 years at the time of accident. He had the promotional prospects of becoming Deputy Registrar as well as Joint Registrar before attaining his superannuation. The wife and minor children of the deceased, who are appellants in C.M.A.No.547 of 1985 filed O.P.No.173 of 1984 claiming compensation at Rs.6,00,000. The injured minor daughter of the deceased filed O.P.No.170 of 1984 claiming compensation at Rs.50,000 for the injuries suffered by her. The claims were resisted by the respondent- Corporation. In the counter filed by the respondent- Corporation it is stated that the deceased was also liable for contributory negligence. According to the respondent, the bus was driven in a normal speed and since the motorcycle was driven in a rash and negligent manner, it came into contact with the bus and on account of that the accident took place. The respondent- Corporation also contended that inasmuch as the accident took place because of the contributory negligence on the part of the deceased, they are not responsible for the accident and consequently they are not liable to pay any compensation to the petitioners.

4. The wife of the deceased and her minor child examined themselves as witnesses. No oral evidence was adduced on behalf of the respondent- Corporation. The petitioners filed 33 documents and the respondent did not file any document. On considering the facts arising in this case the Motor Accidents Claims Tribunal came to the conclusion that the accident took place on account of the contributory negligence on the part of the deceased and therefore the negligence was

apportioned between the deceased and the bus driver in the ratio of 40:60 and accordingly compensation was awarded.

5. In so far as the quantum of compensation is concerned, the Tribunal took note of the fact that the deceased was earning at that time a sum of Rs.1,412 as monthly salary and he was aged 47 years. The Tribunal held that the deceased would have contributed to his family a sum of Rs.1,400 per month out of his monthly salary and by applying the multiplier of 10, the Tribunal arrived at the figure of Rs.1,60,440 out of Rs.1,60,440, 40% was deducted towards contributory negligence on the part of the deceased *i.e.* Rs.67,776 and the balance amount of Rs.1,01,664 was directed to be paid to the petitioners in O.P.No.173 of 1984 as compensation. In so far as the compensation claimed by the injured minor daughter is concerned, the Tribunal awarded compensation of Rs.2,500 as against the claim of Rs.50,000. The Tribunal also awarded 9% interest on these compensation amounts from 4.4.1985 till date of realisation. The Tribunal also awarded Rs.381.50 towards costs.

6. Aggrieved, the petitioners in O.P.Nos.170 and 173 of 1984 are in appeal before this Court, Learned counsel for the appellants herein submitted as under:

The accident took place solely on account of the rash and negligent driving of the respondent bus driver. The deceased was riding his motorcycle in a normal speed on the left margin of the road. He was riding his vehicle about 2 feet away from the left road margin. Therefore, the motorcycle cannot go further towards left. While attempting to overtake the motorcycle, the respondent- Corporation's bus came into contact with the right handle bar of the motorcycle and on account of that, the rider of the motorcycle lost his control and fell on his right side. It is thereafter, the bus ran over him and he died. The pillion rider, daughter of the deceased, fortunately fell on her left side and sustained injuries. Therefore, it is not correct on the part of the Tribunal, to say that the accident occurred also due to the negligence on the part of the deceased. Hence, the Tribunal was not correct in apportioning the negligence in the ratio of 40:60 between the motorcycle rider and the bus driver as the cause for the accident and deducting 40% of the compensation amount. It is significant to note that the respondent- Corporation did not adduce any oral evidence as against the evidence

tendered by P.W.1 who is an injured witness. In fact there was absolutely no negligence on the part of the motorcycle rider. The accident took place on account of the rash and negligent driving of the respondent bus driver.

7. The learned counsel for the appellants also contended that the Tribunal was also not correct in awarding compensation at Rs.1,01,664 when the appellants claim was Rs.6,00,000. The compensation was not awarded on the basis of various heads under which the claim was made. The Tribunal failed to consider the future promotional prospects of the deceased. At the time of the accident the deceased was aged 47 years and therefore in normal course, he can remain in service for another 11 years and by that time he would have been promoted as Deputy Registrar and Joint Registrar, in which case, he would receive the salary at higher pay scale. The Tribunal failed to take notice of these factors-no amount was awarded for loss of consortium to the wife. The pensionary benefit was also not taken into account. So also the gratuity benefits of the deceased was also not taken into consideration. No compensation was awarded for pain and sufferings. It was therefore pleaded that the compensation awarded by the Tribunal in O.P.No.173 of 1984 is unreasonable and grossly inadequate.

8. Learned counsel further submitted that the compensation awarded to the pillion rider is also very low. On account of the accident she suffered various injuries. Her vision was affected. On account of the accident, she was compelled to wear spectacles. Without taking all these aspects into consideration the Tribunal awarded compensation at Rs.2,500 which is not only very low, but also arbitrary and unjust.

9. In order to support his contentions and claims, learned counsel for the appellants relied upon various decisions and filed three calculation memos and pleaded that the compensation as claimed in the calculation memos may be awarded.

10. On the other hand, learned counsel for the respondent- Corporation submitted as under. Without filing cross-objections, it is open to the respondent to canvass before this Court for reduction of compensations awarded by the Tribunal since the compensations awarded are excessive. The motorcycle rider is also guilty of contributory negligence. Therefore, the Tribunal was correct in apportioning the compensation. The bus was going

in a normal speed. It is on account of the negligence on the part of the motorcycle rider the motorcycle handle bar came into contact with the body of the bus and therefore it was submitted that the Tribunal was correct in holding that the deceased is also liable for contributory negligence. The deceased at the time of the accident was earning only Rs.1,412 per month. He would have taken for his personal expenditure at least 1/3rd of his monthly salary. It is not correct to state that he would have taken only Rs.12 per month for his personal expenditure out of his monthly salary. There is no evidence on record to show that the deceased is entitled to travelling allowance and daily allowance. The Tribunal was not correct in applying the multiplier of 10. When the compensation was awarded in a lump sum a deduction of 20% should be made out of the lump sum. This was not done by the Tribunal. The compensation claimed by the appellants under various heads were not substantiated with documentary evidence. It was pleaded that the compensation awarded in O.P.No.173 of 1984 is excessive and the Tribunal should have reduced it to a reasonable extent. P.W.1 daughter of the deceased who was riding on the pillion did not produce any certificate to show as to what kind of injuries she had sustained. The damages claimed under various heads in the case of P.W.1 were also not substantiated with documentary evidence. Therefore, a sum of Rs.2,500 awarded to P.W.1 by way of compensation is also excessive and a reasonable amount should be fixed by way of compensation to P.W.1.

11. We have heard the rival submissions.

12. We have already set out the facts in detail. The accident took place on 14.12.1984. The deceased was riding on the motorcycle and his daughter was riding on the pillion. The motorcycle was going in a normal speed on the left margin of the metal road. In between the motor cycle and the left margin of the road there was a gap of two feet. It means the motorcycle cannot go further towards left. While so, the respondent- Corporation's bus which was coming behind the motorcycle attempted to overtake the motorcycle and in that process the body of the bus came into contact with the right hand handle bar of the motorcycle and as a result of which, the rider of the motorcycle lost his control and fell on his right side and was run over by the bus. The pillion rider fell on her left side and she sustained injuries. The fact remains that the

bus attempted to overtake the motorcycle. The motorcycle was proceeding on the left margin of the road and the motorcycle cannot go further left as there was only 2 feet gap. The bus, which attempted to overtake the motorcycle, ought to have taken care and caution while doing so. The fact that the body of the bus came into contact with the right handle bar of the motorcycle would itself go to show that the driver of the bus was rash and negligent in driving the bus. The circumstances leading to the accident would go to show that the principle of *res ipso loquitur* (things speak for itself) would apply. P.W.1 was examined as a witness. She narrated the incident. There was no contra evidence on the side of the respondent- Corporation to show that there was no negligence on the part of their bus driver. The appellants herein also filed several documents to show the nature of the accident that took place. The circumstances leading to the accident and the evidence produced by the appellants herein would go to show that the accident took place solely on account of the rash and negligent driving of the bus by the respondent- Corporation driver. The deceased was having his minor daughter on the pillion and hence he would not have driven the vehicle in a rash and negligent manner. There is no evidence on record to show that the motorcycle was driven by the deceased in a rash and negligent manner. The Tribunal failed to appreciate the facts arising in this case on this aspect in proper perspective. Therefore, we set aside the finding of the Tribunal that the deceased also contributed negligence on his part in the accident. Accordingly, we hold that there is no negligence on the part of the deceased in riding the motorcycle and the respondent- Corporation's bus driver alone was responsible for the accident as he drove the bus in a rash and negligent manner.

13. Learned counsel appearing for the appellants herein contended that without filing a cross-objection, the respondent cannot canvass for reduction of the quantum of compensation awarded by the Tribunal. Learned counsel submitted that even though the respondent can support the findings of the Tribunal, the respondent is not entitled to ask for reduction of the quantum of damages. On the other hand, learned counsel for the respondent submitted that in view of the provisions contained in O.41, Rule 22, C.P.C. it is open to the respondent to ask for reduction of compensation

without filing a cross objection. The learned counsel further submitted that it is open to the court of appeal to maintain the decree appealed from the ground which had been raised but not accepted by the trial court, even though the respondent did not take any cross objection. This contention raised by the learned counsel for the respondent is tenable in view of the following decisions in the case of *Union Co-operative Insurance Society Limited v. Lazarammal*, (1974) 2 M.L.J. 160: A.I.R. 1974 Mad. 379: 87 L.W. 322, in the case of *Haridas Mundhra v. India Cable Company Limited*, A.I.R. 1965 Cal. 369 and in the case of *Gadden Chinna Venkata Rao v. Koralla Satyanarayanamurthy*, (1943) 2 M.L.J. 336: A.I.R. 1943 Mad. 698: I.L.R. 1944 Mad. 147: 56 L.W. 527: 1943 M.W.N. 557: 209 I.C. 479. Therefore, when we consider these appeals on merits we would take into consideration the arguments advanced by learned counsel for the respondent with regard to reduction of quantum of compensation awarded by the Tribunal.

14. Before the Tribunal the appellants in C.M.A.No.547 of 1985 claimed compensation at Rs.6,00,000. But the Tribunal awarded only Rs.1,01,664. So also the appellant in C.M.A.No.546 of 1985 claimed compensation at Rs.50,000 but the Tribunal awarded Rs.2,500. In order to support their claims, the appellants in C.M.A.No.547 of 1985 filed three calculation memos. In calculation memo No.1 it is stated that the total emoluments for 128 months from February, 1984 to September, 1994 comes to Rs.2,26,085.45 as per Ex.A-33 and the evidence of P.W.3. The average pay per month comes to Rs.1,766.28. If 1/3rd is deducted for the personal expenses of the deceased the balance per month works out to Rs.1,177.52 per month. The total amount at 2/3rd for 128 months of the service of the deceased comes to Rs.1,50,722.56. The pension per month according to the pension rules will be not less than Rs.1000 at 50% on the average of 10 months of last drawn pay. The total for seven years on the basis of span of life for 65 years after retirement of the deceased at the age of 58 years comes to Rs.84,000 (i.e. 12,000 per annum x 7 years). Deducting 1/3rd the balance of 2/3rd works out to Rs.56,000. The deceased will also be entitled to retirement gratuity at the rate of 1/4th of emoluments for each completed six months period of qualifying service. The deceased would have put in a service of 34 years and it means 68 completed half years and

1/4th of the emolument of Rs.1,766.28 would be Rs.441.57 and for 68 half years it would be Rs.30,026.76. For loss of consortium Rs.10,000 was claimed. The total amount under different heads according to calculation memo No.1 is Rs.2,46,749.32.

15. According to calculation memo No.2 the total emoluments the deceased would have obtained for 128 months of service from February, 1984 to September, 1994 comes to Rs.4,42,212.45. The average per month works out to Rs.3,454.78. If 1/3rd is deducted for the personal expenses of the deceased balance 2/3rd payable to the family works out to Rs.2,303.18. The total amount at 2/3rd for 128 months of service of the deceased payable to the family comes to Rs.2,94,808.30. The pension as per rules is 50% of the average emoluments of last ten months of service. Average emoluments is Rs.4,155 50% of Rs.4155 comes to Rs.2078. Pension for seven years from 58 years to 65 years i.e. Life expectation upto 65 years comes to Rs.1,74,552 (i.e. 7 x Rs.2,078). Deducting 1/3rd for self expenses of the deceased balance 2/3rd payable to the family comes to Rs.1,16,368 (i.e. 1,74,552 - 58,184). Death cum retirement gratuity at the rate of 16 1/2 times of last drawn pay comes to Rs.61,050 (i.e. 16-1/2 x 3700) and if Rs.10,000 is added to this amount towards loss of consortium, the total comes to Rs.4,82,226.30. From this Rs.61,497 is deducted towards family pension and the balance comes to Rs.4,20,729.30. Thus, according to calculation memo No.2 the total compensation payable to the family of the deceased is Rs.4,20,729.30.

16. The calculation memo No.3 is prepared on the basis of the revised pay scales under G.O.Ms.No.555, Finance (Pay Cell) Department, dated 10.6.1985 and G.O.Ms.No.666, Finance (Pay Cell) Department, dated 27.6.1989. According to this calculation memo, the total emoluments for the service period (February, 1984 to September, 1994) i.e. from the date of accident to the date of retirement) after deducting family pension and 1/3rd of the value for self expenses of the deceased the balance 2/3rd for the family comes to Rs.2,63,810.30. The pension according to Pension Rules is Rs.2,078 per month. The total for seven years on the basis of life span for 65 years after retirement of the deceased at the age of 58 years comes to Rs.1,74,552 (i.e. (2,078 x 7) and if Rs.58,184 is deducted towards 1/3rd for self expenses of the deceased the balance comes to Rs.1,16,368 being 2/3rd pension payable

to the family. Death cum retirement gratuity is 16 1/2 times of the last drawn pay (3,700 x 16 1/2). Thus it works out to Rs.61,050.00. For loss of consortium Rs.10,000 was claimed. Thus, according to this calculation memo, the total amount to which the family is entitled to is Rs.4,51,228.30.

17. On the other hand, learned counsel appearing for the respondent filed a calculation memo, according to which the total earnings comes to Rs.2,26,805 out of which Rs.1,13,402.00 has to be deducted as per the Supreme Court judgment in *Manjushiri Raha v. B.L. Gupta*, (1977)2 S.C.R. 944: A.I.R. 1977 S.C. 1158: 1977 A.C.J. 134: (1977)2 S.C.C. 174: (1977)1 A.P.L.J. 33 and the balance comes to Rs.1,13,402.50 and if Rs.10,000 is added to it towards loss of consortium, the total compensation works out to Rs.1,23,403.00. According to the decisions reported in *Principal, Tamil Nadu Theological Seminary, Madurai v. A.Saraswathi*, 1991 A.C.J. 310 and *New India Assurance Company Limited v. K.Chandra*, 1991 A.C.J. 386, *Prerna v. Madhya Pradesh State Road Transport Corporation*, 1993 A.C.J. 254, out of monthly salary of Rs.1,412 - Rs.81 should be deducted. After this deduction the net monthly salary comes to Rs.1,331. 1/3rd of personal expenses comes to Rs.442.60. Dependency was calculated at Rs.887, i.e. Rs.1,331-444. Thus the total pecuniary loss is calculated at Rs.1,06,440. To this if Rs.10,000 is added towards loss of consortium, the total comes to Rs.1,16,440. From this amount, 20% is deducted in view of lump sum payment and uncertainties of life, the total compensation works out of Rs.93,152.

18. As per the Supreme Court decision in *National Insurance Company Limited v. M/s.Swamalata Das*, A.I.R. 1993 S.C. 1259 net benefits on the basis of capitalisation theory is suggested. If Rs.1,000 is taken throughout and 10 years multiplier is adopted and if Rs.10,000 is added towards loss of consortium the compensation works out to Rs.1,30,000. If Rs.1,30,000 is invested 11% interest works out to roughly Rs.1,192 per month approximately. This is what the deceased was contributing. Corpus is intact for any number of years and this benefit accrues even after the retirement period during which the pension is Rs.445. It was therefore pleaded by the learned counsel for the respondent that the compensation should be determined in the abovesaid manner.

19. While considering the method of determining compensation under Sec.168 of the Motor

Vehicles Act (59 of 1988) the Supreme Court in the case of *National Insurance Company Limited v. M/s.Swamalata Das*, A.I.R. 1993 S.C. 1259, held as under:

"The appropriate method of assessment of compensation is the method of capitalisation of net income choosing a multiplier appropriate to the age of the deceased or the age of the dependants whichever multiplier is lower. It is, no doubt, true that as a rough and ready measure, the method of aggregating the total expected income for the remainder of the life-expectancy with appropriate deductions towards uncertainties of life and for lump sum payments is also resorted to. But this method is now considered unscientific and is virtually obsolete. At all events wherever it is resorted to it would require to be cross-checked with the results of the appropriate and the more scientific method of capitalisation of the loss of dependency."

20. In *Prerna v. Madhya Pradesh State Road Transport Corporation*, 1993 A.C.J. 254, the Supreme Court held that "while determining the multiplier future increments and promotional chances of the deceased and loss of consortium to the young widow should be taken into consideration." While determining the quantum of compensation the Supreme Court held that "since the compensation is being enhanced by this Court after about 15 years of the accident, there is no question of making any deductions on any score and when the compensation was paid in lump sum deductions with regard to uncertainties of life should not be made." In *Principal, Tamil Nadu Theological Seminary, Madurai v. A.Saraswathi*, 1991 A.C.J. 310, a Division Bench of this Court while considering the provisions of Secs.95(2) (b) and 95(2) (c) of the Motor Vehicles Act, 1939 held that "while the compensation is paid in lump sum 20% should be deducted." In *New India Assurance Company Limited v. K.Chandra*, 1991 A.C.J. 386, a Division Bench of this Court while considering Sec.95(2)(b) of the Motor Vehicles Act 1939, held that "deduction of 1/6th should be made on account of lump sum payment and for uncertainties in life." In *Nirmala Thirunavukkarasu v. Tamil Nadu Electricity Board*, 1984 A.C.J. 210, this Court while considering the quantum of compensation payable in a fatal accident extracted the following tests as adumbrated by Subba Rao.J. (as he then was) in the case of

Gobald Motor Service Limited v. R.K.Veluswami, 1958 A.C.J. 179, viz.

"At first the deceased man's expectation of life has to be estimated having regard to his age, bodily health and the possibility of premature determination of his life by accidents; Secondly the amount required for the future provisions for his wife shall be estimated having regard to the amounts he used to spend on her during his life time and other circumstances; Thirdly the estimated annual sum is multiplied by the number of years of the man's estimated span of life, and the said amounts must be discounted so as to arrive at the equivalent in the form of a lump sum payable on his death; Fourthly, further deduction must be made for the benefit accorded to the widow from the acceleration of her interest in this estate and Fifthly, further amounts have to be deducted for the possibility of the wife dying earlier if the husband had lived the full span of life, and it should also be taken into account that there is the possibility of the widow remarrying much to the improvement of her financial position. It would be seen from the said mode of estimation that many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the respondents may depend upon data which cannot be ascertained accurately but must necessarily be an estimate, or even partly a conjecture. Shortly stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit, and on the other hand any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss, and gain to a dependant, by the death must be ascertained."

In *Nand Kaur v. Sukh Rai*, A.I.R. 1981 Del. 319; 1981 A.C.J. 320, it was held that the average life expectancy should be taken at 70 or 75 years. In *Jaikumar Chhangaral Patni v. Mary Jerome D'Souza*, A.I.R. 1978 Bom. 239; 1978 A.C.J. 28; 1978 Mah.L.J. 164, it was held that "when the compensation is calculated on the basis of what the claimants would have received in all during the course of 23 years, interest receivable on the investment of such lump sum for all these years, reflects an un contemplated and in a way unmerited addition. Discount thus is an indispensable process and part of fair

and just determination. Percentage of discount however must depend on fact and facts of each case." In the abovesaid decision it was also held that further amount of Rs.5,000 towards loss to the estate by way of expectancy cannot be revised on the ground of duplication in awarding damages by following the decision in *Gobald Motor Services Limited v. Veluswami*, A.I.R. 1962 S.C. 1. In *Sankaran National Insurance Company Limited, Tirunelveli Town v. Valliammal*, 1987 T.L.N.J. 1984, this Court while considering the tests for determining the multiplier held as under:

"We have set out the principles regarding multiplier, as held by various High Courts. Therefore, bearing these principles in mind, this Court holds that the system of multiplier in arriving at a quantum of compensation in motor accidents claims, entirely depends upon the discretion of the Tribunal and the Appellate Court and the said discretion vested with the Tribunal or the Appellate court is to be exercised judicially and not arbitrarily. In each case, the multiplier has to be chosen as one quite in accordance with law, justice, equity and good conscience and applied in the case, neither to the advantage of the claimants nor to the detriment of the persons liable, whether the owner of the vehicle involved or the insurance company, but the determination should be just and legal."

21. The fact remains that the deceased was working as a Sub Registrar in the Co-operative Department. His last drawn salary was Rs.1412 and he was 47 years old at the time of the accident. The Tribunal was of the view that the deceased would have contributed Rs.1400 to his family and rest he would have taken for his personal expenses. According to the respondent- Corporation as per decisions reported in *Principal, Tamil Nadu Theological Seminary, Madurai v. A.Saraswathi*, 1991 A.C.J. 310, in the case of *New India Assurance Company Limited v. K.Chandra*, 1991 A.C.J. 386 and in the case of *Prerna v. Madhya Pradesh State Road Transport Corporation*, 1993 A.C.J. 254, after deduction of Rs.51 the net claim would come to Rs.1,331 and out of this 1/3rd should be deducted for personal expenses. On such deduction, the net amount contributed by the deceased to his family would come to Rs.887 (Rs.1,331-Rs.444). Thus the total pecuniary loss and loss of consortium was worked out at Rs.1,16,440 (Rs.1,00,654 + 10,000).

Out of this amount 20% should be deducted for lump sum payment and uncertainties in life. Thus the Respondent corporation worked out the total compensation payable to the family of the deceased at Rs.93,152.

22. It was also pointed out by the respondent-Corporation that if the compensation is calculated on the basis of income capitalisation method as per the decision of the Supreme Court in *National Insurance Company Limited v. M/s.Swarnalata Das*, A.I.R. 1993 S.C. 1259 along with loss of consortium, the compensation would come to Rs.1,30,000 ($\text{Rs.1,000} \times 12 \times 10 - \text{Rs.10,000}$) and interest at the rate of 11% per annum on Rs.1,30,000 would come to Rs.1,192 per month approximately. This is the contribution the deceased would have made to his family per month, according to the respondent- Corporation. This amount is apart from the pension the deceased would get after his retirement at Rs.445 per month.

23. In the decision in the case of *National Insurance Company Limited v. M/s.Swarnalata Das*, A.I.R. 1993 S.C. 1259, the Supreme court pointed out that the income capitalisation method is now considered as unscientific and it has become virtually obsolete. According to the Supreme Court, it would require to be cross-checked with the result of the appropriate and more scientific method of capitalisation of the loss of dependency. Therefore, the method suggested by the respondent-Corporation under the head 'C' in their memo of calculation cannot be accepted. Further, it is not known as to on what basis the monthly income was taken at Rs.1,000 per month in the memo of calculation filed by the respondent.

24. In the decision in *Prerna v. Madhya Pradesh State Road Transport Corporation*, 1993 A.C.J. 254, the Supreme Court held that while determining the multiplier, the future increment and promotional chance of the deceased and the loss of consortium to the widow should be taken into consideration. In the method of calculation suggested by the respondent- Corporation in its memo of calculation filed by it under the heads 'A' and 'B' future increments and promotional chance of the deceased were not taken into consideration and therefore these methods suggested by the respondent- Corporation are not acceptable since these methods are against the decision of the Supreme Court cited supra.

25. In the memos of calculation filed by the

appellants future increments and promotional chances were taken into consideration in a more scientific method. One of the memos of calculation filed by the appellants is on the basis of revised scales of pay under G.O.Ms.No.555, Finance (Pay Cell) Department, dated 10.6.85 and G.O.Ms.No.666, Finance (Pay Cell) Department dated 27.6.1989. The accident took place in the month of February, 1984. The deceased would have retired in the month of September, 1994. He would have drawn the salary for a period of 128 months. In his evidence P.W.3 stated that the deceased could have been promoted as Deputy Registrar with effect from 1.11.1986 and as Joint Registrar from September, 1993 before attaining superannuation. As per G.O.Ms.No.666, Finance (Pay Cell) Department, dated 26.9.1989 his pay scale as Deputy Registrar would be Rs.2,200-75-2,800-100-4,000 and as Joint Registrar his pay scale would be Rs.3,700-125- 4,700-150-5,000. It was submitted that as per the revised pay scale under the abovesaid Government orders, the average salary per month would come to Rs.3,454.78 and out of it if 1/3rd is deducted for his personal expenses 2/3rd payable to his family would come to Rs.2,303.18. On this basis the deceased would have contributed to his family a sum of Rs.2,94,808.30 till his superannuation. The deceased would also be entitled to pension as per the revised pay scale. The pension as per rules is 50% of the average emoluments of last 10 months service. The average life span is determined at 65 years. It means after retirement the deceased would have received his pension for a period of 7 years. Deducting 1/3rd towards his personal expenses, 2/3rd of the amount payable to the family is worked out at Rs.1,16,368 ($7 \times 12 \times \text{Rs.2,078}$) = Rs.1,74,552 - Rs.58,184 = Rs.1,16,368. The deceased would also be entitled to death cum retirement gratuity. This would be 16 1/2 times of last drawn pay. This works out to Rs.61,050 ($\text{Rs.3,700} \times 16.5$). Under the head loss of consortium a claim was made for Rs.10,000. Considering the age of the deceased and the age of his widow this claim appears to be reasonable and accordingly we allow the same. If the abovesaid amounts are taken into consideration, the total amount of compensation claimed by the appellants comes to Rs.4,51,228.30. This, according to the appellants, would be the contribution by the deceased to his family.

26. In *Manjushri Raha v. B.L.Gupta*, (1977)2 S.C.R.

944: A.I.R. 1977 S.C. 1158; 1977 A.C.J. 134; (1977) 2 S.C.C. 174; (1977) 1 A.P.L.J. 33, the Supreme Court held that "where the social need of the hour requires that precious human lives lost in motor accidents leaving a trail of economic disaster in the shape of their unprovided for families call for special attention of the law makers to meet this social need by providing for heavy and adequate compensation particularly through Insurance Companies. Our country can ill-afford the loss of a precious life when we are building a progressive society and if any person engaged in industry, office, business or any other occupation, dies, a void is created which is bound to result in a serious set-back to the industry or occupation concerned. Apart from that the death of a worker creates a serious economic problem for the family which he leaves behind. In these circumstances it is only just and fair that the Legislature should make a suitable provision so as to pay adequate compensation by properly evaluating the precious life of a citizen in its true perspective rather than devaluating human lives on the basis of an artificial mathematical formula. At the same time, the Supreme court also cautioned the authorities concerned in the matter of awarding compensation in the following manner in *Madhya Pradesh State Road Transport, Bhiragarh Bhopal v. Sudhakar*, (1977) 3 S.C.R. 627; A.I.R. 1977 S.C. 1189; (1977) 3 S.C.C. 64.

"In assessing damages certain other factors have to be taken note of, such as, the uncertainties of life and the fact of accelerated payment that the husband would be getting a lump sum payment which but for his wife's death would have been available to him in dribblets over a number of years. Allowance must be made for the uncertainties and the total figure scaled down accordingly. The deceased might not have been able to earn till the age of retirement for some reason or other, like illness or for having to spend more time to look after the family which was expected to grow. Thus the amount assessed has to be reduced taking into account these imponderable factors."

27. In view of the principles laid down by the Supreme court and our High court in the decisions cited supra, out of the abovesaid sum of Rs.4,51,228.30, We have to make certain deductions to arrive at the legitimate compensation

payable to the family of the deceased. Deductions have got to be made for lump sum payment and uncertainties of life. The payment is made according to the family of the deceased. If the deceased was alive the family would get income in dribblets over number of years. The capacity of the earning would also deteriorate due to illness, etc. In such circumstances it is doubtful whether the deceased would be able to contribute 2/3rd of his income. The family of the deceased is also now receiving the family pension which will be increased according to the new payscale as per the report of the 4th Pay Commission. Considering all these aspects in the light of the judicial pronouncements cited supra, we are of the opinion that if 50% is deducted out of the total amount of Rs.4,51,228.30 that would meet the ends of justice. No doubt the family of the deceased is entitled to another Rs.10,000 under the head loss of consortium. Thus the family of the deceased would get Rs.2,25,614 which has been rounded off to Rs.2,26,000 plus Rs.10,000 in all Rs.2,36,000. Thus considering the claim made by the appellants in the light of the judicial pronouncements cited supra, we determine the quantum of compensation payable to the family of the deceased at Rs.2,36,000 instead of Rs.1,01,164 awarded by the Tribunal. The appellants would also be entitled to interest at the rate of 12% per annum on the amount of compensation determined by us from the date of filing the petition till the date of realisation. The respondent- Corporation is directed to deposit the abovesaid amount deducting the amount, if any, already deposited by them in court in O.P.No.173 of 1984 within four weeks from the date of this judgment. Accordingly, C.M.A.No.547 of 1985 stands allowed with costs.

28. In C.M.A.No.546 of 1985, the appellant who is the daughter of the deceased claimed compensation for her personal injuries at Rs.50,000 and the Tribunal awarded Rs.2,500. It is against that order, the present appeal has been preferred by the daughter of the deceased. The appellant also was riding on the motorcycle as the pillion rider. She fell down due to rash and negligent driving of the bus by the driver of the respondent- Corporation. We have already held in C.M.A.No.547 of 1985 that there is no negligence on the part of the motorcycle rider in riding the motorcycle and the negligence was on the part of the bus driver of the respondent- Corporation. Therefore, the

appellant herein is also entitled to get compensation for her personal injuries. According to the learned counsel for the appellant, on account of the accident, she has been made to wear spectacles. According to Ex.A-1 medical certificate she received only simple injuries. She produced some bills to show that she has incurred expenditure in purchasing medicine. Ex.A-2 is the O.P. ticket. By seeing the accident, in which her beloved father, was killed, she would have received mental shock. Considering all these aspects, we determine the compensation payable to the appellant in C.M.A.No.546 of 1985 at Rs.5,000 instead of Rs.2,500 determined by the Tribunal. The appellant is also entitled to interest at the rate of 12% per annum of Rs.5,000 from the date of filing the petition till the date of realisation. The respondent- Corporation is directed to deposit the compensation amount after deducting the amount, if any, already deposited by them in court in O.P.No.170 of 1984, within four weeks from the date of this judgment. C.M.A.No.546 of 1985 is also allowed with costs.

29. In the result, both the C.M.A.Nos.547 and 546 of 1985 are allowed with costs to the abovesaid extent.

B.S. ---- *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No.2100 of 1985 24th September, 1993.

Hindustan Petroleum Corporation Limited
...Petitioner

v.
K.M.Yakub (died) and others ...Respondents.

Tamil Nadu City Tenants' Protection Act (XIX of 1955), Sec.9 - Tenant claiming benefit under Act - Possession physical and actual to be proved by the tenant - Tenant having no possession - Benefit of the Act cannot be claimed.

Held: That the 1st defendant is not in physical possession of the suit site, the 1st defendant is not entitled to invoke the abovesaid Sec.9 and purchase the suit site. The court has also held consistently that if the tenant under the Act is not in physical possession of the site in question, he is not entitled to invoke Sec.9 of the Act. *Vide: Estate of T.P.Ramaswami Pillai v. Mohd. Yousuf, (1983) 2 M.L.J. 319, T.P.R. Raja Sekara Bhoopathy v. Navaneethammal, (1979) 2 M.L.J. 144 and N.Kannayiram v. Sri Kallalagar, 99 L.W. 929. [Para. 12]*

Cases referred to:

Abdul Mallik v. Fr. Joseph Sandanam, (1975) 2 M.L.J. 204. [Para. 5]

Bharat Petroleum Corporation Ltd. v. Francis, (1989) 2 M.L.J. 530. [Paras. 6, 7]

Estate of T.P.Ramaswami Pillai v. Mohd. Yousuf, (1983) 2 M.L.J. 319. [Para. 12]

T.P.R. Raja Sekara Bhoopathy v. Navaneethammal, (1979) 2 M.L.J. 144. [Para. 12]

N.Kannayiram v. Sri Kallalagar, 99 L.W. 929. [Para. 12]

O.R.Santhana Gopalan, for M/s. King and Partridge, for Petitioner.

G.Subramanian, Senior Counsel, for K.Raghunathan, for Respondents.

The Court made the following

ORDER: The 1st defendant, Hindustan Petroleum Corporation Limited in O.S.No.1286 of 1972 on the file of the Subordinate Judge, Erode is the petitioner in this civil revision petition against the concurrent dismissal of its I.A.No.374 of 1979 in the said suit filed under Sec.9 of the Tamil Nadu City Tenants' Protection Act (hereinafter referred to as 'the Act') for purchasing the suit land, with reference to which the abovesaid suit by the 1st respondent herein, sought the relief of possession.

2. The 2nd defendant in the said suit, viz. Lorry Owners' Association is a dealer under the 1st defendant, selling petroleum products of the 1st defendant at the suit site. But, it did not file the abovesaid Sec.9 application, but, only the 1st defendant filed the said application.

3. The trial court has dismissed the said application and the appeal therefrom in C.M.A.No.32 of 1983 filed by the 1st defendant also ended in dismissal. Hence, this civil revision petition.

4. Admittedly, there was lease of suit site in favour of the 1st defendant's predecessor the Coltex (India) Ltd., right from 1953 upto 29.2.1976, as borne out

by the relevant documents and thereafter, there was no renewal of the said lease. But, the enactment, The Caltex (Acquisition of Shares of Caltex Oil Refining (India) Limited and of the Undertakings in India of Caltex (India) Limited Act, 1977 (hereinafter referred to as 'the Caltex Act') came into force on 30.12.1976, whereby the right, title and interests of the abovesaid company Caltex (India) Limited in relation to its undertakings in India stood vested in the Central Government as per Sec.5 of the said enactment. Further, it is also agreed that subsequently to the notification under Sec.9 of the Caltex Act, the abovesaid right, title, etc., Company's assets vested with a Government Company, called Caltex Refining Company of India Limited. Subsequently, as per Ex.B-3 dated 9.5.1978, the said Government Company was amalgamated with the petitioner-Company, viz. Hindustan Petroleum Corporation Limited, which has filed the abovesaid I.A.No.374 of 1979. The suit site is situate in Perundurai, to which the abovesaid Tamil Nadu City Tenants' Protection Act was extended by the relevant notification from 25.6.1975.

5. In the light of the abovesaid facts, of which, there is no dispute, the courts below have concurrently dismissed the said application on two independent grounds, (1) that the provisions of the abovesaid Sec.9 cannot be availed of by the petitioner since it is only an assignee of the original lease in favour of the abovesaid Caltex (India) Limited after the abovesaid date 25.6.1975 and not prior. In this connection the courts below have relied on *Abdul Mallik v. Fr. Joseph Sandanam*, (1975)2 M.L.J. 204 and (2) that the petitioner is not in physical possession of the suit site and only the 2nd defendant is in physical possession thereof and the provisions of Sec.9 of the Act can be invoked only by the tenant who is in physical possession of the site in question.

6. The learned counsel for the petitioner attacks both the abovesaid reasons given by the courts below. Regarding the first reason, the learned counsel admits that the present case is not one of assignment of the lease, but acquisition of the leasehold interest from the lessee Caltex (India) Limited, by separation of law, under the Caltex Act and that hence, the abovesaid *Abdul Mallik v. Fr. Joseph Sandanam*, (1975)2 M.L.J. 204, which dealt with a case of assignment of lease, would not apply to the present case. Instead, he relies on

Bharat Petroleum Corporation Ltd. v. Francis, (1989)2 M.L.J. 530, which is also a case of succession by operation of law, no doubt under a different, but said to be similar enactment, viz. The Burmah Shell (Acquisition of Undertakings in India) Act, 1976 (hereinafter referred to as 'The Burmah Shell Act'). Regarding the other reason given by the courts below, the said counsel submits that the 2nd defendant is only a licensee under the petitioner to deal in petroleum products at the suit site and that possession was only with the petitioner. In this connection, he relies on Ex.B-4 dated 24.11.1976. The agreement between the 1st defendant's predecessor Caltex (India) Limited with the 2nd defendant.

7. On the other hand, the learned counsel for the 1st respondent, with reference to the first of the abovesaid reasons, contends that *Bharat Petroleum Corporation Ltd. v. Francis*, (1989)2 M.L.J. 530, would not apply to the present case, since the language used in the relevant provisions of the abovesaid Caltex Act and the Burmah Shell Act are different.

8. With reference to the second of the abovesaid reasons, the said counsel points out the admission of D.Ws.1 and 2 that the 2nd defendant is in possession of the suit site, paying rent to the 1st defendant. He also cites several decisions, which have consistently held that the abovesaid Sec.9 cannot be invoked by a tenant who is not in physical possession of the site in question.

9. Dealing with this last point, particularly regarding the abovesaid decisions showing that Sec.9 cannot be invoked by a tenant who is not in physical possession of the site in question, I may straightaway say that the petitioner's counsel did not say anything contra regarding those decisions and actually accepted the proposition that only the tenant who is in physical possession of the suit site could invoke Sec.9 of the Act. Therefore, there is no necessity to refer to those decisions. But his contention is as indicated above, the petitioner was actually in physical possession of the suit site.

10. There was also one other contention by the learned counsel for the respondents, that is, as per Sec.5 of the Caltex Act, original vesting was with the Central Government and thereby it became the lessee as successor to Caltex (India) Limited. But, according to the said learned counsel, a Government is not a "person" and so, not a "tenant" at all under Sec.2(4) of the Act and so the

petitioner also would not become such a 'tenant'.
11. Despite the abovesaid different points of arguments, it is clear to me that the civil revision petition could be disposed of on one of the abovesaid points of arguments alone and hence I propose to deal with that alone, viz., whether the petitioner or the 2nd defendant is in physical possession of the suit site. If the petitioner is not in physical possession, then certainly the petitioner cannot invoke Sec.9 of the Act in view of the several decisions of this Court, to which the learned counsel for the petitioner had not taken any exception as indicated in paragraph 9 above. In this connection, I may point out straightaway the following admission by D.Ws.1 and 2 who are respectively the accountant and manager of the 2nd defendant, who are the only witnesses on the side of the defendants. Though in the chief-examination D.W.1 deposed that the 2nd defendant is a licensee under the 1st defendant, he admitted in cross-examination thus:

"2வது பிரதிவாதி சங்கம் தாவா இடத்தில் பெட்ரோல் பங்க் நடத்துவதற்கு 1வது பிரதிவாதிக்கு மாத வாடகையாக ரூபாய் 303/- (முந்நூற்றி மூன்றை) கடந்த ஐந்து அல்லது ஆறு வருஷங்களாகக் கொடுத்து வருகிறது."

Similarly, D.W.2 also admitted as follows in cross-examination:

"இந்துஸ்தான் பெட்ரோலியத்திற்கு மாதம் மாதம் ஒன்றுக்கு ரூபாய் 303 (ரூபாய் முந்நூற்றி மூன்று) கொடுத்து வருகிறோம். கடந்த நான்கு வருஷங்களாக அதே வாடகை தரப்பட்டு வருகிறது."

Further, I also find in paragraph 11 of the plaint, it is stated thus:

"The plaintiff understands that the second defendant is in possession as an assignee or sub lessee or licensee from Caltex (India) Limited and he is in actual possession of the suit site".

But, as against this assertion that the 2nd defendant is in actual possession, there is no denial in the written statement of either of the defendants.
12. No doubt, the learned counsel for the petitioner argues that as per Ex.B-4 dated 24.11.1976, the 2nd defendant was only a licensee and not having exclusive possession as a sub-lessee. In this connection, he also draws my attention to the

relevant portion in Clause 4 of Ex.B-4, which also is entitled as "licence agreement".

"This agreement shall not be construed as creating any right, interest or tenancy in favour of the dealer in respect of the Service Station".
But, this agreement is only between the 1st defendant's predecessor, viz. Caltex (India) Limited and the 2nd defendant. It is also admitted that there is a written agreement between the defendants 1 and 2 also. But that has not been exhibited. So, the abovesaid admission by D.Ws.1 and 2 that the 2nd defendant is paying rent to the 1st defendant all these years and the abovesaid non-denial of the abovesaid relevant allegations in the plaint have to be given full effect and it must be held that the 1st defendant is not in physical possession of the suit site. The 1st defendant is not entitled to invoke the abovesaid Sec.9 and purchase the suit site. As already indicated, this Court has also held consistently that if the tenant under the Act is not in physical possession of the site in question, he is not entitled to invoke Sec.9 of the Act. *Vide: Estate of T.P.Ramaswami Pillai v. Mohd. Yousuf*, (1983)2 M.L.J. 319, *T.P.R. Raja Sekara Bhoopathy v. Navaneethammal*, (1979)2 M.L.J. 144 and *N.Kannayiram v. Sri Kallalagar*, 99 L.W. 929.

13. Therefore, the civil revision petition is dismissed. No costs.

R.S. ---- Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT
MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.880 of 1988

1st October, 1993.

Rajangam

...Petitioner

v.

Sultan Abdul Khader

...Respondent.

Civil Procedure Code (V of 1908), Sec.60(1)

Proviso, Clause (c) - Exemption of house belonging to agriculturist from attachment under - When available.

Two requirements which are necessary for a person to claim exemption of a house under Clause (c) of Proviso to Sec.60(1) of the Civil Procedure Code are: (i) he must be an 'agriculturist' and (ii) he must have occupied the house for the purpose of agriculture. [Para. 4]

In the present case, it has been established that the petitioner is an agricultural coolie, that he is having a plough and other implements and that he was keeping the agricultural implements in his house. On the materials placed before the court below, it ought to have come to a conclusion that he was using the house for the purpose of agriculture and exempted it from attachment. [Para. 5]

Case referred to:

Appasahed v. Bhalchandra, A.I.R. 1961 S.C. 589. [Para. 4]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Sirkazhi, dated 14.12.1987 and made in E.P.No.100 of 1986 in O.S.No.179 of 1982.

Rajaratnam for B.Kumar and B.Satish Sundar, for Petitioner.

B.Motilal Jain, for Respondent.

The Court made the following

ORDER: This civil revision petition is directed against the order passed in E.P.No.100 of 1986 in O.S.No.179 of 1982 on the file of the District Munsif, Sirkazhi.

2. Short facts are: The respondent had obtained a money decree against the revision petitioner and had levied execution in E.P.No.100 of 1986 by attachment and sale of the properties belonging to the revision petitioner. That was resisted by the revision petitioner, who would contend that the property being proceeded with is his residential house that he is an agriculturist and so it is exempted from attachment by Sec.60 of the Code of Civil Procedure. After enquiry, the learned District Munsif had held that it was not used for agricultural purpose and rejected the objections and posted the case for sale proclamation. Aggrieved by the said order, the respondent in the court below has come forward with this revision petition.

3. Mr.Rajaratnam, the learned counsel appearing for the revision petitioner, would submit that the

revision petitioner was in occupation of the house for the purpose of agriculture and so exempted from attachment. I have carefully considered the submission made by him.

4. In *Appasahed v. Bhalchandra*, A.I.R. 1961 S.C. 589, the Apex Court had occasion to consider Clauses (b) and (c) to the proviso to Sec.60(1) of the Code of Civil Procedure. In para. 33, the Apex Court has considered as to who would be an "agriculturist" within the plain language of Clauses (b) and (c) and have laid as follows:

"Therefore, it seems to me that there is no warrant for imposing any qualification on the plain meaning of the word "agriculturist" in Clauses (b) and (c). In my view, an agriculturist contemplated by the clauses is any person who occupies himself with agriculture. This is the view taken in *I.L.R. 1938 Nag. 461*: A.I.R. 1938 Nag. 366 and with it I agree. A person occupying himself with agriculture would be an agriculturist though he does not cultivate with his own hands and carries on agriculture in a very large scale. He would still be an agriculturist though he has other means of livelihood besides agriculture".

The Apex Court had also considered as to who is entitled to claim the benefits of Clause (c) of the Proviso to Sec.60(1), C.P.C., and has laid as follows:

"Now, Clause (c) protects from attachment and sale houses and other buildings with the sites thereof and land immediately appurtenant thereto and necessary for their enjoyment, belonging to an agriculturist and occupied by him. I think it is a fair reading of this clause to say that the houses, buildings and lands must be occupied by the agriculturist for the purpose of agriculture for the object of these clauses is to protect an agriculturist only so far as is necessary for his agricultural operations. If an agriculturist occupied a house, may as a holiday resort, there would be no reason to protect that house from attachment and sale."

From the above ruling, it is seen that the two requirements which are necessary for a person to claim exemption of a house under Clause (c) of Proviso to Sec.60(1), Code of Civil Procedure are:

"(i) he must be an "agriculturist";

(ii) he must have occupied the house for the purpose of agriculture.

5. Bearing the above, I shall now proceed to

consider the evidence available in this case. The revision petitioner figured as a witness. He has stated that he is an agricultural coolie that he is having plough, spade and he storing them in his house. He has also stated that he is having a cattle shed on the northern side of the house. In cross-examination, he has stated that he is having agricultural implements in the house in the paran. He had denied the suggestion that he was not keeping the agricultural implements in the house. R.W.2 corroborated his evidence. According to P.W.1 the revision petitioner was having the agricultural implements in the cattle shed. In cross-examination, he has stated that he did not go into the revision petitioner's house. The cattle shed will be open. While so, the claim of the revision petitioner that he was keeping the agricultural implements in his house is acceptable. His evidence is corroborated by the evidence tendered by R.W.2. P.W.1 had not entered into the house of the revision petitioner. So his claim that he was having them only in the cattle shed, cannot be accepted, in the face of positive evidence of R.Ws.1 and 2. On the materials placed before the court below, the court below ought to have come to a conclusion that he was using the house for the purpose of agriculture and exempted it from attachment. The order contra, cannot be sustained and is liable to be set aside.

6. In view of the above, the civil revision petition is allowed, setting aside the order passed in E.P.No.100 of 1986 and consequently E.P.No.100 of 1986 shall stand dismissed. No costs.

V.K. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thanikkachalam, J.*

C.R.P.Nos.3948 and 3949 of 1986
15th October, 1993.

G.Neela alias Neela George ...*Petitioner*
v.

M.R.Chandra Bai and another ...*Respondents.*
Tamil Nadu Buildings (Lease and Rent Control)

MLJ 25

Act (XVIII of 1960), as amended by Act (XXIII of 1973), Sec.10(2)(i) - Petition for eviction pending on the ground of wilful default in payment of rent - Landlord if can file separate applications for eviction for default in payment of rent for subsequent periods.

The contention of the landlady that for each default period, the landlady is entitled to file a separate petition under S.10(2)(i) of the Act is well founded. Thus it is open to the landlady to file separate petitions for eviction on the ground of wilful default in payment of rent for the subsequent periods, when the earlier petition for eviction on the same ground is pending. [Para. 9] *Perumal v. Muthuswamy, (1962)1 M.L.J. (S.N.) 55 (F.B.), relied on.*

In the present case, both the authorities below came to the concurrent conclusion that the tenant committed wilful default in payment of rent for the petition periods. In the light of the Full Bench decision cited above, there is no infirmity in the orders of eviction passed by the authorities below. [Para. 10]

Case referred to:

Perumal v. Muthuswamy, (1962)1 M.L.J. (S.N.) 55 (F.B.). [Para. 9]

K.N.Subramaniam, for Petitioner.

N.Nagusha, for Respondents.

The Court made the following

ORDER: C.R.P.No.3948 of 1986 is directed against the order passed in R.C.A.No.128 of 1986 which in turn arises out of the order passed in R.C.O.P.No.397 of 1983. C.R.P.No.3949 of 1986 is directed against the order passed in R.C.A.No.129 of 1986 which in turn arises out of the order passed in R.C.O.P.No.2738 of 1983. The petitioner and the respondents in both the revision petitions are the same and they are respectively being the tenant and the landlady.

2. The petition(s) premises is situated at 178, Peters Road, Royapettah, Madras-14. The monthly rent agreed was Rs.300 exclusive of electricity charges. According to the landlady, the tenant committed wilful default in payment of rent from April, 1981 to November, 1981, viz., for a period of 8 months, amounting to Rs.2,400. Hence the landlady filed R.C.O.P.No.115 of 1982 under Sec.10(2)(i) of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960, as amended by Act 23 of 1973, hereinafter referred to as the Act. During the pendency of the above rent control

proceeding, the landlady filed M.P.No.96 of 1982, since the tenant failed to pay rent for the months from April, 1981 to January, 1982, amounting to Rs.3,000. The tenant was directed to deposit Rs.2,400 before the court on or before 18.6.1982, but the tenant did not do so. Hence on 19.6.1982, the Rent Controller ordered eviction. As against the order passed in M.P.No.96 of 1982 in R.C.O.P.No.115 of 1982, the tenant filed R.C.A. Nos.1408 and 1409 of 1982. In the said appeals the tenant deposited Rs.2,400 in August, 1982. The landlady filed M.P.No.1342 of 1982 since the tenant failed to pay rent for the period from December, 1981 to July, 1982, viz., 8 months, amounting to Rs.2,400. As per the order of the court the tenant deposited Rs.1,800 and thereafter the tenant did not pay any amount to the landlady. According to the landlady, the tenant is liable to pay rent from April, 1981 to December, 1982, viz. 21 months, amounting to Rs.6,300. Even deducting the deposits made, viz. Rs.1,800 and Rs.2,400, the tenant has to pay the balance amount of Rs.2,100. Since the tenant defaulted in payment of rent for the months from June, 1982 to November, 1982, R.C.O.P.No.397 of 1983 was filed under Sec.10(2)(i) of the Act. Even thereafter the tenant did not pay any rent and hence the landlady filed R.C.O.P.No.2738 of 1983 for eviction and the default period in the latter case pertains to the period from December, 1982 to May, 1983.

3. In the counter statement, the tenant submitted that the landlady is not the absolute owner of the petition premises. The son of the landlady sent a notice dated 15.4.1980 claiming 3/10 share in the property as well as in the rent payable in respect of the property. The tenant replied to the said notice stating that since there is a *bona fide* dispute with regard to the title over the petition premises between the landlady and her son, she has not been able to pay rent to any one of them. The tenant also submitted that since the earlier petition, R.C.O.P.No.115 of 1982 was pending, the subsequent petitions on the same ground of alleged non-payment of rent are not maintainable. Further the amounts of Rs.2,400 and Rs.1,800 deposited by the tenant in the court is subject to the result in R.C.O.P.No.115 of 1982. There is no element of wilfulness in non-payment of rent from April, 1981 to May, 1983. The landlady is filing successive petitions for eviction with a view to get higher rent from the tenant. When the two earlier

eviction petitions are pending, the landlady has filed the third petition, viz., R.C.O.P.No.2738 of 1983. Therefore it is not correct on the part of the landlady to state that the tenant committed wilful default in payment of rent for the periods from June, 1982 to November, 1982 and also from December, 1982 to May, 1983. According to the tenant, both the petitions are liable to be dismissed.

4. On considering the facts arising in this case and after apprising the evidence, both oral and documentary, adduced on both sides, the Rent Controller came to the conclusion that the tenant committed wilful default in payment of rent for the period from June, 1982 to November, 1982 and from December, 1982 to May, 1983 and accordingly ordered eviction in both the petitions. On appeal the appellate authority, on the facts arising out of the case confirmed the order of eviction passed by the Rent Controller and dismissed the appeals. It is against the order passed in R.C.A.Nos.128 and 129 of 1986, the present revision petitions were filed by the tenant.

5. Learned counsel appearing for the petitioner/tenant submitted as under: The appellate authority erred in holding that the petitions for eviction for the period subsequent to that comprised in R.C.O.P.No.115 of 1982, that is for the period from June, 1982 to November, 1982 default during which period is the subject matter of R.C.O.P.No.397 of 1983, and for the period from December, 1982 to May, 1983 default during which period is the subject matter of R.C.O.P.No.2738 of 1983 are maintainable. The tenant was unable to pay the rent, since a *bona fide* dispute was existing between the landlady and her son over the title to the petition premises. When the earlier R.C.O.P.No.115 of 1982 was pending, the subsequent petitions in R.C.O.P.Nos.397 and 2738 of 1983, are not maintainable. The appellate authority ought to have allowed the application for additional evidence prayed for by the petitioner in M.P.No.425 of 1986 to come to the conclusion that Ex.P-3 dated 30.1.1981 said to have been sent to the tenant by the advocate for the landlady was not served on the tenant but had been returned to the sender. There is no provision in the Rent Control Act compelling the tenant to deposit the rent in court. Further the prescribed authority under Sec.9(3) of the Act was not appointed. Therefore, the tenant does not know where to

deposit the arrears of rent. When the amount spent towards repairs, etc. was under investigation in an earlier proceedings, viz., R.C.O.P.No. 115 of 1982, the subsequent proceedings in R.C.O.Ps.397 of 1983 and 2738 of 1983 are not maintainable. When an identical question as to who is the person entitled to receive the rent is the subject matter of C.R.P.No.1398 of 1986, against R.C.A.No.276 of 1985, against R.C.O.P.No.115 of 1982, in which stay of eviction order is granted, the orders of the appellate authority confirming the order of the Rent Controller in R.C.O.P.Nos.397 and 2738 of 1983 has to be stayed till the disposal of C.R.P.No.1398 of 1986. Thus, according to the learned counsel appearing for the tenant there was no wilful default in payment of rent for the periods between June, 1982 and November, 1982 and likewise between December, 1982 and May, 1983. Hence the order of eviction passed by the authorities below are inconsistent.

6. On the other hand, learned counsel for the landlady submitted as under: The first petition for eviction was filed in R.C.O.P.No.115 of 1982, since the tenant committed wilful default in payment of rent for the period from April, 1981 to November, 1981 and during the pendency of the abovesaid proceedings, again the tenant committed wilful default in payment of rent for the periods from June, 1982 to November, 1982 and from December, 1982 to May, 1983 and hence two separate eviction petitions, viz. R.C.O.P.No.397 of 1983 and R.C.O.P.No.2738 of 1983, were filed and as such they are maintainable. Further all the three above petitions relate to three different periods and therefore pendency of one eviction petition would not affect the conduct of other two proceedings. The case put forward by the tenant that she incurred an expenditure of Rs.2,400 towards repairs and white washing of the petition premises was also not accepted. While so, it is not open to the tenant to contend in the present proceedings that there is a justification on the part of the tenant in not paying the rent as and when it becomes due. Admittedly, during the pendency of R.C.O.P.No.115 of 1982, the tenant committed wilful default in payment of rent for the period from June, 1982 to November, 1982 and from December, 1982 to May, 1983. In such circumstances, it is open to the landlady to file a petition under Sec.11(4) of the Act or to file separate eviction proceedings for the default committed

during the subsequent periods. Even though there is no provision in the Act compelling the tenant to deposit the rent in court and even though no prescribed authority has been appointed under Sec.9(3) of the Act, still the tenant is duty bound to pay the rent every month as and when it becomes due and failure to do so would definitely amount to wilful default in payment of rent. The tenant was already informed that the dispute between the landlady and her son was settled by way of notice to the tenant. Even after the said notice the tenant failed to pay rent for the petition(s) periods. The tenant is not entitled to incur expenditure towards repairs, etc. any amount more than one month's rent under the provisions of the Act. Therefore the tenant cannot claim that she incurred an expenditure of Rs.2,400 towards repairs, etc. which was without the permission of the landlady. Further there is no evidence on the side of the tenant to show that the landlady accepted to adjust the amount of Rs.2,400 towards arrears of rent. Therefore, it is submitted that the orders of eviction passed by the authorities below in both the eviction petitions are in accordance with law and they being concurrent orders, no interference by this court is called for.

7. I have heard the rival submissions. The fact remains that the petitioner herein is the tenant in respect of the petition premises on a monthly rent of Rs.300, exclusive of electricity charges. The tenant committed wilful default in payment of rent for the petition periods, viz. from June, 1982 to November, 1982 and December, 1982 to May, 1983. Earlier the landlady filed R.C.O.P.No.115 of 1982 under Sec.10(2)(i) of the Act for eviction on the ground of wilful default in payment of rent for the period from April, 1981 to November, 1981. During the course of the above R.C.O.P.No.115 of 1982, the landlady filed M.P.No.96 of 1982 under Sec.11(4) of the Act, since the tenant failed to pay rent amounting to Rs.2,400. The Rent Controller directed the tenant to pay the rent on or before 18.6.1982, but the tenant did not pay as directed. But against that order the tenant filed appeals in R.C.A.Nos.1408 and 1409 of 1982. In the appeal proceedings the tenant deposited the arrears amount in court. Thereafter also the tenant did not pay rent to the landlady and again the landlady filed M.P.No.1342 of 1982 and upon orders in the said petition the tenant deposited Rs.1800 in court. While

disposing of the two appeals, viz. R.C.A.Nos.1408 and 1409 of 1982, the appellate authority remanded R.C.O.P.No.115 of 1982 for fresh disposal by the Rent Controller. Thereafter the Rent Controller on a consideration of the facts arising in the remand case ordered eviction on 13.12.1984. Against the said order of eviction passed by the Rent Controller, the tenant preferred an appeal before the Appellate Authority, who confirmed the order of eviction passed by the Rent Controller. Against the Order of the appellate authority, the tenant preferred C.R.P.No.1398 of 1986 before this court. While disposing of that revision this Court refused to interfere with the order of eviction passed by the Rent Controller and confirmed by the appellate authority.

8. During the pendency of the abovesaid eviction proceeding, R.C.O.P.No.115 of 1982, the tenant committed wilful default in payment of rent during the subsequent periods, viz., from June, 1982 to November, 1982 and from December, 1982 to May, 1983 and this made the landlady to file two separate eviction petitions. viz. R.C.O.P.Nos.397 of 1983 and 2738 of 1983. The Tenant accepted that after March, 1981 she did not pay any rent to the landlady. According to the tenant, the son of the landlady sent her a notice dated 15.4.1980 claiming 3/10 share in the rent to be paid to him, since he is having 3/10 share in the petition premises. According to the tenant, inasmuch as there existed a *bona fide* dispute between the landlady and her son over the title to the petition premises, she was unable to pay rent to anyone of them. On the other hand, it was pointed out by the landlady that the dispute between herself and her son was settled and this was duly communicated to the tenant by way of a notice and calling upon her to pay the rent to the landlady. According to the tenant, this notice was not served upon her. It is seen that the notice sent by the landlady was returned stating that the tenant (addressee) is not in town. In her deposition, the tenant said that she paid the rent for March, 1981 on 2.10.1981 and obtained a receipt from the landlady. If the tenant had any doubt with regard to the title and the controversy in respect thereof between the landlady and her son, she would not have paid the rent for the month of March, 1981 on 2.10.1981. Thus there is no justification on the part of the tenant to say that she does not know that the dispute between the landlady and her son

was settled. Moreover, if the tenant had any doubt as to whom the rent has got to be paid, the tenant could have paid the rent into court. But, according to the tenant, it is not compulsory to deposit the rent into court, and in this case the prescribed authority, as contemplated under Sec.9(3) of the Act was not also appointed to enable her to deposit the rent before such authority. When a petition for eviction was filed, nothing prevented the tenant to deposit the rent in the rent control proceedings. This was also not done by the tenant. The landlady then sent notices dated 25.5.1980 and 9.6.1980 calling upon the tenant to pay the arrears of rent and in spite of such notices no rent was paid to the landlady. The arrears of rent was paid only in the rent control appeal proceedings. The tenant deposited Rs.4,200 in the appellate court proceedings for the period from April, 1981 to May, 1982, but the rent due for June, 1982 to November, 1982 and for December, 1982 to May, 1983 was not at all paid, even after petitions for eviction were filed. The landlady filed M.P.No.674 of 1983 for a direction to the tenant to pay the rent for the period from June, 1982 to July, 1983 amounting to Rs.4,200 in which an order was passed directing the tenant to pay that amount on or before 26.9.1983. But the tenant later on requested the court to extend time for payment by filing M.P.Nos.93 of 1982 and 661 of 1985. Time was extended and the tenant deposited in two instalments. Therefore, it is seen that the tenant used to pay the rent only after eviction proceedings were initiated and not prior to that.

9. According to the tenant, the rent control proceedings in H.R.C.O.P.No.115 of 1982 was pending and so the subsequent petitions on the very same ground of wilful default in payment of rent under Sec.10(2)(i) of the Act cannot be filed. It is the contention of the landlady that during the pendency of the eviction petition R.C.O.P.No.115 of 1982 if there is any default it is open to the landlady to file either a petition under Sec.11(4) of the Act or move a fresh petition for eviction under Sec.10(2)(i) of the Act. The contention of the landlady that for each default period, the landlady is entitled to file a fresh petition under Sec.10(2)(1) of the Act is well founded. A Full Bench of this Court in the case of *Penumal v. Muthuswamy*, (1962) 1 M.L.J. (S.N.) 55 (F.B.), while considering this aspect held as under:

“Under the proviso to Sec.10(7) of the present

Act (XVIII of 1960) though the language used is not quite clear, a landlord can file an application complaining of default for subsequent months during the pendency of an application on the ground of default in payment of rent for earlier months. The word "other grounds" in the proviso must relate to the necessary grounds other than those which form the subject-matter of the previous petition.

Under Sec.35(2) of the New Act, its provisions will apply to proceedings instituted under the earlier Act."

In view of the above said Full Bench decision, it is open to the landlady to file separate petitions for eviction on the ground of wilful default in payment of rent for the subsequent periods, when the earlier petition for eviction on the same ground is pending.

10. The tenant submitted that she incurred an expenditure of Rs.2,400 for repairs and white washing which the landlady agreed to adjust towards arrears of rent. But there is no evidence on record to substantiate this version put forward by the tenant. Further, under the Act, the tenant is entitled to incur an expenditure towards repairs only to the extent of one month's rent and beyond that amount the tenant is not entitled to spend without the permission of the landlady. In this case no such permission was obtained from the landlady. Further there is contradiction on this aspect between the oral and documentary evidence. Exs.R-34, R-35 and R-36 respectively for Rs.650, 700 and 1,050 relate to the expenses incurred for white washing, etc. whereas R.W.1 in the witness box would say that she had spent Rs.800 for each year, viz. 1979, 1980 and 1981. However even according to the tenant, for the petition periods, June, 1982 to November, 1982 and December, 1982 to May, 1983, the rent was not paid and the reasons given by the tenant for not paying the rent in time is not convincing. Both the authorities below came to the concurrent conclusion that the tenant committed wilful default in payment of rent for the petition periods. On a careful consideration of the facts arising in these revision petitions in the light of the Full Bench decision cited supra, I hold that there is no infirmity in the orders of eviction passed by the authorities below. The civil revision petitions are dismissed with costs. Time for eviction - two months.

V.K.

---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thangamani, J.*

C.R.P.No.2887 of 1993 15th October, 1993.

Muthukrishnan ...Petitioner

v.

Sakthi Shanmugavel ...Respondent.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.10(3)(a)(i) - Landlord - Government servant - Living away from home town - Wanting to settle down in home town - Owning house in some other town - Seeking eviction of tenant in home town as he wants to settle down - Tenant if can contend that the landlord can settle down in the other town.

The landlord is the native of Dindigul. Only because he was in service, he was away from the town all along. Now it is open to him to settle in Dindigul and seek vacation of his house for the purpose of his residence. It is not for the tenant to oppose the same on the ground that the landlord has his own house in Namakkal and he can as well settle there. [Para. 2]

Case referred to:

Thaneermalai Chettiar v. S.J.Dhanraj, (1986)1 M.L.J. 115. [Para. 3]

Petition under Sec.25 of the Tamil Nadu Buildings Lease and Rent Control Act 18 of 1960 as amended by Act 23 of 1973 praying the High Court to revise the order of the Court of the Principal Subordinate Judge, Dindigul, dated 28.7.1993 and made in R.C.A.No.22 of 1992 (R.C.O.P.No.12 of 1992 dated 8.6.1992, Principal District Munsif, Dindigul).

The Court made the following

ORDER: The revision petitioner is the tenant/respondent in R.C.O.P. No.12 of 1991 on the file of Rent Controller cum District Munsif, Dindigul. The landlord filed that application under Secs.10(3)(a)(i) and 14(1)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960. The landlord alleged that recently he has retired from Government service. He has no other house except the petition house in Dindigul. He is now put up in a rented building in Namakkal. He requires the building for his residence at Dindigul. Even while he was in service he had written letters

to the tenant seeking the house for his accommodation after retirement. The landlord also claimed that the building was constructed 100 years ago and since it is in dilapidated condition, he wants the same for demolition and reconstruction. The trial court allowed his application only on the first ground. The appeal preferred by the tenant in R.C.A.No.22 of 1992 was also dismissed by the appellate authority. Now the tenant has come forward with this civil revision petition against the said orders.

2. Both the courts below have found that the landlord has no other building in Dindigul. There is no dispute that at the time of application he was residing in Namakkal. Learned counsel for the revision petition submitted that the courts below have gone wrong in holding that the landlord is put up in a rented building in Namakkal. Ex.P-16 is the notice given by the landlord to the tenant on 13.2.1989 through his counsel stating about his requirement of the house. In this he has specified that he is residing only in a rented building in Namakkal. This claim has not been repudiated by the revision petitioner in his reply Ex.P-17 dated 25.2.1989. Besides, the tenant has stated in his evidence that only from the landlord he came to know that the letter was having his own house in Namakkal. Excepting this verbal version of the tenant, there is no other material to hold that the landlord is having a house in Namakkal. In any event, the landlord is the native of Dindigul. Only because he was in service, he was away from the town all along. Now it is open to him to settle in Dindigul and seek vacation of his house for the purpose of his residence. It is not for the tenant to oppose the same on the ground that the landlord has his own house in Namakkal and he can as well settle there. Further, we find from Ex.P-10 that even in 1980 the landlord has informed the tenant that he was requiring the building for his own use. The trial court also observes that Exs.P-1 to P-15 the correspondence between the landlord and tenant from 1968 to 1989 indicate that continuously the landlord has been pressing the tenant to vacate the house for his own occupation after his retirement. While so, it is evident that the courts below have rightly found in favour of the landlord.

3. Learned counsel for the revision petitioner cited the decision in *Thanneermalai Chettiar v. S.J.Dhnraj*, (1986) 1 M.L.J. 115, in support of his contention that the burden is on the landlord to

show that he does not own any house in Namakkal. In the case cited the landlord sought eviction of the tenant of his house at Villupuram on the ground that he required the premises for his own occupation. The landlord was permanently residing in Devakottai. He wanted to leave Devakottai and settle down at Villupuram. That application was resisted by the tenant stating that all his vested interest and properties of the landlord are only at Devakottai. The father of the landlord was a businessman and the entire family was doing business in money lending at Devakottai. Besides, they have got a vast estate there. His requirement of the house on the ground that he wanted to settle down at Villupuram was most unjustifiable and unnatural. In these circumstances, Natarajan, J., has held that the landlord failed to establish that there was a genuine pressing need of the house for his own use and occupation. Evidently, the facts therein are not akin to those in the present case. It is not the case of the revision petitioner herein that the landlord has got any avocation in Namakkal. That at one point of time in his service the landlord happened to be in Namakkal cannot be a ground for holding that he does not require his own house at Dindigul which is his native place for his settling there after his retirement. So, it cannot be said that the order of the appellate authority requires interference on the ground of any error in the legality or propriety of its decision.

4. In the result, the civil revision petition is dismissed even at the admission stage itself. Time for eviction three months on condition that the petitioner files an affidavit of undertaking in the court below within two weeks from this day.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Ratnam, J.

C.R.P.No.3437 of 1992 and A.A.O.No.1086 of
1992 29th October, 1993.

K.Manickam ...Petitioner
v.
R.Palanisamy ...Respondent.

Specific Relief Act (XLVII of 1963), Secs. 22 and 29 - Agreement for sale of house - Plaintiff-purchaser cancelling agreement and filing suit for return of initial deposit - Later filing petition for amendment of plaint to include relief of specific performance - If permissible.

Held: What transpires from the stand of the plaintiff-purchaser in the notices to the defendant-vendor dated 23.4.1985 and 28.1.1986 and also the plaint for refund of initial deposit is, though on 23.4.1985, the plaintiff might have entertained a desire to have the agreement dated 1.2.1983 specifically enforced, the idea of securing that relief had been given up by him by the unilateral cancellation of the agreement by notice dated 28.1.1986 and demanding a refund of the amount of advance said to have been paid. It is thus seen that though the plaintiff was aware of the reliefs which he could secure under the agreement dated 1.2.1983, he deliberately opted to cancel the agreement putting an end to the obligations on his part and also on the part of the defendant and had sought recovery of the advance amount paid. This would undoubtedly amount to an election on the part of the plaintiff so as to preclude him from making a volte face and asking for the inclusion of the relief of specific performance earlier abandoned. [Para. 6]

It is thus seen that on the facts and circumstances of this case, the plaintiff had clearly and categorically elected to treat the agreement for sale as at an end resulting in the discharge of both the parties from the obligations thereunder and thereafter, it is not open to the plaintiff to seek by way of an amendment, the relief of specific performance. [Para. 7]

Sundaramayyar v. Jagadeesan, (1965) 1 M.L.J. 562: I.L.R. (1964) 2 Mad. 876: A.I.R. 1965 Mad. 85, Prem Raj v. D.L.F. Housing and Construction (P.)

Ltd., A.I.R. 1968 S.C. 1355, Ayissabi v. Gopala Konar, A.I.R. 1989 Ker. 134 and Roop Chand Chaudhari v. Ranjit Kumari, A.I.R. 1991 P. & H. 212, relied on.

Cases referred to:

Sundaramayyar v. Jagadeesan, (1965) 1 M.L.J. 562: I.L.R. (1964) 2 Mad. 876: A.I.R. 1965 Mad. 85. [Paras. 5, 6, 10]

Prem Raj v. D.L.F. Housing and Construction (P.) Ltd., A.I.R. 1968 S.C. 1355. [Paras. 5, 7]

Ayissabi v. Gopala Konar, A.I.R. 1989 Ker. 134. [Paras. 5, 7]

Roop Chand Chaudhari v. Ranjit Kumari, A.I.R. 1991 P. & H. 212. [Paras. 5, 7]

Gopalakrishnamurthi v. Sreedhara Rao, (1949) 2 M.L.J. 421. [Para. 9]

Ma Shwa Mya v. Mauna, 48 I.A. 214. [Para. 9]

C.R.P.No.3437 of 1992: Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the Additional District Court, Periyar District at Erode, dated 2.9.1992 and made in I.A.No.232 of 1992 in A.S.No.193 of 1990. (O.S.No.54 of 1986, dated 21.9.1989 Principal Subordinate Judge, Erode), etc.

V.K.Muthusamy, for Petitioner.

A.K.Kumarasamy, for Respondent.

The Court made the following

ORDER: The defendant in O.S.No.54 of 1986, Subordinate Judge's Court, Erode, is the petitioner in the civil revision petition as well as the appellant in the civil miscellaneous appeal, directed against the order in I.A.No.232 of 1992 in A.S.No.193 of 1990, Additional District Judge's Court, Erode and in A.S.No.193 of 1990, respectively. For the sake of convenience, the reference to the parties, in the course of this judgment, shall be according to their array in the suit. Briefly stated, the circumstances giving rise to these proceedings are as follows:

On 7.4.1980, a house bearing door No.259, Periyar Nagar, Erode Town, was allotted to the defendant by the Tamil Nadu Housing Board, under a lease-cum-sale agreement on an initial deposit of Rs.5,900 and the defendant agreed to pay the balance in monthly instalments, besides the service charges to the housing board. The defendant entered into an agreement of sale on 1.2.1983 with the plaintiff, whereunder it was agreed to execute a registered sale deed in favour of the plaintiff for Rs.58,000, after receiving a sum of Rs.15,000 as advance, towards part payment of the sale price and

agreeing further, to pay the future instalments and service charges to the Housing Board and to execute a sale deed after receiving the balance of sale consideration in a sum of Rs.43,000. In part performance of the agreement, the plaintiff was put in possession of the house and at the request of the defendant, the plaintiff paid a sum of Rs.1,835.50 to the Housing Board through the defendant, who handed over the receipt for the payment and agreed to adjust that amount also towards the balance of sale consideration of Rs.43,000. The plaintiff thus claimed to have paid Rs.16,835.50 towards part of the sale price of Rs.58,000. Since, according to the plaintiff, the defendant had been delaying to clear the balance amount due to the Housing Board, the plaintiff issued a notice on 23.4.1985 expressing his readiness and willingness to pay the balance of the sale price and take a registered sale deed. But, this, according to the plaintiff, did not evoke any response. Subsequently, enquiries were made by the plaintiff at the Tamil Nadu Housing Board and it was learnt that the defendant had not paid the balance of the sale price and the value of the land payable was pending adjudication and under those circumstances, the defendant, according to the plaintiff, was unable to execute a registered sale deed in favour of the plaintiff, which led to the cancellation of the agreement by the plaintiff by means of a registered notice dated 28.1.1986, whereunder, a demand for the refund of Rs.16,835.50 was also made which, however, was not paid by the defendant. In O.S.No.54 of 1986 instituted by the plaintiff, he prayed for the recovery of the sum of Rs.16,835.50 from the defendant together with interest and costs.

2. In the written statement filed by the defendant, while accepting the allotment of the house bearing door No.259, by the Tamil Nadu Housing Board, on 7.4.1980 and the entering into an agreement for the sale of the house to the plaintiff on 1.2.1983 and the receipt of a sum of Rs.15,000 by way of advance and the handing over of possession of the property to the plaintiff in part performance of the agreement, he denied the payment of Rs.1,835.50 by the plaintiff and stated that the plaintiff did not make any payment at all to the Housing Board on behalf of the defendant. Claiming that he had been paying the monthly instalments, the defendant questioned the readiness and willingness of the plaintiff to perform his part of the contract and stated that the plaintiff never

tendered the balance of sale consideration and called for the execution of the sale deed and that was owing to non-availability of requisite funds with the plaintiff. In addition it was also stated that the land value awaited adjudication by court and the plaintiff has necessarily to wait till the dispute was settled and the plaintiff cannot unilaterally rescind the agreement and seek to recover the advance. The suit was also characterized as premature. Referring to the occupation of the house by the plaintiff, the defendant stated that the house was capable of fetching a monthly rental of not less than Rs.450 and he had thus sustained a loss at that rate per month from 1.2.1983 and that he is entitled to deduct that amount in case he is called upon to refund the advance. Ultimately, the defendant prayed for the dismissal of the suit.

3. The learned Subordinate Judge, Erode, who tried the suit, on a consideration of the oral as well as the documentary evidence, found that the plaintiff is not entitled to recover any amount from the defendant and ultimately dismissed the suit. Aggrieved by this, the plaintiff preferred A.S.No.193 of 1990 before the Additional District Judge's Court, Erode. In I.A.No.232 of 1992 in A.S.No.193 of 1990, the plaintiff prayed for an amendment of the plaint to include two paragraphs with reference to his readiness and willingness to perform his part of the contract and the ability of the defendant to execute the sale deed justifying the inclusion of the relief of specific performance as well as the cancellation of the agreement made was on an erroneous appreciation of the state of affairs. In the prayer portion of the plaint also, the plaintiff wanted the introduction of the relief for specific performance ordering the defendant to execute and register the sale deed. This application was resisted by the defendant on the ground that the plaintiff in the notice issued by him on 28.1.1986 had voluntarily cancelled or rescinded the agreement of sale and demanded the amount of advance paid and had also instituted the suit for the return of the advance amount with interest and under those circumstances, the plaintiff cannot be permitted to make a *volte face*, to introduce a new case that he had always been ready and willing to perform his part of the contract and that the cancellation of the agreement was erroneous. In addition, it was also the case of the defendant that the plaintiff cannot be permitted to introduce a new set of pleas diametrically opposed to the

stand earlier taken by him and that if the amendment is permitted, that would alter the character of the suit. An additional plea was also raised that the relief of specific performance prayed for, would also be barred by limitation.

4. The learned Additional District Judge, Erode, placing reliance upon an unreported judgment of this Court in *M. Karupiah v. A. Chinnaswami Gounder*, C.R.P. Nos. 3877 and 4316 of 1981, dated 5.10.1982, allowed the amendment of the plaint as prayed for by the plaintiff. Consequently, he allowed A.S.No. 193 of 1990 and remitted the suit for fresh disposal. The correctness of the orders allowing the amendment of the plaint and remanding the suit, is questioned in the civil revision and the appeal respectively.

5. Learned counsel for the defendant strenuously contended that though the plaintiff had in the notice dated 23.4.1985, purported to demand specific performance of the agreement of sale stating that he was ready and willing to perform his part of the obligations under the agreement, yet, by another notice dated 28.1.1986, the plaintiff had cancelled the agreement dated 1.2.1983 and had demanded only the return of the advance amount together with other amounts claimed to have been paid by him and under those circumstances, the plaintiff must be held to his option exercised by him and cannot now be permitted to introduce an amendment claiming the relief of specific performance. Strong reliance in support of this contention was placed on the decision reported in *Sundaramayyar v. Jagadeesan*, (1965) 1 M.L.J. 562; I.L.R. (1964) 2 Mad. 876; A.I.R. 1965 Mad. 85, *Prem Raj v. D.L.F. Housing and Construction (P.) Ltd.*, A.I.R. 1968 S.C. 1355, *Ayissabi v. Gopala Konar*, A.I.R. 1989 Ker. 134 and *Roop Chand Chaudhari v. Ranjit Kumari*, A.I.R. 1991 P. & H. 212. On the other hand, learned counsel for the plaintiff contended that under identical circumstances in *M. Karupiah v. A. Chinnaswami Gounder*, C.R.P. Nos. 3877 and 4316 of 1981, dated 5.10.1982, this Court had upheld the allowing of such an amendment and that would govern this case as well, rendering it unnecessary to interfere with the orders passed by the court below.

6. From paragraph 6 of the plaint as originally filed, it is seen that on 23.4.1985, the plaintiff had sent a notice to the defendant expressing his readiness and willingness to pay the balance of the sale price and also to take a registered sale deed. This

would indicate that at the time when the notice was issued, the plaintiff was keen on obtaining the relief of specific performance of the agreement dated 1.2.1983, though there was no reply to that notice from the defendant. However, in paragraph 7 of the plaint, it had been stated that owing to the non-payment of the balance of the sale price and the increased land value payable by the defendant, which was also pending decision, the defendant had rendered himself unable to execute a registered sale deed and plaintiff cancelled the agreement by his notice dated 28.1.1986, and demanded refund of Rs. 16,835.50, which the defendant failed to pay. From the stand so taken, it is evident that at the time when the notice dated 28.1.1986 was issued, the plaintiff had abandoned the idea of securing the specific performance of the agreement dated 1.2.1983 and was content to get back the amount paid by him by way of advance. Otherwise, the cancellation of the agreement by the notice dated 28.1.1986 and the demand for the refund of the advance amount by the plaintiff, could not have been so made by the plaintiff. What transpires from the stand of the plaintiff in the notices dated 23.4.1985 and 28.1.1986 and also the plaint is, though on 23.4.1985, the plaintiff might have entertained a desire to have the agreement dated 1.2.1983 specifically enforced, the idea of securing that relief had been given up by him by the unilateral cancellation of the agreement by notice dated 28.1.1986 and demanding a refund of the amount of advance said to have been paid. It is thus seen that though the plaintiff was aware of the reliefs which he could secure under the agreement dated 1.2.1983, he deliberately opted to cancel the agreement putting an end to the obligations on his part and also on the part of the defendant and had sought recovery of the advance amount paid. This would undoubtedly amount to an election on the part of the plaintiff so as to proclude him from making a *volte face* and asking for the inclusion of the relief of specific performance, earlier abandoned. It is in this connection, the decision in *Sundaramayyar v. Jagadeesan*, (1965) 1 M.L.J. 562; I.L.R. (1964) 2 Mad. 876; A.I.R. 1965 Mad. 85, is relevant. In that case, it had been pointed out that where a party to the contract of sale made a claim for damages, on the footing of the breach by the other party, it would amount to definite election on his part to treat the contract as at an end and thereafter no suit for specific

performance can be maintained by him, for, by such election, he had disabled himself from making the averment that he has always been ready and willing to perform his part of the contract. Similar is the situation in this case, where the plaintiff was fully aware of the reliefs available to him owing to the alleged non-performance of the obligations by the defendant under the terms of the agreement dated 1.2.1983, but, he had chosen in the first instance to secure the relief of specific performance in the first notice dated 23.4.1985, though in the second notice dated 28.1.1986, he had cancelled the agreement and had demanded only the refund of the advance amount and some other amount. This would amount to an election on the part of the plaintiff treating the agreement as cancelled and seeking to recover only the advance amount paid thereby disabling himself from claiming the relief of specific performance.

7. In *Prem Raj v. D.L.F. Housing and Construction (P.) Ltd.*, A.I.R. 1968 S.C. 1355, the question arose whether a plaintiff suing for a declaration that a certain contract is void and inoperative, having been obtained by undue influence, can, in the same suit, in the alternative, ask for the relief of specific performance of the same contract. While holding that it would not be open to the plaintiff to do so, the Supreme Court, referring to Sec.37 of the Specific Relief Act, 1877, corresponding to Sec.29 of the Specific Relief Act, 1963, pointed out that it is not open to a plaintiff to sue for rescission of the agreement and in the alternative sue for specific performance and such omission is deliberate, so that no such alternative prayer would be available to the plaintiff. In this case, there was no need whatever for the plaintiff to have resorted to the relief of rescission as, in the second notice dated 28.1.1986, the plaintiff had unequivocally cancelled the agreement dated 1.2.1983 and thereafter, he could not have prayed for the relief of specific performance, as the very agreement on which that would have been available to the plaintiff, stood cancelled by his own act. In *Ayissabi v. Gopala Konar*, A.I.R. 1989 Ker. 134, it was laid down that where the plaintiff had once repudiated the contract and elected to sue for damages, he cannot thereafter claim specific performance of that contract. This decision also would support the case of the defendant that the plaintiff cannot, at this stage, be permitted to include the relief of specific performance earlier abandoned by him. In

Roop Chand Chaudhari v. Ranjit Kumari, A.I.R. 1991 P. & H. 212, it was held that once a suit for return of the earnest money/ advance is filed, the plaintiff disentitles himself to the alternative relief of specific performance, even if claimed in that suit and he cannot be allowed to amend his plaint later and this is primarily on the basis that a claim for return of earnest money is based on repudiation of the contract and when once the contract is repudiated, the relief for specific performance would not be available either as an alternative relief or even by way of an amendment to the plaint. It is thus seen that on the facts and circumstances of this case, the plaintiff had clearly and categorically elected to treat the agreement dated 1.2.1983 as at an end resulting in the discharge of both the parties from the obligations thereunder and thereafter, it is not open to the plaintiff to seek by way of an amendment, the relief of specific performance.

8. It would also be relevant to notice that Sec.22 of the Specific Relief Act, 1963, provides that a person suing for the specific performance of a contract, may, in appropriate cases, ask for any other relief, including refund of any earnest money under Sec.22(1) (b) and for the purpose of obtaining such relief, he must specifically ask for it and if it had not been so asked, the court shall, at any stage of the proceeding, allow the plaintiff to amend the plaint notwithstanding anything to the contra contained in the Code of Civil Procedure. From this also, it follows that in a suit for specific performance of the contract only, the relief of refund of earnest money or deposit could be asked for and in this case, the relief asked for initially was not for specific performance, but for refund of the advance amount and in such a case, there is no question of the applicability of Sec.22(1)(b) of the Specific Relief Act, 1963, also.

9. There is yet another aspect which requires to be noticed. At the time when the plaintiff issued the notice dated 23.4.1985, he was fully aware of his right under the agreement of sale dated 1.2.1983, as otherwise, he would not have called upon the defendant to perform his part of the obligations under the agreement, while expressing his readiness and willingness to perform the obligations cast on him thereunder. In other words, at the time when the notice dated 23.4.1985 was issued, the plaintiff was fully aware of his right to seek the relief of specific performance. Even after being

aware of his right to seek such a relief, the plaintiff did not do so. This would mean that the plaintiff had not chosen to mention in the original plaint, the reliefs which were available to him on facts and within his knowledge, and in such an event, to permit an amendment, would result in a new case being made on facts, which were available, but were not put forward. In *Gopalakrishnamurthi v. Sreedhara Rao*, (1949) 2 M.L.J. 421, it had been pointed out that facts available to the plaintiff, which he had not chosen to mention, could not be permitted to be brought in by an amendment, and in so holding, reliance was placed upon the decision of the Privy Council in *Ma Shwa Mya v. Mauna*, 48 I.A. 214, to the effect that a new case cannot be permitted to be made out on facts, which were available, but not put forward. This principle also would be applicable on the facts and circumstances of this case, inasmuch as the plaintiff was not only fully aware of the facts, but was also aware of the reliefs which he could have prayed and which, indeed, were prayed for in the first notice dated 23.4.1985.

10. That leaves for consideration, the unreported judgement in *M.Karuppiah v. A.Chinnaswami Gounder*, C.R.P.Nos.3877 and 4316 of 1981, dated 5.10.1982, referred to earlier, on which considerable reliance was placed by learned counsel for the plaintiff. On a careful perusal of the judgement, it is seen that in the course of the suit, which was pending after a remit order, an amendment was prayed for to delete the relief for specific performance and the amendment was allowed. It does not appear from the judgement that there was any election of relief as in this case. Further, the decision in *Sundaramayyar v. Jagadeesan*, (1965) 1 M.L.J. 562: I.L.R. (1964) 2 Mad. 876: A.I.R. 1965 Mad. 85, has also not been properly appreciated in that, it had been stated that the question how far the plaintiff would be entitled to seek specific performance, after having asked for a refund of the advance, is a matter that has to be gone into in the trial of the suit. When the very question is whether he should be permitted to go for trial on a case seeking the relief of specific performance, it appears that that cannot be gone into in the course of the trial of the suit, but should be dealt with and decided even at the stage of considering the amendment. Further, when the plaintiff in his case had elected to cancel the agreement dated 1.2.1983 by the notice dated 28.1.1986, it is difficult to

conceive of the agreement being kept alive or intact, for the purpose of enabling the plaintiff to include by way of an amendment, the relief of specific performance. For the aforesaid reasons, the decision in *M.Karuppiah v. A.Chinnaswami Gounder*, C.R.P.Nos.3877 and 4316 of 1981, dated 5.10.1982, cannot be pressed into service by learned counsel for the plaintiff.

11. Thus, on a due consideration of the facts and circumstances of the case and also the relevant decisions, the orders of the court below allowing the amendment of the plaint and also remitting the suit for fresh disposal cannot be sustained. The civil revision petition and the appeal are, therefore, allowed and I.A.No.232 of 1992 in A.S.No.193 of 1990 shall stand dismissed and the remit order in A.S.No.193 of 1990, is set aside. The learned Additional District Judge, Erode, is directed to dispose of A.S.No.193 of 1990 on merits. No costs.

V.K

Order accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.No.1333 of 1993 26th November, 1993.

J.Cheganlal Jain and another ...Appellants
v.
XIII Judge, Court of Small Causes, Madras and
another ...Respondents.

Constitution of India (1950), Arts.226, 133 and 134-A - Petition for fixation of rent under Rent Control Act - Landlord contending that the rent court has no jurisdiction to proceed with the case as the relationship of landlord and tenant was not existing between the parties - Contention rejected - Writ petition against order, if maintainable - Certificate for filing appeal to S.C., if can be granted.

When the question as to whether the rent court has jurisdiction or not can be decided by that court and it is open to the aggrieved party to avail the remedy under the law as against that order, certainly Art. 226 of the Constitution is not to be

exercised in such cases. The Supreme Court has laid down in *Ghan Shyam Das Gupta v. Anat kumar Sinha*, A.I.R. 1991 S.C. 2251, that the remedy provided under Art.226 is not intended to supersede the modes of obtaining relief before a civil court or to deny the defences legitimately open in such actions. In *Mohan Pandey v. Usha Rani Rajgaria*, A.I.R. 1993 S.C. 1225, it has been further held that the jurisdiction under Art.226 cannot be used for deciding disputes for which remedies under the general law, civil or criminal, are available. [Para. 6]

Therefore, the present writ petition is not maintainable. The remedy open to the petitioners is to urge all the contentions before the civil court. If they fail there, it would be open to them to file an appeal or revision as provided under the Rent Control Act. [Para. 7]

Learned counsel for the appellants made an oral application under Art.134-A for granting a certificate under Art.133 that the case involves a substantial question of law of general importance which needs to be decided by the Supreme Court. No such question arises in this case, as the decision rests on decisions of Supreme Court as pointed out above. [Para. 10]

Cases referred to:

Issardos S.Lulia v. Smt.Mari, A.I.R. 1962 Mad. 458. [Para. 5]

Ghan Shyam Das Gupta v. Anat kumar Sinha, A.I.R. 1991 S.C. 2251. [Para. 5]

Mohan Pandey v. Usha Rani Rajgaria, A.I.R. 1993 S.C. 1225. [Paras. 5 & 6]

Appeal under Clause 15 of the Letters Patent against the Order of Kanakaraj, J., dated 9.11.1993 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.19811 of 1993 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* or any other prerogative writ calling for records in R.C.O.P.Nos.862 and 3142 of 1980, on the file of the 1st respondent herein declare this first respondent to be *coram non judice*, the orders and decree dated 16.6.1993 passed in M.P.Nos.653 and 972 of 1990 in R.C.O.P.No.862 of 1988 and M.P.No.611 of 1991 in R.C.O.P.No.3142 of 1988 to be nonest and not binding on the petitioner No.2 herein and quash the same, prohibit the first respondent from proceeding with the R.C.O.P.Nos.862 and 3142 of 1988 in any manner whatsoever with such further or other relief or reliefs.

M.Ranka, for Appellants.

The Judgment of the Court was delivered by *K.A.Swami, C.J.*: This appeal is preferred against the order dated 9.11.1993 passed by the learned single Judge in W.P.No.19811 of 1993. In the said writ petition, the petitioners/appellants have sought for quashing the order dated 16.6.1993 passed in M.P.No.653 of 1990 in R.C.O.P.No.862 of 1988.

2. It may be pointed out here that the petitioners/appellants had also filed another writ petition in W.P.No.19810 of 1993, seeking a writ in the nature of *prohibition*, prohibiting the V Assistant Judge, City Civil Court, Madras, from proceeding further with O.S.No.3877 of 1987.

3. Learned Single Judge has rejected both the writ petitions by a common order. As already stated, the present writ appeal relates only to the subject matter of W.P.No.19811 of 1993.

4. R.C.O.P.No.862 of 1988 is filed by one Hamid Sultan for fixing the rent. In that proceeding, W.P.No.653 of 1988 is filed on the ground that the proceeding is not maintainable, since there is no relationship of landlord-tenant existing, and the court has no jurisdiction, therefore, the said issue should be tried as a preliminary issue. The learned XIII Judge, Court of Small Causes, Madras, by order dated 16.6.1993, has rejected the said application on the ground that the trial of the case has advanced and the present petition is only intended to procrastinate the proceedings. Learned Judge has also referred to the evidence recorded in the case and the stage at which the R.C.O.P. is pending.

5. It may be pointed out that the learned single Judge has rejected the writ petition on the ground that the jurisdiction under Art.226 of the Constitution of India cannot be allowed to be invoked against an order passed by the civil Judge exercising jurisdiction under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 hereinafter referred to as 'the Act', when the aggrieved party is entitled to avail the remedy under the Act. In support of this view, the learned single judge has placed reliance on a decision of this Court in *Issardos S.Lulia v. Smt.Mari*, A.I.R. 1962 Mad. 458 and also on two decisions of the Supreme Court in *Ghan Shyam Das Gupta v. Anat kumar Sinha*, A.I.R. 1991 S.C. 2251 and *Mohan Pandey v. Usha Rani Rajgaria*, A.I.R. 1993 S.C. 1225.

6. However, the contention of Mr.M.Ranka, learned counsel for the appellants, is that when the very

jurisdiction of the court is challenged, the petitioner/appellants should not be made to undergo the ordeal of the proceedings, and the writ petition in such a case can very well be maintained. It may be pointed out that whether the court, exercising jurisdiction under a special enactment or under a common law, has jurisdiction or not, to deal with the case brought before it, is a matter which can very well be decided by that court. It is not as though our law does not permit to decide such question by that court. When the question as to whether a court has jurisdiction, or not, can be decided by that court and it is open to the aggrieved party to avail the remedy under the law as against that order, certainly Art.226 of the Constitution of India is not to be exercised in such cases. In such cases, if Art.226 is to be exercised, we would better close all the courts and exercise the jurisdiction under Art.226 alone. Therefore, the Supreme Court has laid down in *Ghan Shyam Das Gupta v. Anant Kumar Sinha*, A.I.R. 1991 S.C. 2251, referred to above, that the remedy provided under Art.226 is not intended to supersede the modes of obtaining relief before a Civil Court or to deny defences legitimately open in such actions, in *Mohan Pandey v. Usha Rani Rajgaria*, A.I.R. 1993 S.C. 1225, it has been further held that the jurisdiction under Art.226 cannot be used for deciding disputes for which remedies under the general law, civil or criminal are available.

7. Therefore, we are of the view that the remedy open to the petitioners is to urge all the contentions raised herein before the civil court. If they fail there, it would be open to them to file an appeal or revision as provided under the Act. Hence it is not possible to appreciate the contention urged on behalf of the appellants.

8. However, learned counsel tried to persuade us by referring to certain rent receipt to indicate that the landlord has tried to split the tenancy, and thereby, he has tried to create a tenancy in favour of the second petitioner (wife of first petitioner) which accordance to him is not permissible. All that we can say is that, as it is open to the petitioner/ appellants to urge all these contentions before the court which is seized of the matter it would not be appropriate for us to express any opinion on the rent receipts produced before us.

9. For the reasons stated above, we see no ground to admit the writ appeal. Accordingly, it is rejected. However, we make it clear that all the

contentions of the petitioners/ appellants are left open to be urged in the appropriate proceedings. 10. As soon as we pronounced the aforesaid order, learned counsel for the appellants made an oral application under Art.134-A of the Constitution for granting a certificate under Art.133 of the Constitution that the case involves a substantial question of law of general importance which need to be decided by the Supreme Court, we are of the view that no such substantial question of law of general importance arises in this case, and our decision rests on the decisions of the Supreme Court as already pointed out above. Certificate sought for is refused.

V.K.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Thangamani, JJ.

Appeal No.1354 of 1990 and C.M.P.No.9176 of 1993
5th August, 1993.

J.K.Abdul Jabbar Rowther ...Appellant
v.

V.J.Mani Raj and others ...Respondents.

(A) *Civil Procedure Code (V of 1908), O.14, Rule 5 - Issues - Recasting of by Court - Notice to parties not necessary.*

The court is always entitled to recast the issues before judgment and it is not necessary to the court to issue notice to the parties when it finds that proper issues have not been framed. O.14, Rule 5 of the Code of Civil Procedure empowers the court to amend the issues or frame additional issues at any time before passing a decree for the purpose of determining the matters in controversy between the parties. [Para. 7]

(B) *Specific Relief Act (XLVII of 1963), Secs.15 and 20(2) - Specific performance of contract - Agreement containing unconscionable terms - Court if can refuse specific performance.*

A court cannot grant specific performance of an agreement which contains unconscionable terms,

which give an unfair advantage to the party who seeks specific performance. Sec.20(2) of the Specific Relief Act provides that the court may properly exercise discretion not to decree specific performance where the terms of the contract on the conduct of the parties are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant. The same sub-section provides that if the performance of the contract would involve hardship on the defendant which he did not foresee at the time of the contract, the court would not enforce such a contract.

[Para. 10]

(C) *Evidence Act (I of 1872), Sec.17 - Admission - Party making admission if can explain it.*

The proposition of law that admissions can be explained by the party concerned cannot be disputed.

[Para. 19]

Cases referred to:

Vejanla Poothi Raju v. V.B.Raju, (1969) 2 S.C.W.R. 200. [Para. 10]

Nagubai v. B.Sama Rao, A.I.R. 1956 S.C. 593; 1956 S.C.A. 959; 1956 S.C.C. 321; 1956 S.C.J. 655; 1956 S.C.R. 451; 1956 A.L.T. 1029; I.L.R. 1956 Mys. 152. [Para. 19]

M.M.Chettiv. C.Coomeresawamy Naidu and Sons, A.I.R. 1980 Mad. 212. [Para. 19]

Thirumallappa v. Ramappa, (1937) 2 M.L.J. 511; I.L.R. 1938 Mad. 140; A.I.R. 1938 Mad. 133; 46 L.W. 910; 1937 M.W.N. 1285; 176 I.C. 639. [Paras. 20, 21]

R.Anandavalli v. Alagammal, (1993) 1 M.L.J. 15. [Para. 21]

Narayan Bhagwant Rao Gosavi Baaljiwale v. Gopal Vinayak Cosavi, A.I.R. 1960 S.C. 100. [Para. 21]

Bhup Narain v. Gokul Chand, A.I.R. 1934 P.C. 68. [Para. 22]

S.N.Mundado v. New Mofussil Company Limited, A.I.R. 1946 P.C. 97. [Para. 22]

Veeramalai v. Thadikara, A.I.R. 1968 Mad. 383. [Para. 22]

Babulal v. M/s.Hazari Lal Kishori Lal, A.I.R. 1982 S.C. 818; 1982 All.L.J. 345; (1982) 1 S.C.C. 525; (1982) 8 All.L.R. 259; (1982) 1 A.P.L.J. (S.C.) 23; (1982) 1 S.C.J. 294. [Para. 22]

Appeal No.1354 of 1990: Appeal against the decree of the Court of the Additional Subordinate Judge, Vellore, North Arcot District, dated 26.11.1990 and passed in O.S.No.669 of 1988, etc. *T.R.Mani*, Senior Counsel for *M/s.T.M.Hariharan and P.R.Balasubramanian*, for Appellant.

T.R.Rajagopalan, for Respondent No.1.

M.N.Padmanabhan, for Respondent Nos.2 to 6.

The Judgment of the Court was delivered by *Srinivasan, J.*: The plaintiff, whose suit for specific performance has been dismissed, is the appellant herein. The case set out in the plaint is as follows: The properties described in the plaint schedule belonged originally to the first defendant. They were rented out to five persons. The first defendant was himself occupying one portion and running a printing press. As he wanted to augment his income and for that purpose demolish the superstructure and put up a new construction, he approached the plaintiff and the latter agreed that he would finance him provided a lease of the suit properties is granted to the plaintiff. The first defendant agreed to that course and as the building was in a dilapidated stage, he agreed to vacate the tenants and also vacate the portion occupied by him, demolish the entire building and put up new construction and lease out the entire property to the plaintiff. On 19.2.1988, an agreement was entered into between the plaintiff and the first defendant, which is marked as Ex.A-1. Under the agreement, the first defendant agreed to evict the tenants within three months and also vacate the portion in his occupation within the said time. He agreed to demolish the existing building and reconstruct a new building. A sum of Rs.50,000 was paid by the plaintiff to the first defendant for the purpose of evicting the tenants and demolishing the existing building. He agreed to receive further amounts from the plaintiff for the expenses to be incurred for demolishing the building and raising a new construction. He agreed to let out the new building to the plaintiff for a rent of Rs.2,000 per mensem. It was also agreed that the rent of Rs.2,000 would be adjusted towards the total amount paid by the plaintiff for a period of five years and thereafter, the first defendant would pay interest for the balance amount payable to the plaintiff at the rate of 24% per annum. The lease would be for a period of ten years after reconstruction and a lease deed would be executed and registered after the reconstruction was over. The plaintiff was informed that a plan had been submitted to the Municipality for approval in March, 1988 for demolition and reconstruction. On 26.4.1988 the plaintiff paid a further sum of Rs.50,000 towards expenses for demolition and reconstruction by cash and the same was acknowledged in a

pocket note book marked as Ex.A-3 in the handwriting of the first defendant himself. Thus, a total sum of Rs.1,00,000 had been received by the first defendant. The Municipality sanctioned the plan on 2.5.1988. The first defendant evicted the tenants and vacated the portion in his occupation. Only one tenant continued in occupation. The building was almost demolished excepting the portion in the occupation of the aforesaid tenant, who was running a radio repairing shop. At that stage, the first defendant changed his attitude and the plaintiff became apprehensive of the conduct of the first defendant. The plaintiff learnt that defendants 2 to 6 obtained a conveyance of the property from the first defendant and got it registered. Defendants 2 to 6 are not *bona fide* purchasers as they have been the family auditors for the first defendant for a long period and the latter was always acting on their advice. Even before entering into the lease agreement, the first defendant should have secured the advice of defendants 2 to 6 and from stage to stage, they were advising him. Defendants 2 to 6 are fully aware of the agreement in favour of the plaintiff and in any event, the plaintiff is entitled to enforce his rights under the contract as against all the defendants. The plaintiff had been ready and willing throughout to perform his part of the contract. The plaintiff reserves his right to claim damages from the defendants by separate proceeding. The suit is filed for specific performance of the agreement of lease dated 19.2.1988. The prayer in the plaint is to direct the first defendant to execute the lease deed free of all encumbrances and get the lease deed registered. It is also prayed that the defendants shall be directed to deliver possession of the suit property as contemplated under the agreement of lease. A permanent injunction restraining the defendants from encumbering the plaint schedule property is also prayed for by the plaintiff. In the Schedule to the plaint, the property was described as that existed prior to the agreement Ex.A-1. A building is also described as measuring 32 feet east to west and 57 feet north to south bearing Door Nos.13/1, 14, 14/1 and 14/2 with a well.

2. The first defendant filed a written statement. According to him, he never agreed to lease out the entire property to the plaintiff as alleged in the plaint and the agreement set out in the plaint is not enforceable in law. He denied the receipt of Rs.50,000 in cash on 20.4.1988. He also denied the

avermment that defendants 2 to 6 were his auditors. It is stated that he consulted his advocate A.Venugopal who is the family lawyer and that he used to act only on the advice of the said lawyer. It is also contended that the alleged agreement is void for uncertainty and not enforceable. It is also pleaded that the suit is not maintainable inasmuch as the alleged agreement itself relates only to the execution of the lease after the completion of the construction of a new building.

3. Defendants 2 to 6 filed a separate written statement. They have also raised the plea that the agreement is not enforceable for various reasons, set out in the written statement. It is also contended that they have paid a valuable consideration of Rs.2,41,000 and purchased the property under a registered agreement dated 11.5.1988 (Ex.B-1). It is stated that after their purchase, they got the tenants vacated and started demolition of the building with a view to put up new construction.

4. In the additional written statement filed by the first defendant a plea is raised that the suit is premature and not maintainable in law. In the additional written statement filed by the other defendants, after an amendment of the plaint, it is stated that the defendants had admittedly no knowledge of the suit agreement Ex.A-1 and had purchased the properties for valid and good consideration and what was in existence at the time of the suit was only a vacant site and the suit building was not in existence.

5. The trial Court initially framed four issues. The first issue is whether the plaintiff is entitled to get a lease of the suit property as per the document dated 19.2.1988 as claimed in the plaint. The second issue is whether the plaintiff is entitled to get a permanent injunction. The third issue is whether the suit is maintainable in law and the fourth issue is what are the reliefs to which the plaintiff is entitled. After the conclusion of the trial, the learned Subordinate Judge, at the time of delivering the judgment reframed the issues. He framed six issues. The first issue is whether the plaintiff is entitled to get a lease free of encumbrance as per the document dated 19.2.1988. The second issue is whether the plaintiff is entitled to get delivery of possession of the suit property. The third issue is whether defendants 2 to 6 have purchased the property for proper consideration without knowledge of the plaintiff's agreement. The fourth issue is whether the plaintiff is entitled to permanent

injunction. The fifth issue is whether the suit is premature. The 6th issue is to what relief the plaintiff is entitled.

6. The trial court answered issues 1, 2 and 4 in the negative and issues 3 and 5 in the affirmative. Consequently, it held that the plaintiff was not entitled to any relief under issue No.6. In short, the trial court held that the agreement under which the plaintiff claims is not enforceable in law, the suit is premature, the plaintiff is not entitled to get the reliefs prayed for in the suit and defendants 2 to 6 are *bona fide* purchasers for value without notice of the plaintiff's agreement.

7. In this appeal, it is vehemently contended by the learned senior counsel for the appellant that the trial court has recast the issues without any notice to the parties which has considerably prejudiced them. It is also argued that issue No.5 has been framed without any plea to that effect in the pleadings. We would straightaway point out that this contention is without merit inasmuch as a specific plea is raised in the additional written statement of the first defendant that the suit is premature. Hence, the trial court is justified in framing that issue. We also find that the issues originally framed do not cover the entire dispute between the parties as adumbrated in the pleadings. The court is always entitled to recast the issues before judgment and it is not necessary to the court to issue notice to the parties when it finds that proper issues have not been framed. Particularly in this case, we find that the parties have let in evidence on all the issues as framed by the trial court at the time of judgment and no prejudice has been caused to any of the parties. O.14, Rule 5 of the Code of Civil Procedure empowers the court to amend the issues or frame additional issues at any time before passing a decree for the purpose of determining the matters in controversy between the parties. On the facts of the case, we find the issues as framed by the learned trial Judge at the time of the judgment are properly framed and they cover the entire controversy between the parties as set out in the pleadings and as brought out in the evidence.

8. We have already referred to the fact that the plaintiff has prayed in the plaint for a direction to the first defendant to execute a lease deed with reference to the suit property and also deliver possession of the suit property as contemplated under the agreement of lease dated 19.2.1988. We

have also referred to the circumstance that the schedule to the plaint describes the property as it existed prior to the agreement. It also refers to the building has been demolished and at the time of filing of the suit, there was no building and the site was vacant. The prayer in the suit cannot be granted because the property as described in the schedule did not exist at the time of the filing of the suit. Secondly, the agreement put forward by the plaintiff under Ex.A-1 is that a lease deed would be executed in favour of the plaintiff after the construction of a new building and possession of such building would be handed over to the plaintiff after the execution and registration of such lease deed. But the prayer in the plaint relates only to the property which existed previously and not the property which is to come into existence in future. 9. Ex.A-1 refers to the payment of a sum of Rs.50,000 by the plaintiff to the first defendant on the date of the agreement for the purpose of evicting the tenants and demolishing building. In paragraph 3 of the plaint that is reiterated. The document also provides that further amount would be paid by the plaintiff for further expenses in that regard. But, no time limit has been prescribed for demolition of the building even though a time limit of three months has been specified for the purpose of evicting the tenants and vacating the building by the first defendant. In the last paragraph of the agreement it is stated that the sum of Rs.50,000 received on the date would be kept as rental advance at the time when the lease is executed and it would be refunded to the plaintiff when he vacates the shop. There is no mention about the amounts which the plaintiff has agreed to pay thereafter for the purpose of expenditure in connection with evicting the tenants and demolishing building. On the other hand, P.W.1 has categorically stated in his evidence that the sum of Rs.50,000 is not paid as rental advance. There is no evidence on record to prove as to how the other amounts apart from the initial payment of Rs.50,000 should be returned to the plaintiff and on what terms those amounts are to be advanced to the first defendant. In that aspect of the matter, the agreement is vague.

10. It is also provided in Ex.A-1 that after a period of five years, the first defendant should pay interest on the balance amount at 24% per annum. It is brought out in the evidence of the plaintiff that the total expenditure for demolition and

reconstruction would be about Rs.20,00,000 and the interest for such amount at the rate of 24% after a period of five years would come to Rs.37,000 per month. The agreed rent for a total period of ten years is only Rs.2,000 per mensem as per the agreement. If the first defendant is to pay a sum of Rs.37,000 per month by way of interest and deduct only Rs.2,000 for rent, there is no knowing how the debt would be discharged by the first defendant. There is no provision in the agreement as to how the first defendant should discharge the entire debt. According to the plaint, the agreement to lease out relates to the entire building as reconstructed. If that is so, the first defendant will have no property with him to be let out to others so as to get an income from the property. That means that the entire amount advanced by the plaintiff would also continue to be a permanent loan around the neck of the first defendant, which he will never be able to discharge. He will always be a permanent debtor throughout his life. If that is the effect of Ex.A-1, it is wholly unconscionable and such an agreement cannot be enforced in law. A court cannot grant specific performance of an agreement which contains unconscionable terms, which give an unfair advantage to the party who seeks specific performance. *Vide: Vejanla Poothi Raju v. V.B.Raju, (1969) 2 S.C.W.R. 200. Sec.20(2) of the Specific Relief Act provides that the court may properly exercise discretion not to decree specific performance where the terms of the contract on the conduct of the parties are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant. The same sub-section provides that if the performance of the contract would involve hardship on the defendant which he did not foresee at the time of the contract, the court would not enforce such a contract.*

11. While it is the case of the plaintiff that under the agreement the first defendant agreed to give a lease of the entire building as constructed, P.W.3 says that the agreement was to grant a lease of the ground floor only of the new building. In fact the plaintiff as P.W.1, did not say so in his evidence. But, P.W.3 has obviously given that version in order to earn the sympathy of the court and to show that the contract between the parties is reasonable. The terms of Ex.A-1 do not show that the agreement to lease the new building was restricted to a portion thereof or the ground floor

only.

12. The agreement Ex.A-1 does not contain any detail whatever of the proposed building. The measurements of the building proposed to be constructed are not set out. No plan is attached to the agreement. It cannot be known by a reading of Ex.A-1 as to what sort of building is to be constructed by the first defendant with the aid of the money lent by the plaintiff. Reliance is placed by the plaintiff on Sec.14(3)(c) of the Specific Relief Act. The sub-section reads thus:

“Where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land; Provided that the following conditions are fulfilled, namely:

- (i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;
- (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not as adequate relief; and
- (iii) the defendant has, in pursuance of the contract, obtained, possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed”.

13. Even as the proviso shows, the terms of the agreement must be sufficient to enable the court to precisely determine the exact nature of the building. Seeing the lacuna in this case, P.W.1 put forward a new version in his evidence that the agreement was to construct a building in accordance with the plan Ex.A-4. He admits that there is no such recital in Ex.A-1. The following passage in his deposition would reveal the truth.

“பிளானில் கண்டபடி கட்டிடம் கட்டவேண்டும். இதுபோல் வா.சா.1ல் இல்லை. இப்போதுதான் வா.சா.1 நான் பிளானில் கண்டபடி என்று சொல்லுகிறேன். இதுபோல் மனிராஜிடம் பேசி ஒப்பந்தம் செய்து கொள்ளவில்லை. எந்த விதமான கட்டிடம் கட்டவேண்டும் என்றும் ஒப்பந்தம் இல்லை. எத்தனை அடிக்கு எத்தனை அடி கட்ட வேண்டும் என்றும் ஒப்பந்தம் இல்லை. சிறியகடை பிரிக்கப்பட்டது அல்லது பெரிய அறைகளாகக் கட்டுவாரா என்றும் ஒப்பந்தம் இல்லை. கட்டிடத்தை எத்தனை மாதங்களுக்குள்

முடிக்கவேண்டும் என்றும் ஒப்பந்தம் இல்லை. செலவு செய்தியும் பணத்துக்கு உச்ச வரம்பு இல்லை. வா.சா.ஆ.1 உடன் பிளாணை இணைக்கவில்லை. வா.சா.1 ஏற்பட்டபோது பிளான் இல்லை.

The admissions made in the above passage clearly show that the case put forward for the first time in the evidence is false. It is to be noted that P.W.1 has admitted that there was no plan at the time of Ex.A-1. Learned counsel for the appellant wants to contend that the admission of P.W.1 would only mean that no plan was attached to Ex.A-1 we are unable to accept this contention. The same statement is made by P.W.1 again in the course of cross-examination in the following passage:

“வா.சா.ஆ.1க்கு பிறகு முனிசிபல் பிளான் போட்டாரா என்று ஞாபகம் இல்லை. வாடகை ஒப்பந்தத்திற்கு பிறகுதான் முனிசிபாலிடி பிளானையும் லைசென்சையும் 1ம் பிரதிவாதி தாக்கல் செய்தார்.”

The categorical statement made by him that the first defendant filed the plan in the Municipality only after Ex.A-1 shows that there was no plan at the time of Ex.A-1 and at any rate, the plan was not the subject matter of negotiation between the plaintiff and the defendant. The agreement Ex.A-1 if at all, was entered irrespective of any plan and in particular Ex.A-4.

14. The above features show that the terms of Ex.A-1 are vague and if they are enforced as interpreted by the plaintiff, they would work out unreasonable hardship on the first defendant and they are really unconscionable. In the circumstances, Ex.A-1 is not enforceable at the instance of the plaintiff as prayed for by him.

15. The next question is whether defendants 2 to 6 are *bona fide* purchasers without knowledge of Ex.A-1. There is not much dispute as to the fact that defendants 2 to 6 have purchased the property for valuable consideration of Rs.2,41,000. The evidence of the first defendant and the third defendant as D.Ws.1 and 2 proves that they paid a sum of Rs.2,41,000 for purchasing the property. The contest really centres round the alleged knowledge of defendants 2 to 6. In the plaint, it is stated that defendants 2 to 6 are the auditors of the first defendant and they were consulted before the suit

agreement was entered. It is also alleged that they were fully aware of the suit agreement. D.W.1 has deposed that defendants 2 to 6 are not his auditors, and that he has no auditor at all. In another place, he has stated that his family is paying income-tax and there is an auditor for his family and his name is P.N.B.Manian, whose sons are defendants 2 to 6. It is further stated by him that Maniam is dead and defendants 2 to 6 are auditors. Learned counsel for the appellant contends that the later statement of D.W.1 contradicts the earlier statement that he had no auditor at all and also proves that defendants 2 to 6 are his auditors. We are unable to accept any such contention and give such an interpretation to the statement of D.W.1. He has only stated in the earlier portion that he has no personal auditor and in the later portion he has stated that his family had an auditor and he is no more. He has not stated that defendants 2 to 6 are his auditors. He has merely stated that defendants 2 to 6 are carrying on the profession of auditors. D.W.2 has deposed that his father's clients are the clients of defendants 2 to 6. Learned counsel for the appellant submits that this would constitute an admission on the part of D.W.2 that the first defendant is also their client. We are unable to accept this contention. No such inference can be drawn from that general statement. It is further stated by D.W.2 that at the time of purchase he enquired the first defendant as to who was his auditor and got a reply from him and that he was not liable to pay income tax. The necessity for such an enquiry is stated to be that for a transaction of the value of over Rs.50,000 income-tax clearance should be obtained. In that connection, the third defendant made an enquiry and learnt that the first defendant had no auditor.

16. On the other hand, the evidence adduced on the side of the plaintiff itself shows that defendants 2 to 6 are not the auditors of the first defendant. The version given in the plaint that defendants 2 to 6 are the first defendant's auditors is falsified by the deposition of the plaintiff. Even in his chief examination the plaintiff has said that Ex.A-1 and the copy thereof were read by the first defendant's advocate. That shows that the person who was consulted by the first defendant at the time of Ex.A-1 was his advocate and not an auditor. It is also stated by P.W.1 that he does not know defendants 2 to 6 personally. He is not, therefore, competent to say that defendants 2 to 6 are the

auditors of the first defendant. He also stated that he does not know where they reside and where they are carrying on their profession and who are their clients. There is nothing on record to show that defendants 2 to 6 were the auditors of the first defendant.

17. The evidence of P.W.1 itself shows that nobody else apart from himself, the first defendant, the attester and the scribe of the document knew about Ex.A-1. In the cross-examination he has stated that at the time of writing Ex.A-1 himself, the first defendant and P.Ws.2 and 3 were alone present and nobody else knew about the agreement. He has also stated that till he filed the suit, nobody else knew about the agreement. As regards defendants 2 to 6, the first defendant has expressly admitted that they were not aware of the agreement. He has admitted that it is correct to say that defendants 2 to 6 were not aware of the agreement and they purchased the property for proper price. He has also stated earlier that he does not know whether defendants 2 to 6 were aware of Ex.A-1. He has also stated categorically that defendants 2 to 6 do not know about Ex.A-1. A reading of the admissions clearly shows that defendants 2 to 6 were never aware of the agreement Ex.A-1.

18. Reliance is placed by learned counsel for the appellant on the evidence of P.Ws.2 and 3 according to whom, defendants 2 to 6 were informed about Ex.A-1. A perusal of the depositions of P.Ws.2 and 3 shows that there are number of contradictions in their versions and they are not speaking the truth. We have already referred to the circumstance that P.W.3 goes one step further than P.W.1 and deposes that under Ex.A-1, the ground floor of the new building was alone agreed to be let out. Both P.Ws.2 and 3 are very much interested in the plaintiff and they are giving evidence only to oblige him. We do not believe their evidence.

19. It is submitted by learned counsel for the appellant that admissions can always be explained by parties and in the present case, the statements made by P.W.1 are either inadvertently made or there is a wrong recording by the trial court. If it is a case of wrong recording, the plaintiff should have taken steps in the trial court itself to get the deposition corrected. His counsel could have read the deposition and informed the learned Judge of the mistake and get it corrected. No such step was

taken. If it is a case of inadvertent admission, the plaintiff's counsel should have put appropriate questions in the re-examination and got an explanation from the plaintiff. There is no explanation whatever by the plaintiff in the present case of the admission and we cannot, therefore, accept the contention that the admissions of P.W.1 have been explained in the present case. The proposition of law that admissions can be explained by the party concerned, cannot be disputed. In *Nagubai v. B.Shama Rao*, A.I.R. 1956 S.C. 593; 1956 S.C.A. 959; 1956 S.C.C. 321; 1956 S.C.J. 655; 1956 S.C.R. 451; 1956 An.L.T. 1029; I.L.R. 1956 Mys. 152, it is held that an admission is not conclusive as to the truth of the matters stated therein and it is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It is also held that it can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel. In *M.M.Chetti v. C.Coomaraswamy Naidu and Sons*, A.I.R. 1980 Mad. 212, it is held that the law by no means regards admissions as conclusive proof of the matters admitted and the court should examine any given admission inside out to see if it suggests any clear inference on the fact in issue against the party making it. The proposition cannot apply in the present case.

20. In *Thirumallappa v. Ramappa*, (1938) 2 M.L.J. 511; I.L.R. 1938 Mad. 140; A.I.R. 1938 Mad. 133; 46 L.W. 910; 1937 M.W.N. 1285; 176 I.C. 639, Varadachariar, J. held that a Judge when asked to consider the weight of an admission by a party cannot ignore it on some guess of his own without plea or explanation by the party making the admission. As pointed out already, there is no explanation on the part of the plaintiff with regard to the admissions made by him.

21. Recently a Division Bench of this Court has considered the evidentiary value of admissions in *R.Anandavalli v. Alagammal*, (1993) 1 M.L.J. 15 and held that admission is the best form of evidence and the plaintiff can certainly rely on it. It was also pointed out that in that case, no attempt whatever was made by the defendants to show that the said admission was wrong, and when the defendants had not given any explanation, the court cannot on some presumption think that the admission may not be true. The Bench relied on the judgment in *Thirumallappa v. Ramappa*, (1937) 2

M.L.J. 511: I.L.R. 1938 Mad. 140: A.I.R. 1938 Mad. 133: 46 L.W. 910: 1937 M.W.N. 1285: 176 I.C. 639, as well as the judgment of the Supreme Court in *Narayan Bhagwant Rao Gosavi Balajiwal v. Gopal Vinayak Gosavi*, *A.I.R. 1960 S.C. 100*.

22. Learned counsel for the appellant contends that the burden is on the transferees viz. defendants 2 to 6 to prove that they are *bona fide* purchasers for value without notice. We have already referred to the various circumstances and facts of this case to show that defendants 2 to 6 are purchasers in good faith for value without knowledge of Ex.A-1. Hence, there is no necessity to consider in detail the following judgments relied on by learned counsel in support of the said proposition.

Bhup Narain v. Gokul Chand, *A.I.R. 1934 P.C. 68*, *S.N.Mundado v. New Mofussil Company Limited*, *A.I.R. 1946 P.C. 97*, *Veeramalai v. Thadikara*, *A.I.R. 1968 Mad. 383* and *Babulal v. M/s.Hazari Lal Kishori Lal*, *A.I.R. 1982 S.C. 818: 1982 All.L.J. 345: (1982) 1 S.C.C. 525: (1982) 8 All.L.R. 259: (1982) 1 A.P.L.J. (S.C.) 23: (1982) 1 S.C.J. 294*.

The proposition does not apply in the present case. Consequently, we hold that defendants 2 to 6 are *bona fide* purchasers for value without notice of the suit agreement.

23. The only other question that remains to be considered is whether the plaintiff should be permitted to reserve the claim for damages. As noticed already, in the plaint, in paragraph 5 the plaintiff has reserved his right to claim damages from the defendants by separate proceedings. There is no mention in the plaint about the amount of Rs.1,00,000 said to have been paid by the plaintiff to the first defendant. There is no prayer in the plaint for refund of the said amount. The plaintiff filed I.A.No.635 of 1988 under O.2, Rule 2 of the Code of Civil Procedure for leave to file a separate suit for refund of Rs.1,00,000 and for damages against the defendants. A certified copy of the order in the said application has been produced before us by learned counsel for the appellant. It is seen that the learned Subordinate Judge after dismissing the suit by his judgment dated 26.11.1990 passed an order on the same day in the application dismissing the same on the ground that the suit has been dismissed. The order of the learned Subordinate Judge in the application is undoubtedly erroneous. The plaintiff has prayed for reservation of the relief under O.2, Rule 2 of the Code

of Civil Procedure for taking separate proceeding with regard to the same. That application had been filed long before the suit was taken up for trial. The court should have considered that application earlier and disposed of the same in accordance with law. If the court had decided against the plaintiff, he would have either challenged the order in the higher forum or amended the plaint or included the relief in this suit alternatively.

24. After hearing counsel on both sides on that question, we are of the view that leave ought to have been granted to the plaintiff for reserving the prayer for the refund of the sum of Rs.1,00,000 alleged to have been paid by him to the first defendant and for damages, since the plaintiff has expressly reserved the same in the original plaint itself. Hence, we grant the leave prayed for by the plaintiff in I.A.No.635 of 1988. The plaintiff is given liberty to file a fresh suit for the reliefs which he has reserved in the present proceedings. However, in such a suit, the defendants are entitled to raise all the pleas available to them in law including the plea of limitation. The grant of this liberty to file a separate suit will not mean that the plaintiff will be entitled to get such reliefs in the fresh suit which might be instituted by him as against the defendant.

25. In the result, C.M.P.No.9176 of 1993 is allowed. A.S.No.1354 of 1990 is dismissed with costs of respondents 2 to 6.

B.S. ----- Suit dismissed/Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Thanikkachalam, J.

C.R.P.No.2180 of 1993 15th October, 1993.

M/s.Rajarani Silk Palace and others ...Petitioners
v.

C.K.B.Murugan ...Respondent.

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act (XXIII of 1973), Sec.25 - Revision under - Concurrent*

findings of fact - If can be interfered with.

Both the courts below concurrently came to the conclusion that the petitioners herein sub-let a portion of the petition premises. Since the conclusion arrived at by the authorities below is concurrent no interference is called for. [Para. 7]

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act (XXIII of 1973), Sec.10(2)(ii)(a) - Sub-letting by tenant - Proof - Onus of - Landlord if should prove receipt of rent by tenant from sub-tenant.*

In the matter of establishing a sub-tenancy under Sec.10(2)(ii)(a) of the Tamil Nadu Buildings (Lease and Rent Control) Act, it is for the landlord to show that the tenant has parked with legal possession of the petition premises. But it remains to be seen that in the matter of sub-letting, it is hardly difficult to find out the payment of rent by the sub-tenant in favour of the chief tenant. Since it is a hide and seek game, it would not be always possible to find out the payment of rent by the sub-tenant to the chief tenant. [Para. 9]

(C) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act (XXIII of 1973), Sec.10(2)(iii) - Eviction of tenant under - Tenant putting up stair case - Impairment of value and utility of building not proved - Eviction, if can be granted.*

In the absence of any evidence on the side of the landlord to show that the construction put up by the tenant impaired the value and utility of the building, the eviction sought for under Sec.10(2)(iii) of the Act cannot be granted. [Para. 14]

Cases referred to:

Subramanian v. Malar Selvi, 99 L.W. 1064. [Para. 10]

The Vellore Shrop Kumaraswami Chetti Choultry by the Executive Trustee V.K.Kannappa Chettiar v. Veerasami, 85 L.W. 192. [Para. 11]

The Jamia Daras Salam Arabic College Trust by the Honorary Secretary, Kaka Haji Kd. Omar Sahib v. B.Rajanna, 85 L.W. 478. [Para. 12]

J.R.K.Bhavanandam, for Petitioners.

V.M.Rajavel, for Respondent.

The Court made the following

ORDER: The tenants are the petitioners herein. 2. The petition for eviction was filed under Secs.10(2)(ii)(a) and 10(2)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by Act 23 of 1973 (hereinafter referred to as 'the Act').

3. The petition premises is situated at No.31, Nainappan Street, Mannadi, Madras-1. The petitioners herein are the tenants in respect of the petition premises on the monthly rent of Rs.1,000 payable according to English calendar month. According to the landlord, the tenants sublet the petition premises to the respondents 6 to 8 without the written consent of the landlord. Further, according to the landlord, the tenants without the permission of the landlord put up a construction in the open space on the first floor. Therefore, according to the landlord, the value and utility of the building are materially impaired. Hence, the petition was filed under Secs.10(2)(a)(ii) and 10(2)(iii) of the Act.

4. The tenants filed the counter stating that there is no subletting to the respondents 6 to 8 as alleged by the landlord. According to the tenants, the rent is Rs.500 per mensem for both residential and non-residential portions. Even though the landlord agreed to give the entire portion, but he did not do so. Hence, the tenants initiated proceedings against the landlord and the same is now pending. According to the tenants, the landlord permitted the tenants to put up the superstructure on the first floor and also agreed to pay the expenses incurred by the tenants for such construction. Since the landlord refused to pay the expenses incurred by the tenants, the tenants filed a suit and the same is now pending. Hence, as a counter blast the landlord filed the present falsely alleging that the tenants sublet the petition premises to the respondents 6 to 8 without the written consent of the landlord. According to the tenants, no portion was sublet to the respondents 6 to 8 as alleged by the landlord. Hence, the petition is liable to be dismissed.

5. On considering the evidence both oral and documentary, the Rent Controller came to the conclusion that the tenants sublet a portion of the petition premises to the 6th respondent. Hence as this ground evicting was ordered. Insofar as the acts of waste is concerned, the Rent Controller held that the landlord failed to establish that the tenants committed acts of waste. Accordingly, the petition for eviction filed on the ground of acts of waste was dismissed.

6. On appeal the Rent Control Appellate Authority confirmed the order of eviction passed by the Rent Controller on the ground of subletting. So also, the Rent Control Appellate Authority held

that the landlord failed to establish that the tenants committed acts of waste. Accordingly, the order passed by the Rent Controller on this ground was also confirmed by the Rent Control Appellate Authority. It is against this order, the present revision has been preferred by the tenants. The first ground in this revision relates to eviction ordered on the ground of subletting. According to the tenants, there is no subletting as alleged by the landlord in the present case. Originally, the landlord alleged that a portion of the petition premises was sublet to the respondents 6 to 8. But, ultimately the landlord failed to establish that a portion of the petition premises was let out to the respondents 6 and 7. The authorities below without appreciating the facts arising on this aspect in proper perspective, held that the tenants sublet a portion of the petition premises to the 6th respondent only. There is no evidence on the side of the landlord to show that the 8th respondent was in possession of the petition premises. The tenants did not part with the legal possession of the rented premises in favour of the 6th respondent. The 8th respondent in the sale deed executed in her favour mentioned her address as that of the petition premises. The unilateral act on the part of the 8th respondent would not go to show that the 8th respondent is a sub-tenant under the petitioners herein. There is no evidence on record to show that the 8th respondent was paying the rent to the petitioners herein. The 8th respondent is residing in Burma. Whenever the 8th respondent came to Madras, the 8th respondent used to stay in the petition premises, since the 8th respondent happened to be the friend of the petitioners herein. That would not go to show that the petitioners herein sublet a portion of the petition premises to the 8th respondent. It was therefore pleaded that the authorities below were not correct in coming to the conclusion that the petitioners herein sublet a portion of the petition premises in favour of the 8th respondent.

7. On the other hand, the learned counsel for the landlord submitted that a portion of the petition premises was let out by the petitioners herein in favour of the 8th respondent. The 8th respondent in the sale deed, Ex.P-1 dated 29.1.1986 clearly stated that the 8th respondent is residing in the petition premises. In the counter filed by the petitioners herein, it is not stated that the 8th respondent is residing in Burma and whenever he comes

to Madras, he used to stay in the house of the petitioners herein. This explanation was offered only at a later stage. The 8th respondent was not examined as a witness in the present case. Ex.P-1 would clearly go to show that the petitioners herein parted with the legal possession of a portion of the petition premises in favour of the 8th respondent. Both the courts below concurrently came to the conclusion that the petitioners herein sublet a portion of the petition premises in favour of the 8th respondent. Since the conclusion arrived at by the authorities below is concurrent, no interferences called for.

8. I have heard the rival submissions. The fact remains that the petitioners herein are the tenants under the respondent herein in respect of the petition premises. According to the landlord, the petitioners herein sublet a portion of the petition premises in favour of the respondents 6 to 8. But both the authorities below concurrently came to the conclusion that the petitioners herein sublet a portion of the petition premises in favour of the 8th respondent only. In so far as the respondents 6 and 7 are concerned, the authorities below held that the landlord failed to establish that a portion of the petition premises was let out by the petitioners herein in favour of the respondents 6 and 7. But, according to the tenants, no portion of the petition premises was sublet in favour of the 8th respondent as alleged by the landlord. P.W.1 in his evidence stated that his brother's son told him that the petition premises was sublet by the tenants in favour of the respondents 6, 7 and 8. The 8th respondent is P.K.P. Jainulabdeen. His wife is Ayesha Mary. Ex.P-1 is the sale deed relating to the property at Door No.95, Nainappan Street, George Town, Madras-1. The 8th respondent's wife purchased the aforesaid property under the sale deed Ex.P-1. The sale deed is dated 29.1.1986. In the sale deed, it is stated that the 8th respondent and his wife were residing in the petition premises. Therefore, according to the landlord, a portion of the petition premises was let out to the 8th respondent by the petitioners herein. According to the evidence tendered by the tenants, the 8th respondent is their friend, who is residing in Burma and whenever the 8th respondent comes to Madras, he used to stay in the petition premises since he happens to be the friend of the petitioners herein. But, this was not stated in the counter filed by the petitioners herein. The authorities below

pointed out that since the 8th respondent is residing in a portion of the petition premises, he gave his address in the sale deed, as that of the petition premises. The authorities below also held that the landlord failed to establish that the petitioners herein sublet a portion of the petition premises in favour of the respondents 6 and 7. No further material was brought to the notice of this Court to vary this finding. Apart from the second respondent, nobody else was examined on behalf of the petitioners herein.

9. The petition for eviction was filed on 19.1.1987 and the sale deed, Ex.P-1 was executed on 29.1.1986. Therefore, it remains to be seen that even before the filing of the petition for eviction, a portion of the petition premises was let out to the 8th respondent by the petitioners herein. The authorities below further pointed out that when a notice was sent to the 8th respondent, it was returned with an endorsement that the party left. From this, the authorities below came to the conclusion that the 8th respondent would have been in occupation of the petition premises prior to the purchase of a house under Ex.P-1 sale deed. The learned counsel appearing for the petitioners herein pointed out that there is no evidence on the side of the landlord to show, that the petitioners herein received any rent from the 8th respondent. But, it remains to be seen that in the matter of subletting it is hardly difficult to find out the payment of rent by the sub tenant in favour of the chief tenant. Since it is a hide and seek game, it would not be always possible to find out the payment of rent by the subtenant to the chief tenant.

In the matter of establishing a sub-tenancy under Sec.10(2)(ii)(a) of the Tamil Nadu Buildings (Lease and Rent Control) Act, it is for the landlord to show that the tenant has parted with legal possession of the petition premises. In the present case, by producing Ex.P-1 sale deed, the landlord established that the petitioner herein parted with the legal possession of a portion of the petition premises in favour of the 8th respondent.

10. In the case of *Subramanian v. Malar Selvi*, 99 L.W. 1064, while considering the question of subletting, this Court held as under:

"The relationship between a tenant and the alleged subtenant is within the special knowledge of either the tenant or the sub-tenant. Unless therefore a tenant or sub-tenant satisfactorily explains the presence of the alleged

sub-tenant in the premises, the court is entitled to draw the inference in a case where an utter stranger is found in the premises must have been sublet. Such an inference is clearly permissible in law."

11. In *The Vellore Shrop Kumaraswami Chetti Choultry by the Executive Trustee V.K.Kannappa Chettiar v. Veerasami*, 85 L.W. 192, while considering the provisions of Sec.10(2)(ii) of the Act, this Court has held as under:

"It is true that it is difficult to get direct evidence about the sublease by tenant and it is fact which can be proved as much as by circumstantial evidence as by direct evidence."

12. In *The Jamia Daras Salam Arabic College Trust by the Honorary Secretary, Kaka Haji Kd. Omar Sahib v. B.Rajanna*, 85 L.W. 478, while considering the provisions of Sec.10(2)(ii)(a) of the Act, this Court held as under:

"It will be seen that room No.6 is only 16' x 8' and surely the first respondent would not have put himself to the inconvenience of limiting the space available for his staff and clients by permitting the second respondent to occupy a portion of room No.6, merely on account of friendship. I am certain that some rent must have been received from the second respondent by the first respondent, though materially it does not find a place in the accounts of either the first respondent or the second respondent. They are no doubt income-tax assesseees. But it would have been suicidal to them if they had exhibited the payment of rent in the accounts, because that would have immediately created evidence of subletting and entailed their eviction straightaway. Not merely has the second respondent a separate phone and a board of his own, but according to the admission of the first respondent, the second respondent has also a key for room No.6, though the second respondent would deny it. Incidentally, the denial by the second respondent would show a desire to suppress an inconvenient fact. It is clear that even on the evidence on the side of the respondents the second respondent has been occupying a portion of room No.6 as a sub-tenant on payment of rent, and that occupation is without the permission of the landlord. Hence, the first respondent is liable to be evicted under Sec.10(2)(ii) of the Act".

13. Thus, on a careful consideration of the facts

arising in this case on this aspect, both the authorities below concurrently came to the conclusion that the petitioners herein sublet a portion of the petition premises in favour of the 8th respondent without the written consent of the landlord and thereby rendering themselves liable to be evicted under Sec.10(2)(ii) of the Act. No fresh material was placed before this Court to dislodge this concurrent finding arrived at by the authorities below, in ordering eviction under Sec.10(2)(ii) of the Act. Accordingly, I am not inclined to interfere with the order of eviction passed by the authorities below under Sec.10(2)(ii) of the Act.

14. Next ground in this revision relates to acts of waste said to have been committed by the tenants. According to the landlord, the tenants put up a superstructure in the open space on the first floor without the consent of the landlord. But according to the tenants, the landlord consented for putting up such construction in the open space on the first floor. The tenants also state that the landlord has agreed to reimburse the expenses incurred by the tenants in putting up such construction. According to the tenants, they also filed a suit against the landlord for recovery of the amounts incurred by way of expenditure in putting up the structure and the suit is now pending. According to the tenants, they incurred an expenditure of Rs.40,000 in the matter of putting up the alleged construction on the first floor. The landlord states that by putting up the construction, the value and utility of the petition premises are impaired. If that is so, it is for the landlord to establish the same. No evidence was adduced to establish this ground. No Engineer's report was filed and no Engineer was examined in order to show that the alleged construction put up by the tenants impaired the value and utility of the petition premises. In the absence of any evidence on the side of the landlord, the authorities below concurrently came to the conclusion that the landlord failed to establish the acts of waste alleged to have been committed by the tenants. Even before this Court, no fresh material was placed to vary the findings given by the authorities below on this aspect. Thus, in the absence of any evidence on the side of the landlord to show that the construction put up by the tenant impaired the value and utility of the building, the eviction sought for under Sec.10(2)(iii) of the Act cannot be granted. Thus, on a careful consideration of the facts arising on this aspect, I am of the

opinion that the authorities below were correct in dismissing the petition filed on the ground of acts of waste under Sec.10(2)(iii) of the Act.

15. In this view of the matter, the civil revision petition is dismissed. However, there will be no order as to costs. Time for eviction two months.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Thangamani, JJ.

App.No.690 of 1983 and C.M.P.No.12535 of 1993
11th October, 1993.

M.S.P.Rajesh

...Appellant

v.

M.S.P.Raja and others

...Respondents.

(A) Evidence Act (I of 1872), Sec.68 - Succession Act (XXXIX of 1925), Sec.63(c) - Scope and applicability - Will - Mode of proof.

Sec.68 of the Evidence Act, provides that if a document is required by law to be attested, it shall not be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution if there be an attesting witness alive and subject to the process of the court and capable of giving evidence. This section lays down the mode of proof of a Will by calling at least one witness but it does not set out or purport to define what is required to be proved. That, however, has been laid down in Sec.63(c) of the Succession Act. Even if one witness who is called is able to depose to all that is required, by Sec.63(c) of the Succession Act, for the valid execution of a Will, that would suffice for Sec.68 of the Evidence Act. Sec.68 of the Evidence Act does not, in any manner, change or alter the requirements to be proved by Sec.63(c) of the Succession Act. A reading of Sec.63(c) of the Succession Act with Sec.68 of the Evidence Act establishes that a person propounding a Will has to prove that the Will was duly and validly executed and that should be done by not merely establishing that the signature

on the Will was that of the testator but also that the attestations were made in the manner contemplated by clause (C) of Sec.63 of the Succession Act. It is not necessary under Sec.68 of the Evidence Act to examine both or all the attesting witnesses. [Para. 17]

(B) Wills - Registration - If obligatory - Non-registration - Effect.

It is true that registration will go a long way to dispel the doubt as to the genuineness of the Will. But where the execution is proved by cogent and acceptable evidence, the Court should not disbelieve the Will merely because it is not registered. [Para. 31]

(C) Will - Proved to be true - Court, if can enquire about fairness of dispositions therein.

Once a Will is proved to be true and it was executed by testator, it is not for the court to embark upon an enquiry whether the dispositions made therein are fair and just. [Para. 37]

Cases referred to:

Harnes v. Hinkson, (1946)2 M.L.J.156 (P.C.). [Para. 10]

Venkatachala Iyengar v. Thimmajamma, 1959 S.C.J. 507. [Para. 11]

Ramachandra Rambux v. Champabai, A.I.R. 1965 S.C. 354; (1965)2 S.C.J. 557; (1964)6 S.C.R. 814. [Para. 22]

Seth Beni Chand v. Smt.Kajla Kunwar, (1977)1 S.C.R. 578. [Para. 23]

Jaswant Kaur v. Amrit Kaur; (1977)1 S.C.R. 925. [Para. 24]

Kalyan Singh v. Chhoti, A.I.R. 1990 S.C. 396. [Para. 25]

Vijayanthimala Bali v. Rattan Chamman Bali, (1990)1 L.W. 27. [Para. 26]

Sarat Aurari Bibi v. Raj Santhi Chand, A.I.R. 1929 P.C. 45. [Para. 28]

G.Thathaigh v. Venkata Subbiah, A.I.R. 1968 S.C. 1332. [Para. 28]

Appeal No. 690 of 1983: Appeal against the decree of the Court of the Subordinate Judge, Srivilliputhur, in O.S.No.12 of 1981, dated 26.4.1982. etc.,

The Judgment of the Court was delivered by *Thangamani, J.*: The family of Rao Bahadur Senthilkumara Nadar of Virudhunagar is one of the richest in this part of the country. It owns extensive extents of plantations in Shervaroy Hills and Kerala besides other assets including a spinning Mill at Tuticorin. It is also having a very flourishing

foreign trade of coffee. The family has also its business in Mangalore, Coimbatore, Bangalore and Virudhunagar. M.S.Periaswami Nadar is the eldest of the three sons of Senthikumara Nadar. There was a partition among Senthikumara Nadar and his sons under Ex.B-76 dated 9.4.1941. Appellant Rajesh and first respondent Raja are the sons of Periaswami Nadar. The father and two sons in turn divided their family properties under Ex.B-2, dated 6.9.1954. Periaswami Nadar died on 21.1.1955. Under Ex.A-2, dated 11.10.1956 appellant, first respondent and their mother Thangammal partitioned the properties left by Periaswami Nadar. Schedule 'A' of this partition deed relates to the properties allotted to the mother. They include suit items 1, 12, 13 and 14. Item 1 is a house known as Thanga Mahal Maligai in Virudhunagar. This bears Door Nos.93 to 96 of Ramamoorthi Road and measures 460' east-west and 220' north-south. Item 14 bearing Door No.12-A of Rajaji C.C.Road is the rear portion of Thanga Mahal Maligai. Periaswami Nadar and Thangammal were residing in Thanga Mahal Maligai. The first respondent is also residing in the same house with his family. In 1956 they purchased Cauvery Peak Estate 20 Km. away from Yercaud. Appellant Rajesh is residing in the bungalow in that Estate. He also claims that he and his family members used to stay in the upstairs portion of Thanga Mahal Maligai whenever they visited Virudhunagar. The first respondent also does not dispute the fact that the drawing room and two bed rooms in the upstairs are kept for common use. Both the brothers were taking part in public life also. Appellant Rajesh was the President of Panchayat Board, Yercaud and became the President when it became Panchayat Union. He was also the President of Shervaroy Plantations Association and of Yercaud Club. Respondent Raja was the Chairman of the Virudhunagar Municipality from 1959 to 1969. Disputes arose between the brothers in April, 1974. Civil suits were instituted in the Courts at Salem and Ramnad. There was even a complaint that on 5.7.1974 appellant tried to shoot the first respondent twice in Yercaud. Well-wishers of the family intervened to bring about reconciliation between the brothers. Both of them agreed for an interim arrangement as suggested by Thiru Rajaram, former Minister, Thiru Sankara Mudaliar a leading lawyer of Salem and Baskar the first cousin of the brothers. Pursuant to the same

certain Estates were left in the management of the first respondent. Later on the first respondent expressed his inability to continue the arrangement. On 1.2.1975 the first respondent passed Ex.A-39 letter on the appellant stating that he is unable to be away from Virudhunagar since he has a lot of personal interest and public activities. He realises that the appellant should continue to be in the management of all the Estates as before not only to have efficient administration but also to discharge the liabilities to the banks and to continue the foreign trade in coffee and other commodities and maintain the reputation of their firms and business. He has put the appellant in possession of the estate that were given to him for his management as per the interim arrangement. While the appellant left for London on 13.5.1975, the first respondent also went abroad on 4.6.1975. The first respondent came back on 12.6.1975. The appellant returned to India on 19.7.1975. In the meanwhile, mother Thangammal had passed away on 19.6.1975 at Virudhunagar.

2. In this background appellant instituted the present suit on 25.1.1978 for partition and separate possession of his half share in the suit properties and for rendition of accounts. As we have already stated suit items 1 and 14 cover Thanga Mahal Maligai while suit item 2 is a theatre known as Central cinema. Items 3 to 13 are small houses and shop leased out to tenants. Items 15 and 16 relate to gold jewels, silverware and furniture of the mother. The second respondent is a lessee of item 2 cinema theatre. Appellant has claimed half share in these items on the basis that his mother died intestate.

3. The first respondent pleaded in his written statement that items 15 and 16 do not belong to the estate of Thangammal and instead the two sons of the appellant and Ramesh Raja his son are the owners of the same. He also claimed that Thangammal while she was in a sound and disposing state of mind executed Ex.B-16 her last Will on 14.6.1975 bequeathing items 1 and 14 to be enjoyed by him without any right of alienation and the vested remainder in favour of his son Ramesh Raja. And she also directed that the other properties are to be enjoyed by both the brothers in equal moieties. He was appointed as the executor of the Will. He is always ready and Willing to give the appellant his share in item 2 to 13 after discharging the debts and paying the estate duty and other

taxes as enjoined in the Will. He has to render accounts only in respect of these items and not in respect of items 1 and 14.

4. Thereupon, in I.A.No.523 of 1978 the appellant got the plaint amended on 28.11.1978 by including certain further allegations. He averred that Thangammal was ailing and unconscious and so she could not have executed the Will with the necessary mental capacity. Besides, there is no reason for depriving him of his lawful share in the residential house and the disposition is unnatural.

5. In the additional written statement filed on 19.4.1979 the first respondent alleged that the appellant was aware of the execution of the Will and he has not chosen to disclose the same in the plaint.

6. The plaint was again amended in I.A.No.67 of 1980 on 5.2.1980 whereunder the appellant disputed the entire Will and the disposition covered by it. In order to avoid unnecessary contentions, the third respondent son of the first respondent was impleaded as a party to the suit in I.A.No.1100 of 1979, dated 24.10.1979.

7. As per the amendment in I.A.No.198 of 1981 dated 16.11.1981 the appellant alleged in the plaint that the Will appears to have been brought about under suspicious circumstances after the death of the mother. Even assuming without admitting that the signature is true, one blank paper containing the signature must have been utilised for fabricating the alleged Will.

8. In the additional written statement dated 16.11.1981 the first respondent pleaded that the original Will was shown to the appellant by him when he met him at Virudhunagar shortly after his return from foreign trip.

9. The trial court found that the Will is genuine and the appellant is entitled to get his half share in items 2 to 13 alone after the Executor discharged the liabilities as enjoined in the Will. And ultimately it dismissed the suit with cost. And this appeal is directed against the said decree and judgment.

10. As early as in *Harmes v. Hinkson*, (1946) 2 M.L.J.156 (P.C.), the Privy Council had laid down that the *onus probandi* lies in every case upon the party propounding a Will and he must satisfy the conscience of the court that the instrument so propounded is the last Will of a free and capable testator. If a party writes or prepares a Will under which he takes a benefit, that is a circumstance

that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true Will of the deceased. The onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the Will, extreme debility in the testator, clandestinity, and other circumstances which may increase the presumption even so much as to be conclusive against the testator. The adverse presumption may be rebutted. If no evidence is given by the party on whom the burden is cast, the issue must be found against him. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced and it can come to no such conclusion. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered. The conscience of the Court must be satisfied by the removal of doubt from the judicial mind. Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact.

11. In *Venkatachala Iyengar v. Thimmajamma*, 1959 S.C.J. 507, the Apex Court has pointed out that as in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters. However, unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator, who has already departed the world cannot say whether it is his Will or not, and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills, the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the

document of his own free Will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. There may however be cases in which execution of the Will may be surrounded by suspicious circumstances. In such cases, the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last Will of the testator.

12. Let us now proceed to consider how far the first respondent is successful in discharging the initial onus on him. Besides himself he has examined D.W.2 Rajaram one of the attestors to prove the Will. The evidence of the first respondent as D.W.1 is to the effect that from the inception he is residing in Thanga Mahal Maligai. His parents were also living with him. The appellant is always residing at Yercaud in the Estate Bungalow there. After the demise of his father this witness and his wife and children were looking after mother Thangammal. The mother was never under the care and protection of the appellant. On 12.6.1975 when he returned from abroad, she expressed her desire to execute a Will in respect of her properties. She told him that the entire Thanga Mahal Bungalow, other buildings surrounding the same, furniture, silver and gold items and all movables should be enjoyed by him during his life time and thereafter they should go to his son Ramesh Raja the third respondent herein. And he and his brother should take the remaining properties in equal moities. She also directed that since this witness was residing at Virudhunagar, he should arrange to discharge the debts due by her to M.S.P. Nadar and sons and pay the Estate duty and other tax arrears from the assets left by her. At her instance he arranged to bring Advocate Thangamani to Thanga Mahal Maligai from Madurai at 4.00 p.m. on 13.6.1975. In his presence she apprised Thangamani of her intention. Thangamani took notes of what Thangammal told him. He left for Madurai stating that he would bring the draft of the Will on the next day. Accordingly he came back at 11.00

a.m. on 14.6.1975. He read over the draft to the mother in the presence of this witness. He explained certain clarifications asked for by Thangammal. Thereafter the latter directed Thangamani to prepare a will in terms of that draft. Then Thangamani handed over the draft and letter head of the mother to D.W.3 Natarajan and arranged to get the Will typed. At about 2.00 p.m. on that day, D.W.3 Natarajan brought the typed matter and the draft. Thangamani compared these two. At that time D.W.2 Rajaram also arrived on the scene. This witness had sent a car and brought him as per earlier arrangement. In the presence of all of them Thangamani read over the Will to Thangammal. The latter told them that the contents were correct. She wanted to know where she should sign. Thangamani put an "x" mark on the last page and wanted Thangammal to sign at that place. Accordingly she signed there. Ex.B-16 is the said Will. Advocate Thangamani, D.W.2 Rajaraman, D.W.3 Natarajan and this witness saw Thangammal affixing her signature in the Will. Thangamani signed as the first attester to this Will which was witnessed by Thangammal. D.W.2, D.W.3 and this witness. Including the mother all of them saw D.W.2 Rajaraman attesting the Will as second witness. Then Thangamani handed over the Will to the mother. He took away the draft and notes with him. D.W.1 Raja further swears that his mother was hale and healthy and in a sound state of mind while she executed the Will.

13. D.W.2 Rajaram is a Chartered Accountant by profession. He swears that in 1982 while giving evidence in court his annual income was rupees thirty thousand to forty thousand. He was the auditor of appellant Rajesh from 1955 to 1978. Since the accounts of the appellant were transferred to Salem, some other Auditor in Salem is in charge of them now. He also speaks about his presence in Thanga Mahal Maligai on 14.6.1975 along with late Thangamani and D.W.1 at the time of execution of Ex.B-16 Will by Thangammal. According to him, in the previous evening D.W.3 Natarajan rang him up and informed that on the next day he had to keep himself free from other engagements so that he could come and attest the Will to be executed by Thangammal. On 14.6.1975 he was informed over phone at Twelve o' clock that car would be sent at 2.00 p.m. And he came to Thanga Mahal Maligai in that car. When all of them were seated, Thangamani read over the Will

to Thangammal. Thangammal said that the contents were correct. She asked him where she should sign. Thangamani put 'x' mark on the last page and gave it to D.W.3 Natarajan. D.W.3 Natarajan placed the same before Thangammal and the latter signed Ex.B-16 Will. This witness, late Thangammal, D.W.3 Natarajan and D.W.1 Raja saw Thangammal affixing her signature in the Will. Then Thangamani signed as first attester which was witnessed by Thangammal, D.W.3 Natarajan, D.W.1 Raja and this witness. Thereafter, this witness put his signature as the second attester. This was seen by others there including Thangammal and Thangamani.

14. In the cross-examination of D.W.2 Rajaram nothing substantial has been elicited as to why his testimony should not be acted upon. No doubt, he admits that even now he continues to be the Auditor of the first respondent and his family members. All of them are income-tax assesseees. Learned Senior Counsel for the appellant assails the evidence of this witness mainly on the ground that he is a person who is very much interested in the respondent. In his capacity as the auditor of first respondent's family, all the family members have reposed confidence on him. Besides he came, he attested and he left immediately. He does not know other details. However, we are mainly concerned with the execution of Ex.B-16 Will and the credibility of this attester witness cannot depend either upon the duration of his stay at Thanga Mahal Maligai on that afternoon or his knowledge about the detailed contents of Will. It is significant to note that D.W.1 Rajesh does not dispute the fact that D.W.2 Rajaram was his family auditor till 1975. He concedes in his evidence that his accounts for the year ending 31.3.1975 were sent to Income Tax Office in 1977 through the auditor. Till that date D.W.2 Rajaram was looking after all the affairs relating to his accounts. Exs.B-84 to B-91 are the letters written by him to D.W.2 Rajaram in this connection. In Ex.B-84 dated 7.1.1978 he has appreciated the co-operation of D.W.2 Rajaram with the new auditor in regard to the income-tax affairs of the appellant. Ex.B-89 is the letter dated 31.1.1978 addressed by the appellant to D.W.2 Rajaram enclosing a copy of the letter received by him from the Income-tax Office. Ex.B-85 is the letter dated 8.5.1978 written by the appellant to D.W.2 Rajaram enclosing a cheque for a sum of Rs.1,000 towards his fees for the services

rendered for the assessment year 1975-76 in his income-tax cases. While appreciating the work done by the Auditor in income-tax matters appellant has apologized for the delay in sending the cheque. In Ex.B-90 the letter dated 30.1.1979 the Income-tax Officer has been informed by the appellant's office at Cauvery Peak, Yercaud, that the appellant would be returning from abroad only on 17.2.1979 and a copy of this letter has been marked to D.W.2 Rajaram. In Ex.B-91, dated 31.1.1979 D.W.2 Rajaram has been requested by the appellant's office to draft a reply to the Income Tax Department. In Ex.B-86 the appellant has written to the Central Board of Direct Taxes, New Delhi requesting them to transfer his file to Salem and a copy of this letter also has been marked to D.W.2 Rajaram. In Ex.B-87 dated 3.4.1979 the appellant has written to D.W.2 Rajaram acknowledging the statements sent by him in the case of the estate of late Srimathi Thangammal for the period 11.8.1975 to 31.6.1976. Ex.B-88 is another letter written to the Auditor by the appellant on 3.4.1979 appreciating his co-operation with his new auditor Venkatasubbu of Coimbatore in all his tax matters. This correspondence would indicate that the relationship between the two was nothing but cordial. So it is unlikely that a person of D.W.2's association and involvement in the family of M.S.Periaswami Nadar for such a long number of years would have gone to the extent of colluding with the first respondent in fabricating Ex.B-16 Will and coming forward as a witness to forswear against the interest of the appellant. He has promptly denied the suggestion that he is deposing falsely since he is interested in the first respondent.

15. Ex.B-74 is the letter written by the first respondent to the Income-tax Officer on 19.9.1977 in connection with Income-tax assessment of Thangamani for the year 1975-76. D.W.2 Rajaram admits that he has prepared all the income-tax and wealth-tax return of Thangammal. In this letter he has described first respondent M.S.P.Raja as legal heir of late Thangammal. Learned Senior Counsel for the appellant commented that the Auditor has not chosen to describe the first respondent as Executor of Ex.B-16 Will left by Thangammal. Had the existence of the Will been true, he would not have shown the first respondent as merely legal heir in this letter. In support of his argument he pointed out the evidence of D.W.2 Rajaram that he is aware of the difference between dying

intestate and testate. There is no substance in this argument. Even as per the evidence of appellant he became aware of the existence of Ex.B-16 Will on 2.6.1976 from Advocate Thangamani. While so the manner in which the first respondent is described in Ex.B-74 is of little significance.

16. D.W.3 Natarajan joined M.S.Periaswami Nadar in 1974. He was working in Virudhunagar Branch of M.S.P.Nadar and sons. He speaks about the first respondent informing him on 12.6.1975 about his mother's desire to execute a Will and this witness contacting Advocate Thangamani over phone to go over to Virudhunagar on the next day as per the direction of D.W.1 Raja. He also says that he rang up D.W.2 Rajaram and told him to be present on the next day at the residence of Thangammal to attest the Will. He narrates in detail about the presence of Thangammal, Advocate Thangamani, appellant, first respondent and D.W.2 Rajaram in the bungalow of Thangammal and the preparation, execution and attestation of the Will by the persons concerned. He is functioning practically as the agent of first respondent in all the cases relating to the appellant and first respondent in the Courts of Madurai and Ramnad from 1977 onwards. Admittedly he is conducting the present litigation on behalf of the first respondent. Even if we are to take that the testimonies of D.W.1 Raja and D.W.3 Natarajan are interested in nature, the evidence of D.W.2 Rajaram establishes beyond the possibility of any doubt that Thangammal executed Ex.B-16 Will while she was in a sound and disposing state of mind.

17. In this connection, it is necessary to refer to Sec.63(c) of the Succession Act which runs as under:

"The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary".

Sec.68 of the Evidence Act, 1872 provides that if a document is required by law to be attested it shall

not be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. This Section lays down the mode of proof of a Will by calling at least one witness, but it does not set out or purport to define what is required to be proved. That however has been laid down in Sec.63(c) of the Succession Act. Even if one witness, who is called, is able to depose to all that is required by Sec.63(c) of the Succession Act, for the valid execution of a Will, that would suffice for Sec.68 of the Evidence Act. Sec.68 of the Evidence Act does not in any manner change or alter the requirements to be proved by Sec.63(c) of the Succession Act. A reading of Sec.63(c) of the Succession Act with Sec.68 of the Evidence Act, establishes that a person propounding a Will has to prove that the Will was duly and validly executed and that should be done by not merely establishing that the signature on the Will was that of the testator, but also that the attestations were made in the manner contemplated by Clause (C) of Sec.63 of the Succession Act. It is not necessary under Sec.68 of the Evidence Act, to examine both in all the attesting witnesses. There is no dispute that Advocate Thangamani, the other attester to Ex.B-16 had died on 16.10.1981. And in our view the disinterested testimony of D.W.2 Rajaraman amply satisfies the requirements of law referred to above.

18. The challenge of learned senior counsel for the appellant of Ex.B-16 Will is two fold. His first contention is that Thangammal had no mental capacity to execute the Will. In this connection the appellant P.W.1 states that his mother was aged about 70 or 72 when she died on 19.6.1975. She was suffering from diabetes and blood pressure for a number of years. Often she fell into coma. Before he went abroad on 13.5.1975 he visited his mother at Virudhunagar on the evening of 12.5.1975. At that time she was bed-ridden in coma stage. She could not identify him. Significantly enough, excepting the *ipse dixit* of this witness on the health of his mother, he has not produced any other material to substantiate his version. He admits in cross-examination that between July, 1974 and May, 1975 he had seen his mother thrice and at that time the mother had asked him why he and his brother were quarrelling with each other. This gives the lie direct to the testimony of P.W.1 that

his mother was practically unconscious and unable to know what was happening around her for some period prior to her demise. Besides Exs.A-40 and B-97 the draft lease deeds dated 21.10.1974 between second respondent Baskaran and Thangammal relating to suit item 2 cinema theatre bear the signature of Thangammal. Ex.A-44 dated 14.8.1973 and Ex.B-65, dated 22.1.1975 are powers executed by Thangammal in favour of D.W.2 Rajaram. Exs.B-64 and B-66 are income-tax returns for the years 1974-75 and 1975-76 relating to Thangammal which contain her signature. Ex.B-98 dated 4.8.1973, Ex.A-5 dated 3.5.1974, Ex.A-41 dated 11.11.1974, Ex.A-42 dated 26.7.1974 and Ex.A-43 dated 18.6.1974 are communications addressed by Thangammal to Income-tax Department. That was communicating with the Income-tax department and had given power of attorney of D.W.2 auditor during the years 1973 to 1975 rule out the possibility of her being bed ridden and in a state of coma for number of years prior to her death.

19. D.W.6 Dr.Muthuswamy and D.W.7 Dr.Mohan are Medical Practitioners of Virudhunagar. D.W.6 Dr.Muthuswamy states that he is the family Doctor since the days of Senthikumara Nadar. After D.W.7 Dr.Mohan who is a relative of the family came to practice, Thangammal used to get treatment from him also. In the early hours of 19.6.1975 D.W.6 Dr.Muthuswamy received a phone message that her condition was serious. When he rushed to Thanga Mahal he found that she was suffering from chest pain. Without responding to artificial respiration treatment she died. Ex.B-75 is the certificate issued by him stating that she died on account of coronary thrombosis. The evidence of D.W.7 Dr.Mohan is to the effect that Thangammal is the elder sister of his mother. She used to come to his clinic and take treatment. She had visited his clinic even on the evening prior to her demise. At that time she was normal. He did the routine check-up on her. On the next morning on receipt of message he went to Thanga Mahal in the car sent by Thangammal. When he went there, D.W.6 Dr.Muthuswamy was also there. He found Thangammal was dead. According to him, Thangammal was never in a state of semi-consciousness prior to her demise. Appellant as P.W.1 admits that these two were his family Doctors. The only suggestion made to these two Doctors during their cross-examination is that they are deposing

falsely at the instance of the first respondent. It is pertinent to note that D.W.7 Dr.Mohan is the mother's sister's son of both the appellant and the first respondent. No convincing reason has been shown as to why these two Doctors should speak falsehood about the health of Thangammal. D.W.7 Dr.Mohan also states in his evidence that when she visited his clinic on the day prior to the demise she told him that she had proposed to go to Courtallam. Her health was in a fit condition to undertake the trip. The evidence of these two Doctors also improbabilises the claim of the appellant that Thangammal was not in a sound disposing state of mind at the time of the alleged execution of her last Will Ex.B-16.

20. The stand taken by the appellant in his plaint is that when he left Virudhunagar on 12.5.1975 his mother was not conscious and could not even identify him. But he admits in cross-examination that it never occurred to him to take his mother to big hospitals like C.M.C., Vellore and get her treated there. Prior to 12.5.1975 he had seen his mother in coma stage twice or thrice. The first occasion she fell into coma was in 1960. D.W.6 and D.W.7 Doctors never got Thangammal admitted as an in-patient in their Nursing Homes and treated her. Subsequent to 1960 after she was laid up with coma she had executed several settlement deeds and other documents by going over to Sub-Registrar's Office. She had filed a number of income-tax and wealth-tax returns. She had visited Yercaud and Courtallam during seasons. On 1.4.1971 she had been to Palakad and got registered Ex.B-12 settlement deed. After he left for England on 13.5.1975 he never enquired about the health of his mother either from the first respondent or from his relations in Virudhunagar. When he stayed on the night of 12.5.1975 at Thanga Mahal, Nagarathina Nadar, Dharumar who are the brothers of Thangammal and Lakshmi Ammal who is the sister of Thangammal and other close relations did not come to see the mother. These factors also make us difficult to accept the claim of the appellant that Thangammal was not in command of her mental faculties prior to her death and could not have made the dispositions with the full knowledge and consent of the implications of Ex.B-16 Will.

21. Thiru T.R.Mani, learned senior counsel for the appellant has next placed before us these factors as suspicious circumstances attendant in

the coming into existence of Ex.B-16 Will:

(1) The Will has been typed on three old letter heads instead of thick white papers; the letter-head papers are worn out and brown with age, the quality of the paper is such that it is unlikely to be used in a big estate like this. A solemn document like Will which is going to be a title deed of a valuable property Will not be generally written on a low quality paper like this.

(2) In the last page of Ex.B-16 the typing is not uniform and larger space is left between the lines in the last few lines.

(3) The interspace in typing in the last sheet different from other pages.

(4) Thangammal's signature is found against 'x' mark and the signature itself is very much below the typing.

(5) The signature of the two attestors and their subscription are found crammed at the bottom of page 3 and the first attestor's subscription "now at Virudhunagar" is an interlienation; Very little space is left for two people to sign in that place.

(6) There is considerable space between the end of typed portion and the signature of the testator.

(7) Normally a Will is not type written.

(8) The person who has typed the Will has neither attested nor spoken about it. And even his name is not disclosed.

(9) Non-disclosure of the existence of the Will at the earliest point of time.

(10) Though the second respondent is a tenant of the Cinema Theatre described in Item 2, he happens to be a relation and not a stranger to the family, yet he was not asked to attest at Will.

(11) Mutation of names has been effected in the Municipal Registry in a hurried manner.

(12) The payments said to have been made to the first attestor for his two taxi trips from Madurai to Virudhunagar and back are not shown in the accounts.

(13) The instructions chit and the draft of the Will referred to in the evidence are not produced.

(14) The attestors are interested persons.

(15) The attestation of Advocate Thangamani appears to be a later addition.

(16) The first respondent who is the

propounder of the Will and his family members have been given a lion's share in the estate of Thangammal.

(17) The propounder has taken active part and was instrumental in bringing about the Will.

(18) The appellant is given only a paltry share.

(19) There is no obvious reason to deviate from the dispositions made in the previous Will. There it is the appellant who was appointed executor and the bequest was equal between the brothers.

(20) The mother was having throughout equal affection to both her sons and the bequest is unnatural.

(21) Ex.B-16 Will dealing with enormous properties was not registered, though the testator is stated to have been alive for five days after the execution of the Will and there is a Registration Office at Virudhunagar.

(22) There is no explanation as to why the Will was not signed by Thangammal at the bottom of each page even though the family lawyer is alleged to have been present at the time of execution.

(23) There is no need or justification for appointing an executor for the reasons given in Ex.B-16. Payment to M.S.P.Nadar and Sons is only a book adjustment. There was no Income-tax arrears by Thangammal as alleged. Estate duty paid under Ex.B-52 does not require any executor.

22. Learned Senior Counsel for appellant also draws our attention to these cases of this aspect. In *Ramachandra Rambux v. Champabai*, A.I.R. 1965 S.C. 354; (1965) 2 S.C.J. 557; (1964) 6 S.C.R. 814, it has been held: (i) In order to judge the credibility of the witness, the court is not confined only to the way in which the witnesses have deposed or to the demeanour of the witnesses, but it is open to it to look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trustworthiness of the witnesses. This issue cannot be determined by considering the evidence adduced in the court separately from the surrounding circumstances brought out in the evidence, or which appear from the nature and the contents of the document itself. (ii) It is necessary for the propounder to satisfy the court about the genuineness of the Will by the removing all suspicions which naturally flow from the various circumstances.

23. *Seth Beni Chand v. Smt. Kamla Kunwar*, (1977) 1 S.C.R. 578, has laid down that the *onus probandi* lies in every case upon the party propounding a Will, and the must satisfy the conscience of the court that the instrument so propounded is the last Will of a free and capable testator. Where the circumstances surrounding the execution of the Will are shrouded in suspicion, it is the duty and function of the propounder to remove that suspicion by leading satisfactory evidence, and by offering an explanation of suspicious circumstances which can satisfy a prudent mind.

24. In *Jaswant Kaur v. Amrit Kaur*, (1977) 1 S.C.R. 925, it is held: (a) In cases where the execution of a Will is shrouded in suspicion, its proof ceases to be a simple *lis* between the plaintiff and the defendant. What generally is an adversary proceeding becomes in such cases a matter of the court's conscience. The presence of suspicious circumstances makes the initial onus heavier and, therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the court the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator. (b) A Will has to be proved like any other document by applying the usual test of the satisfaction of the prudent mind. (c) Since Sec.63 of the Succession Act requires a Will to be attested it cannot be used as evidence until at least one of the attesting witnesses is examined, if available. (d) Unlike other documents the Will speaks from the death of the testator and, therefore, the maker of the Will is never available for deposing as to the circumstances in which the Will was executed. That circumstance introduces a certain amount of solemnity in proof of testamentary instruments.

25. *Kalyan Singh v. Chhoti*, A.I.R. 1990 S.C. 396, has held that a Will is one of the most solemn documents known to law. The executant of the Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the Will. It must be stated that the factum of execution and validity of the Will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to

their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.

26. Regarding principles governing the proof of a Will one of us (Srinivasan, J.) has pointed out in *Vijayanthimala Bali v. Rattan Chamman Bali*, (1990) 1 L.W. 27, that the Supreme Court indicated in *Surendrapal's case*, A.I.R. 1974 S.C. 1999, that the suspicious circumstances surrounding the execution of the Will would be. (a) Where the signature is doubtful, (b) the testator is of feeble mind or is overawed by powerful minds interested in getting his property, (c) Where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair and (d) Where there are other reasons for doubting that the dispositions of the Will are not the result of the testator's free Will and mind. It was held that in such cases, where there may be legitimate suspicious circumstances, they must be reviewed and satisfactorily explained before the Will is accepted.

27. The appellant does not seriously dispute the signature of Thangammal in Ex.B-16 Will. According to him, either the signature is forged or by utilising her signature obtained on a blank letter head of hers, the Will has been concocted with the assistance of family Lawyer Thangamani and Auditor D.W.2 Rajaraman, who are close friends of the first respondent. In para.11(c) of the plaint, which was inserted subsequently by way of amendment after the inspection of the original Will by him, the stand taken by the appellant is that even assuming without admitting that the signature appearing in the Will is true, one blank paper containing the signature must have been utilised for fabricating the Will. There is no express repudiation of the genuineness of the signature of Thangammal in the Will. Only in the witness box P.W.1 states that the signature in Ex.B-16 Will is not that of his mother. In cross-examination also he reiterates that somebody has forged the signature of his mother in that Will. However, the appellant has not taken any steps to get the signature in Ex.B-16 Will compared with that of the

admitted signature of Thangammal by any handwriting expert so as to disprove the evidence of D.Ws.1 and 2.

28. Learned Senior Counsel for the appellant urges that there is no obvious reason for Thangammal to disinherit her eldest son in respect of her most valuable house property. He further submits that the first respondent was throughout living with the mother and took a leading part in bringing about Ex.B-16. He who propounds the impugned Will Ex.B-16 claims the bulk of the benefits under it for himself and his son. So the burden is very heavy on him to establish its truth and genuineness and due execution by the mother out of her own free Will and volition and in a sound disposing state of mind. *Sarat Kumari Bibi v. Raj Shanthi Chand*, A.I.R. 1929 P.C. 45, lays down that when the writer of a Will has taken a very active part in the preparation of the Will under which he gets a substantial advantage, the propounders of the Will must prove that the testator was aware of the contents of the Will. The decision in *G.Thathaigh v. Venkata Subbaiah*, A.I.R. 1968 S.C. 1332, is also the authority for the position that if the propounder takes a prominent part in the execution of the Will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the Will and in appreciating the evidence in such a case, the court should proceed in a vigilant and cautious manner. So there is no doubt that the duty cast upon the appellant in this connection is onerous.

29. However, a careful scrutiny of the evidence on record would reveal that there is nothing unnatural in the bequest made by Thangammal under Ex.B-16 Will. P.W.1 admits that under various settlement deeds Exs.B-3, B-5 to B-10, B-12, B-13 and B-14 Thangammal has given properties to the families of both her sons in such a manner that they get more or less equal share in her entire estate. As we have already seen, the brothers were only on cordial terms when Ex.B-16 came into existence. Admittedly the appellant was residing in the bungalow in Cauvery Peak Estate which is 20 Km. away from Yercaud. He used to visit Virudhunagar only occasionally. While he is put up in the Estate Bungalow since 1956, the first respondent is all along residing only with his mother in Thanga Mahal Maligai at Virudhunagar. It does not appear he has any other house of his own anywhere. And even as per the particulars of

valuation given in the plaint the market value of all the suit items covered by Ex.B-16 Will come to Rs.5,70,500. The value of items including Thanga Mahal Maligai (Items 1 and 14) given to the first respondent comes to Rs.3,91,250 while the items bequeathed to the family of appellant works out to Rs.1,79,250. And the difference in value is only Rs.2,12,000. Considering the enormity of the estate left by Thangammal including the properties settled by her on the family members of her two sons, it cannot be said that she has made any invidious distinction between her sons in making the bequest of Thanga Mahal Maligai to her younger son. Besides, it has to be borne in mind that Thangammal had distributed all her income yielding lands and houses equally to her two sons. And, what Thangammal herself states in the Will is self-explanatory.

“என்னுடைய குமாரர்கள் எம்.எஸ்.பி.ராஜேசும், எம்.எஸ்.பி.ராஜாவும், என்னுடைய மூத்த குமாரர் எம்.எஸ்.பி.ராஜேஷ் கடந்த 30 வருடங்களுக்கு மேல் ஏற்காட்டிலேயே சாகவதமாய் குடியிருந்து வருகிறார். என்னுடைய இளைய குமாரர் எம்.எஸ்.பி.ராஜா என் கூடவே கடந்த 30 வருடங்களாக தங்க மஹாலில் குடியிருந்து வருகிறார். அவரே எனக்கு வேண்டிய சகல காரியங்களையும் பார்த்து வருகிறார்.”

So it cannot be said either that the bequest is unnatural or that Thangammal has disinherited her elder son in toto and preferred the first respondent in making the bequest under her last Will. Instead she has given one additional property to her younger son. And it cannot be said that it is so outrageous an act.

30. One other argument advanced by learned Senior Counsel for the appellant is that under her earlier Wills Thangammal had divided her estate in equal moities between her sons. The present disposition makes a deviation from the bequest made therein for no obvious reason. Ex.B-11 dated 2.9.1967 is the only earlier Will exhibited in this case. This discloses that she has executed Wills and codicils earlier and cancelled them. Under this Will the appellant has been appointed executor and failing him the first respondent is named. In this Will she has given her 1/4 share in Karapara Estate measuring 1148 acres to the five children of the first respondent. And she has given the residue of her

estate equally to two sons of the appellant and first respondent. So it cannot be said that under Ex.B-16 Will she has made a deviation from the dispositions made in the earlier Will to the disadvantage of the appellant.

31. Learned Senior Counsel for the appellant next draws our attention to the fact that the impugned Will has not been registered and the first respondent has not shown any reason for the failure to register the Will, even though Thangammal happened to live for five days after the coming into existence of the Will. It is true that registration would go a long way to dispel the doubt as to the genuineness of the Will. But where the execution is proved by cogent and acceptable evidence, the court should not disbelieve the Will merely because it is not registered. And we have already seen that in this case the execution has been duly established by the convincing testimony of D.W.2 Rajaraman.

32. Exs.B-17, B-19 and B-40 are the copies of Ex.B-16 Will containing the attestation dated 23.6.1975 of D.W.4 Lakshminarayanan, the then Municipal Commissioner of Virudhunagar. D.W.4 states in his evidence that after comparing the original Will produced before him he attested these copies on 23.6.1975. On 7.8.1975 the first respondent presented Ex.B-18 application in Virudhunagar Municipality to effect mutation in the Municipal Registry in respect of the suit house as per the terms of the Will left by his mother. He had enclosed Ex.B-19 attested copy of the Will along with this application. This bears the date seal of Municipality as 7.8.1975. Exs.B-20 to B-28 are correspondence dated 14.8.1975 sent by Virudhunagar Municipality to the first respondent in this connection marking copies to appellant. D.W.4 stated that he had passed orders on this application on 14.8.1975 for change of registry. D.W.5 Boopalan was the Revenue Officer of Virudhunagar Municipality in 1975. He speaks about the receipt of Ex.B-18 application from the first respondent and his placing the same before the Commissioner for orders. It is the evidence of the appellant as P.W.1 that he did not receive any communication from Virudhunagar Municipality before the change of registry in respect of the suit house. And there is no material to hold that any notice was served on the appellant. The hurried manner in which the Municipal Registry has been changed from the name of Thangammal even

without notice to P.W.1 is relied on by the appellant as one of the suspicious circumstances which improbabilises the due execution of Ex.B-16 Will. It is quite possible that D.W.1 who is a former Chairman of the Virudhunagar Municipality was able to prevail upon these two officers and managed to change the registry without proper service of notice on appellant within a very short period after the death of Thangammal. However we do not think that this hurried transfer of registry can in any way affect the credibility of the Will in any manner. Instead the production of Ex.B-16 Will in the Municipal Office on 23.6.1975 within four days of the death of Thangammal only strengthens the claim of the first respondent that Ex.B-16 is a genuine document.

33. As we have already seen, Advocate Thangamani is one of the attestors to Ex.B-16 Will. He died on 16.10.1981 before commencement of trial. P.W.1 states in his evidence that on 2.6.1976 he met Thangamani in a marriage house at that time Thangamani enquired whether he could not settle his dispute with his brother. He told Thangamani that the first respondent had sent a list containing 'A' and 'B' Schedules in respect of their properties and he was agreeable to come to an understanding on the basis of that list. Thangamani wanted this witness to send the list to him so that he could take up the matter with the first respondent. At that time Thangamani casually informed him about the existence of Ex.B-16 Will. Neither this witness asked Thangamani nor the latter apprised him of the details of the Will. On 3.6.1976 he wrote Ex.B-49 letter enclosing the list of properties. In this letter P.W.1 has asked Thangamani whether his mother had signed the Will in his presence. It is significant to note that in the list annexed to Ex.B-49 letter Thanga Mahal Maligai is shown as one of the items to be divided between the brothers as per the proposal of the first respondent. On the basis of this, learned Senior Counsel for the appellant argues that had the Will been true, the first respondent would not have shown Thanga Mahal Maligai as one of the items to be shared between the brothers. But significantly enough P.W.1 admits in his evidence that the original list attached to Ex.B-49 is with him. This list covers the properties settled by his mother in favour of her grand children, the first respondent and his wife. Evidently the original list would have gone a long way in support of the appellant's claim that there was a

proposal ignoring the Will. But the appellant has not chosen to produce this original list. Evidently in the absence of the original list, no importance could be attached to the Annexure to Ex.B-49.

34. Ex.B-50 purports to be the office copy of the letter dated 7.6.1976 addressed to the appellant by Advocate Thangamani in reply to Ex.B-49 letter. This letter reads that

".....Myself and T.R.Rajaraman, Chartered Accountant, Virudhunagar were present when your mother signed the Will....."

This is relied upon by the first respondent to prove the genuineness of Ex.B-16 Will. However this letter does not contain the signature of Thangammal. It bears only the initial. And this initial has not been identified by anybody as that of deceased Thangamani. Even the written statement makes no mention of this letter. The only evidence on this document is that of D.W.1 Raja who states that in June, 1976 Advocate Thangamani rang him up and spoke about his meeting the appellant at his residence at Madurai and the latter addressing a letter to him on 3.6.1976 and his replying. D.W.1 further deposes that Thangamani also expressed his desire to talk to him in connection with that letter. Accordingly he met the Advocate. At that time Thangamani showed him Ex.B-49. Thangamani asked his views regarding the list annexed to Ex.B-49. He told Thangamani that he did not hand over the original of the said list to the appellant. Learned Senior Counsel for the appellant rightly draws our attention to the fact that Exs.B-49 and B-50 have been produced in Court by the Clerk of Advocate Thangamani. However, the said Advocate's Clerk has not been examined. In the absence of any evidence regarding the identification of the initial of Thangamani in Ex.B-50, this document serves no purpose and no importance could be attached to the aforesaid version of D.W.1 also.

35. As per the appellant only when he met Advocate Thangamani on 2.6.1976 at madurai he came to know about the existence of the Will. Whereas D.W.1 Raja swears that subsequent to the death of his mother he met the appellant for the first time on 23.7.1975 at Bangalore. Both of them had been there in connection with Coffee Board auction. When he was conversing with his brother, he revealed to him the leaving of the Will by the mother and discussed with him further steps to be taken. At that time suit item 2 Central Cinema had

been leased out to second respondent Baskaran as per Ex.B.38. The licence for the Cinema was also standing in the name of the lessee. On the terms of Ex.B-16 Will, the appellant and the first respondent had become co-owners of the theatre. They had to get the 'C' Form Licence changed in the name of either the appellant or the first respondent. So on 25.7.1975 the appellant sent a "no objection certificate" to him from Yercaud. He forwarded a copy of Ex.B-16 and the "no objection certificate" to the Collector of Ramnad for change of licence. The appellant though admits his visiting Bangalore on 23.7.1975 for Coffee Board auction, denies that he was informed about the Will by his brother and later on he had sent his willingness for change of 'C' Form Licence in his letter to the first respondent. Ex.A-8 is the office copy of the letter dated 19.7.1975 addressed to the appellant by M.S.P.Nadar and Sons seeking the signature of the appellant in connection with the transfer of the Central Cinema theatre licence. Though P.W.1 pretends that he does not know whether he had received the original of Ex.A-8 letter, he admits that the words "sent on 27.7.1975" and the initial therein are his. He further states that on 12.8.1975 he wrote Ex.B-82 letter to the Collector withdrawing "his no objection certificate" referred to in Ex.A-8. It is likely that this change of heart on the part of the appellant is perhaps due to his second thought over the Will. So his present claim that he became aware of the Will only on 2.6.1976 during a casual conversation with Advocate Thangamani does not appear to be probable.

36. Anyway, admittedly the appellant had knowledge of the Will since 2.6.1976. However, for 1 1/2 years he had not taken any steps repudiating the genuineness of the Will. In fact, when the present plaint came to be filed on 13.12.1977, significantly enough there was absolutely no reference to the existence of the Will. And the claim was made on the basis that Thangammal died intestate on 19.6.1975. Only after the first respondent made mention of the Will in his written statement, the appellant sought to amend the plaint disputing the genuineness of Ex.B-16. This conduct on the part of the appellant erodes on his credibility when he swears that he became aware of the Will only on 2.6.1976 from Advocate Thangamani. His keeping quiet for more than two years without questioning the truth and genuineness of the Will only lends support to the view that Ex.B-16 is a

true one.

37. The other infirmities in the Will as pointed out by learned Senior Counsel for the appellant are no doubt there. But it is possible to make comments of the nature against any Will. And it cannot be said that these infirmities even cumulatively would render the execution of the Will an utter improbability very near to impossibility. Considering the preponderance of probabilities we have no doubt in our mind that Ex.B-16 is the last Will left by deceased Thangammal having been executed by her while in a sound disposing state of mind. We are of the view that the propounder has cleared any suspicion with satisfactory evidence. Our conscience is satisfied not only on execution but about its authenticity. Once a Will is proved to be true and it was executed by testator, it is not for the court to embark upon an enquiry whether the dispositions made therein are fair and just.

38. Learned Senior counsel for the appellant next contends that even as per Ex.B-16 Will his client is entitled to a half share in suit items 2 to 13 and trial court went wrong in dismissing the suit in entirety. He also takes objection to the refusal of the trial court to pass an interim preliminary decree regarding these items. But the trial court rightly took the view that the first respondent has been appointed as executor for these items. He has to discharge all the arrears of tax and debt due by Thangammal from out of the income of these properties. The appellant is entitled to his half share only in whatever remains after the fulfilment of the liabilities as enjoined in the Will. So we find no merit in this contention of learned senior counsel for the appellant.

39. *C.M.P.No.12535 of 1993*: In this application the first respondent seeks to file certain documents as additional evidence in the appeal. These documents relate to the proceedings in O.S.No.18 of 1978 on the file of Sub Court, Madurai for dissolution and taking of accounts of the Firm M.S.P.Nadar and Sons. The decree therein provides that the liability of accounting of either parties shall be gone into by the Joint Commission Thiru T.R.Rajaraman, D.W.2 herein and one S.Venkatasubbu, Chartered Accountant of Coimbatore. They are sought to be marked for the reason that D.W.2 acted as Commissioner for the present appellant also. However, it appears that in the Joint Commission while D.W.2 herein represented the first respondent, Thiru S.Venkatasubbu

represented the appellant. So we do not think that these documents are of any relevancy here.

40. In the result, A.S.No.690 of 1983 is dismissed with costs of the first respondent.

C.M.P.No.12535 of 1993 is also dismissed. No cost.

B.S. ---- *Appeal and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *AR.Lakshmanan, J.*

W.P.Nos.5513, 5514 and 5659 to 5661 of 1992
7th December, 1993.

B.M.Habibullah and others ...*Petitioners*
v.
The State of Tamil Nadu represented by the District Collector, Nilgiris District, Udthagamandalam and others ...*Respondents.*

(A) Tamil Nadu Land Encroachment Act (III of 1905), Secs.5 to 7 - Requirements of a valid notice - Petitioners carrying on business in the site belonging to the Government - Petitioners invested considerable money - Obtained licence for running the business - Demolition of the shops by the Government by using bulldozer - No prior notice given - Stock in trade was thrown in the streets - Writ of mandamus by the shopowner - Direction to restore the building and structure that stood prior to demolition sought - Action of the Government held arbitrary, high handed and contrary to the established procedure.

(B) Constitution of India Art.226 - Writ of mandamus - When can be issued.

The petitioners have been carrying on business since 1970 in the shop in the site belonging to the Government situated near Coonoor bus stand falling within the municipal limits of Coonoor municipality. The petitioner invested considerable sums of money in the business and has also obtained licence for running the business and also drug licence under the provisions of Drugs and Cosmetics. Without any notice to the petitioners and justification, the first respondent and an army

of revenue and police officials demolishing the petitioners shops by using bulldozer. The stock in trade were also thrown on the streets and all the shop owners were subjected to humiliation and ignoring. The petitioners filed writ petitions for issue of a writ of *mandamus*.

Held: A notice under Sec.5 of the Act was issued to the petitioner. It does not bear any date. In the said notice it was mentioned that the property will be forfeited under Sec.6 of the Act, and the petitioner was called upon to show cause and on before 1990. There is also some over-writing. This hardly satisfies the legal requirement of the provisions of the Act. There cannot be any denial of the fact that the right of hearing given to the unauthorised occupant under Sec.7 of the Act is a valuable right and a prior notice under Sec.7 of the Act is a valuable right and it has to be strictly in conformity with the Act. Even the 'B' memo issued by the Tahsildar does not bear any date as to when the Revenue Inspector or Tahsildar inspected the encroachment even though the said memo bears the month and date indicating the enjoyment of the lands by unauthorised occupants. There is another 'B' memo bearing the month without any date signed by the Tahsildar. But at the end of the notice there is an endorsement to the effect "*Evicted land resumed to Government*" signed by the tahsildar. [Para. 29]

A writ of *mandamus* directing the respondents to restore the premises occupied by the respective petitioners prior to their forcible eviction and put them in possessions of their respective premises is issued. As regards the claims for compensation, all the petitioners are given liberty to approach the appropriate forum. Having regards to the finding that the respondents in the District Collector, The Nilgiris, The Commissioner, Coonoor Municipality and the Tahsildar Coonoor, have exceeded their powers and have acted arbitrarily and high handedly and contrary to the established procedure. [Para. 45]

Cases referred to:

Meera Nreshwalia v. The State of Tamil Nadu, 1990 Writ L.R. 313. [Para. 43]

Indrasan Pai v. Enayat Khan, A.I.R. 1952 Pat. 317. [Para. 43]

Jai Berche v. Kedar Nath, I.L.R. 2 Patna 10. [Para. 43]

Rodger v. Comptoir D'Escompte De Paris, (1871) L.R. 3 P.C. 466. [Para. 43]

Emperor v. Nasir Ahmed, (1945) 581 W. 57: A.I.R. 1945 P.C. 12. [Para. 43]

Dipendra Nath Bakwit v. State of Bihar, A.I.R. 1962 Patna 101. [Para. 43].

Sohan Lal v. Union of India, A.I.R. 1967 S.C. 529. [Para. 43]

T.Rajalakshmi v. Coimbatore City Municipal Corporation, (1992) 1 M.L.J. 568. [Para. 44]

N.S.Nandakumar and N.S.Mukundan, for Petitioners.

A.S.Venkatachalamurthi, Special Government Pleader and *D.Krishnakumar*, Government Advocate, for Respondent Nos.1 and 3.

K.Raghunathan and N.Sampath, for Respondent No.2.

The Court made the following

ORDER: These five writ petitions raise common questions and hence they are taken up together and disposed of by a common order. For the sake of convenience, I propose to refer to the facts in W.P.No.5513 of 1992.

2. According to the petitioner in W.P.No.5513 of 1992, he has been carrying on business since 1970 under the name and style of S.A.B. stores in shop No.2, Block No.110 in the site belonging to the Government situated near Coonoor bus stand falling within the municipal limits of Coonoor Municipality. It is the case of the petitioner that he has invested considerable sums of money in the business and has also obtained licence for running the business for the year 1992-93 and also obtained a drug licence under the provisions of Drugs and Cosmetics Act. It is stated by the petitioner that on 11.4.1992 without any notice and justification, the 1st respondent and an army of revenue and police officials demolished his shop and 22 other shops by using Bulldozer. It is also stated that the stock-in-trade were thrown on the streets and all the shop owners were subjected to humiliation and ignominy. The petitioner would state that no notice was issued to him either under the Tamil Nadu Land Encroachment Act or under any other law to evict them from the place occupied by them. According to the petitioners, the demolition of the shops belonging to them is not only illegal but also highhanded.

3. On the basis of the above averments, the petitioner has sought for a writ in the nature of *mandamus* for the following relief:

"To forbear the respondents or any authorities claiming on their behalf from in any way

interfering with the possession and enjoyment of the land of an extent of about 160-200 sq.ft., in which the demolished shop No.2 in Block No.110, of the petitioner situated near Coonoor bus stand in the strip of land adjoining the river side of the new bridge (near bus stand area), Coonoor Town, The Nilgiris District, to direct the respondents to restore the building and structure as stood prior to 11.4.1992 of the said shop; and to direct the respondents jointly or severally to pay the compensation of Rs.5 lakhs for demolition and destruction of the said shop and the stock-in-trade of the business carried on by the petitioner under the name and style of SAB Stores in the said shop on 11.4.1992."

4. W.P.No.5514 of 1992 is filed by one Iqbal making similar averments. According to him, he is in occupation of Shop No.1, Block No.110. Similarly, W.P.No.5659 of 1992 was filed by one I.Venkatasubramani. He claims that his father was allotted an extent of 200 sq.ft. of land in R.S.No.2185/1 in or about 1960-61. The site plan as well as the building permit were approved in 1962 for constructing a building. Originally, his father was carrying on Tea Stall Business and after his demise, he is carrying on the said business. It is stated by him that he has been assessed to house-tax and his application for permanent assignment was pending. He would also state that on 11.4.1992, the 1st respondent accompanied by army of officials demolished his shop unauthorisedly and illegally.

5. W.P.No.5660 of 1992 is filed by one K.I.Vargheese, who claims to carry on business, a General Stores and Bakery, in Revenue Survey No.2185 for the past 12 years in the Coonoor bus stand. His grievance is the same like that of the other petitioners.

6. W.P.No.5661 of 1992 is filed by one P.Nanjundiah claiming to be an allottee of a site of 240 sq.ft. in R.S.No.2185/1 in or about 1973. He is carrying on a business by name Nanjundeswara Milk and Coffee Bar. His grievance is also the same like that of the other petitioners.

7. The petitioners in W.P.Nos.5514 and 5659 to 5661 of 1992 also prayed for a writ of *mandamus* forbearing the respondents from in any way interfering with their possession and enjoyment of the respective shops situate near Coonoor bus stand. They also prayed for restoration of the building and structure as stood prior to 11.4.1992 of their respective shops. They further prayed for

compensation in varying sums for demolition of their shops and the stock-in-trade of the business carried on by them.

8. Respondents 1 and 3 *viz.*, the District Collector, The Nilgiris, and the Tahsildar, Coonoor, have filed a common counter affidavit. It is stated in the common counter that about 22 bunk sheds were erected unauthorisedly causing great inconvenience and marking the appearance of the tourist spot. Such encroachments also caused obstruction for the free flow of traffic and the public at large. Therefore, according to respondents 1 and 3, a decision was taken on the basis of G.O.Ms.No.41, Revenue, dated 20.1.1987, to remove the encroachments so as to enable free flow of traffic in and around Coonoor bus stand. It is stated that out of 22 encroachments, 12 encroachers were paying 'B' Memo Fees to the Revenue Department. It is stated that notice dated 20.3.1992 under Sec.6 of the Land Encroachment Act, 1905, was served by affixture on the petitioners and the petitioners in W.P.Nos.5659 to 5661 of 1992 refused to receive the said notice, under which 15 days time was given for removing the objectionable encroachments. It is also the claim of the respondents that the 15 days time expired on 9.4.1992 and thereafter action was sought to be taken on 11.4.1992. The specific case of respondents 1 and 3 is, that before the officers actually implemented the eviction, the petitioners themselves removed their belongings including the bunk sheds, which are capable of being shifted, leaving the permanent structure. In other words, the respondents would state that the petitioners voluntarily vacated the premises and removed all their belongings.

9. With reference to the petitioners in W.P.Nos.5659 and 5661 of 1992, respondents 1 and 3 would state that they were in occupation of Government lands after issuing due notice under Sec.6 of the Land Encroachments Act. So far as the petitioners in W.P.Nos.5513 and 5514 of 1992 are concerned, respondents 1 and 3 would state, that they are in unauthorised occupation and were not assessed to any 'B' Memo Fees and they were running five shops in the locality and hence they were also removed along with the other petitioners. It is also stated by respondents 1 and 3 that excepting the petitioners, the other 17 persons who are also evicted, have not raised any objection and therefore, it is claimed that the eviction was legal.

10. The 2nd respondent *viz.*, the Commissioner of

Coonoor Municipality, has filed a separate common counter affidavit stating that the petitioners have put up structures in the land belonging to the Government and that the land is situated on the revertment of the river bank and it adjoins the pavement in Coonoor bus stand. It is his categorical case that the municipality has not issued notice for the removal of the obstruction and has not demolished any building. It is also repeated by the 2nd respondent that the petitioners voluntarily vacated and removed their belongings. According to the 2nd respondent, *to his knowledge*, the 1st and 3rd respondents have issued notice under Sec.6 of the Land Encroachment Act.

11. Miss. Leena Nair, the Collector of Nilgiris, has filed a separate common counter affidavit dealing with the specific allegations of the petitioners. She would say that she never stayed at Coonoor (Incoserve Guest House) on the night of 10.4.1992 and that the action initiated by the 3rd respondent/ Tahsildar, Coonoor, is in accordance with law and the 3rd respondent has followed the procedure laid down by law.

12. The petitioners have filed separate reply affidavits refuting the various statements made in the counter - affidavits. They also stated that no notice was issued to them under any provision of law. Further, they deny the specific allegation that they voluntarily vacated the premises and removed the articles.

13. The petitioners in W.P.Nos.5513 and 5514 of 1992 in their reply affidavits have set out in detail the origin of the shops occupied by them, nature of investments and how the demolition took place besides denying the issue of notice under the Land Encroachment Act.

14. So far as the petitioner in W.P.No.5659 of 1992 is concerned, he would state in his reply affidavit that he had made an assignment application for assigning the land and the same was followed by reminder in 1991. Pending assignment and patta, the 3rd respondent, it is claimed, had written a letter to the 2nd respondent on 23.12.1991 seeking the latter's remarks for the grant of lease and that the 2nd respondent had also passed a resolution for renewal of lease.

15. The petitioner in W.P.No.5660 of 1992 would state in his reply affidavit that his building was assessed to property tax and that he is the absolute owner of the building. In the reply affidavit filed by the petitioner in W.P.No.5661 of 1992, it is stated

that his building was assessed the property tax and that he is the absolute owner of the building. It is the case of all the petitioners that they eke out their livelihood by carrying on business in the respective shops and that they have no other source of income.

16. The 3rd respondent had filed an additional counter affidavit after perusing the reply affidavits of all the petitioners as well as the report of the Advocate Commissioner, which I will refer to at the appropriate stage.

17. Having regard to the controversies and issues involved in the writ petitions, I felt it was necessary to appoint an Advocate Commissioner and accordingly, I passed an order on 25.9.1992 appointing Mr.S.Mohamed Yousuff, Advocate, Madras, *inter alia* to peruse the official records maintained by the 3rd respondent as well as the 2nd respondent and submit a report after local inspection. Pursuant to my orders, the Advocate Commissioner has submitted a detailed report together with number of annexures on 14.12.1992. Respondents 1 and 3 filed a memo of objections to the Commissioner's report. The 2nd respondent has also filed objections to the Advocate Commissioner's report.

18. The 3rd respondent, thereafter, has filed an additional counter affidavit as well as additional objections to the Commissioner's report. According to him, the additional counter - affidavit became necessary because of the statements contained in the reply affidavit as well as in the report of the Advocate Commissioner. In this additional counter - affidavit it is admitted that the petitioners in W.P.Nos.5659 to 5661 of 1992 alone put up walls on three sides with zinc sheet roofs. So far as the petitioners in W.P.Nos 5513 and 5514 of 1992 are concerned, it is stated, that they were having only bunks owned by the 2nd respondent and they did not put up any construction. It is reiterated that all the petitioners vacated the premises voluntarily and removed their belongings even prior to 9.00 a.m. on 11.4.1992.

19. The Advocate Commissioner in his detailed report has found that all the petitioners have been in possession and enjoyment of specific sites in survey No.2185/1, Coonoor Town, and the sites in their occupation vary from 160 to 240 sq.ft., and buildings. It is also found by him that the sites occupied by the petitioners in W.P.Nos.5513 and 5514 of 1992 were located by the municipality

during 1970 itself when the petitioners fixed their zinc sheet shops. So far as the petitioners in the other writ petitions were concerned, the buildings were constructed by them between 1961 and 1970. It is also his finding that the revenue authorities were collecting the lease amount during the subsistence of lease and thereafter they were collecting charges under the provisions of the Tamil Nadu Land Encroachment Act from the petitioners in W.P.Nos.5659 to 5661 of 1992. The aforesaid petitioners were also paying the property tax in respect of the building put up by them. He has also found that the petitioners in W.P.Nos.5659 and 5661 of 1992 are having approved plan for the buildings. So far as the petitioners in W.P.Nos.5513 and 5514 of 1992 are concerned, the Advocate Commissioner has found that the shops in their occupation were allotted by the 2nd respondent. He has also found that the 2nd respondent was collecting licence fee towards the business carried on in the respective shops.

20. According to the Advocate Commissioner, the five shops in question stood on the projected pavement foundation and they are not erected on the road margin. He has also recorded a finding that the shops in question are not situated in the bus stand and they do not hinder the free flow of traffic. On the basis of the reports and statements of the Tahsildar/3rd respondent and the Municipal Commissioner/2nd respondent, the Advocate Commissioner has recorded the admission by the aforesaid officials that no complaint has been received from the public stating that the shops in question pose any hindrance to the traffic or public and that two more shops are still existing even to-day.

21. In support of his findings, the Advocate Commissioner has filed copies of the 'B' Memos, municipal records, revenue records, photographs and map and sketches, police complaint, etc., besides statements given by the petitioners and some third parties. He has also filed the following documents:

- (i) The statements of the Tahsildar, Village Administrative Officer, Coonoor and the Zonal Deputy Tahsildar, Coonoor.
- (ii) Property tax assessment records.
- (iii) Resolutions of Coonoor Municipality.
- (iv) Statements by citizens of Coonoor.
- (v) Proceedings taken under the Land Encroachment Act records.
- (vi) Sketches and maps.

- (vii) Resolutions passed by the 2nd respondent granting lease.
- (viii) Licences.
- (ix) Records pertaining to levying of licence fees for the buildings constructed.
- (x) Proceedings of the 2nd respondent granting approval for the site for construction of a building.
- (xi) Proceedings relating to leasing of land in favour of the petitioners.
- (xii) Order of the Government granting lands belonging to Government for temporary occupation for non-agricultural purposes.
- (xiii) Proceedings relating to removal of lease.
- (xiv) Property tax receipts.
- (xv) Chitta.
- (xvi) Receipts for payment of electricity charges.
- (xvii) Receipts issued by the 2nd respondent for renewal of licences.
- (xviii) Renewal of certificate for running a catering establishment.
- (xix) Water tax receipts.

The above are the copies of the records maintained by the respondents in their respective offices.

22. Respondents 1 and 3 have filed a memo of objection to the report of the Advocate Commissioner, in which they have specifically said in paragraph 4 that they are not disputing the period of occupation with respect to the petitioners in W.P.Nos.5659 to 5661 of 1992. It is also admitted by them that the petitioners in W.P.Nos.5513 and 5514 of 1992 had taken the bunks in auction from the municipality. They have disputed the admission said to have been made by the Tahsildar and that the applicability of Tamil Nadu Public Premises Eviction of Unauthorised Occupants Act. They have also disputed some of the findings of the Commissioner. It is significant to notice that no specific objection has been raised with regard to the public documents maintained by the respondents.

23. The 2nd respondent has also filed his objections. He has not raised any objection with regard to any documents maintained in his office, copies of which have been filed by the Advocate Commissioner.

24. Mr.A.S.Venkatachalamurthy, the learned Special Government Pleader has produced three files containing notices issued under Sec.5 of the Land Encroachment Act to the petitioners in

W.P.Nos.5659 to 5661 of 1992. Admittedly, no such documents are produced with regard to the other two petitioners in W.P.Nos.5513 and 5514 of 1992.

25. I have carefully considered the lengthy arguments of the respective counsel. I have also carefully perused the entire pleadings, documents filed by the Advocate Commissioner and by the Municipality and the other relevant papers.

26. Now, it becomes necessary for me to refer the provisions of the Land Encroachment Act, 1905. Under Sec.6, any person who is in unauthorised occupation of the land belonging to the Government, for which he is liable to pay assessment under Sec.3, may be summarily evicted by the Collector. Any building or other construction erected on such building, if not removed after such written notice by the Collector, is liable to forfeiture. The procedure for eviction is laid down in Sub-sec.(2) of Sec.6. A prior notice under Sec.7 is necessary before taking action under Sec.6 of the Act.

27. I have already dealt with the legal requirement of a notice under Secs.6 and 7 of the Act in my order in *T.K.Rajasekaran and others v. The Collector of Madurai*, W.P.Nos.9977 of 1992 and 1979 of 1993 dated 8.9.1993, wherein I have taken the following view:

“In order to appreciate the contention of the petitioners, it is necessary to understand the scope and ambit of the provisions of Secs.5 to 7 of the Tamil Nadu Land Encroachment Act, 1905 (Act 3 of 1905). The above sections are reproduced hereunder:

(5) *Liability of person unauthorisedly occupying land to penalty after notice:* Any person in any area other than the transferred territory liable to pay assessment under section shall also be liable at the discretion of the Collector, or subject to his control, the Tahsildar or Deputy Tahsildar to pay in addition by way of penalty:

(i) If the land be assessed land, a sum not exceeding five rupees or, when ten times the assessment payable for one year under Sec.3 exceeds five rupees, a sum not exceeding ten times such assessment, provided that no penalty shall ordinarily be imposed in respect of the unauthorised occupation of such land for any period not exceeding one year;

(ii) If the land be unassessed, a sum not exceeding ten rupees, or when twenty times the

assessment payable for one year under Sec.3 exceeds ten rupees, a sum not exceeding twenty times such assessment.

Provided that where the notice under this section is caused to be served by the Revenue Inspector, he shall require the person reputed to be in unauthorised occupation of the land to show cause against such notice to the Tahsildar or Deputy Tahsildar having jurisdiction and shall also make a report in writing containing such particulars as may be specified in rules or orders made under Sec.8 to the Tahsildar or Deputy Tahsildar having jurisdiction.

(6) *Liability of person unauthorisedly occupying land to summary eviction, forfeiture of crops, etc.:* (1) Any person unauthorisedly occupying any land for which he is liable to pay assessment under Sec.3 or Sec.3-A may be summarily evicted by the Collector or subject to his control, by the Tahsildar or Deputy Tahsildar or any other officer authorised by the State Government in this behalf (hereinafter referred as the Authorised Officer) and any crop or other product raised on the land shall be liable to forfeiture and any building or other construction erected or anything deposited thereon shall also, if not removed by him after such written notice as the Collector or subject to his control, the Tahsildar or Deputy Tahsildar or Authorised Officer may deem reasonable, be liable to forfeiture. Forfeitures under this section shall be adjudged by the Collector or subject to his control by the Tahsildar, or Deputy Tahsildar, or Authorised Officer and any property so forfeited shall be disposed of as the Collector or subject to his control, the Tahsildar or Deputy Tahsildar or Authorised Officer may direct.

(2) An eviction under this section shall be made in the following manner, namely:- By serving a notice in the manner provided in Sec.7 on the person reputed to be in occupation or his agent requiring him within such time as the Collector or the Tahsildar or Deputy Tahsildar or Authorised Officer may deem reasonable after receipt of the said notice to vacate the land, and, if such notice is not obeyed, by removing or deputing a subordinate to remove any person who may refuse to vacate the same, and if the officer removing any such person shall be resisted or obstructed by any person,

the Collector or the Tahsildar, or Deputy Tahsildar or Authorised Officer shall hold a summary inquiry into the facts of the case, and if satisfied that the resistance or obstruction was without any just cause and that such resistance or obstruction still continues, may issue a warrant for the arrest of the said person and on his appearance commit him to close custody in the office of the Collector or of any Tahsildar or Deputy Tahsildar or Authorised Officer for such period not exceeding 30 days as may be necessary to prevent the continuance of such obstruction or resistance or may send him with a warrant in the form of the Schedule for imprisonment in the civil jail of the district for the like period:

Provided that no person so committed or imprisoned under this section shall be liable to be prosecuted under Secs.183, 186 or 188 of the Indian Penal Code in respect of the same facts.

(3) Any authorised officer taking proceedings under this section shall make a report in writing containing such particulars as may be specified in rules or orders made under Sec.8 to the Collector, Tahsildar or Deputy Tahsildar having jurisdiction.

7. *Prior notice to person in occupation:* Before taking proceedings under Sec.6 the Collector or Tahsildar or Deputy Tahsildar or Revenue Inspector or any Authorised Officer or any other officer specified by the State Government in this behalf (not being an authorised officer) (hereinafter referred to as the 'specified officer') as the case may be, shall cause to be served on the person reputed to be in unauthorised occupation of land being the property of Government a notice specifying the land so occupied and calling on him to show cause before a certain date why he should not be proceeded against under Sec.6. Such notice shall be observed in the manner prescribed in Sec.25 of the Tamil Nadu Revenue Recovery Act, 1864, or in such other manner as the State Government by rules or orders under Sec.8 may direct.

Provided that no such notice shall be necessary in the case of any person unauthorisedly occupying any land, if he had been previously evicted from such land under Sec.6 or if he has previously vacated such land voluntarily after the

receipt of a notice under Sec.5-B or under this section:

Provided further that where the notice under this section is caused to be served by any Revenue Inspector or any specified officer he shall require the person reputed to be in unauthorised occupation of the land show cause against such notice to the Collector, Tahsildar, Deputy Tahsildar or authorised person having jurisdiction, as the case may be, and shall also make a report in writing containing such particulars as may be specified in rules or orders made under Sec.8 to the Collector, Tahsildar, Deputy Tahsildar or authorised person having jurisdiction, as the case may be."

The condition precedent for taking action under Sec.6 is, (i) Issuance of a prior notice under Sec.7 to the person concerned to show cause *before a certain date to be fixed (italics is mine)* why he should not be proceeded against under Sec.6 of the Act; (ii) On service of such notice, if sufficient cause is not shown serving a notice under Sec.6 requiring him within such a time as the Collector may deem reasonable to vacate the land; and (iii) If such notice is not obeyed, directing removal of the person from the land.

If any crop or other product raised on the land shall be liable to forfeiture and any building or other construction erected or anything deposited thereon shall also, if not removed after such written notice, as the Collector may deem reasonable, be liable to forfeiture. Forfeiture shall be adjudged by the Collector and any property so forfeited shall be disposed of as the Collector or as the Collector may direct. Both the written notice and the adjudging of forfeiture can be done by the Tahsildar or Deputy Tahsildar or other authorised officers subject to the control of Collector.

I am not referring to the other portions of Sec.6 of the Act for they are not necessary for the purpose of the present case.

The prior notice to be issued under Sec.7 should specify a date before which the person in unauthorised occupation should be asked to show cause as to why he should not be proceeded against. It is obligatory on the part of the authority issuing notice under Sec.7 to specify 'a certain date'. In contra distinction, Sec.6(2)

uses the expression "service of a notice on the person reputed to be in occupation requiring him within such time" as the Collector may deem reasonable to vacate the land. Thus, it is clear that prior notice under Sec.7 should contain 'a certain date' while a notice under Sec.6(2) to specify 'such time' as the Collector or his subordinate may deem reasonable. Thus, the legislature has deliberately used two different expressions in Secs.7 and 6 of the Act. If a prior notice issued under Sec.7 does not contain 'a certain date', it would be in violation of the mandatory requirement of the Section.

In the light of the above legal provision, the notices under Sec.7 in the present cases have to be examined. A reading of the notices issued under Sec.7, as found in the files produced would clearly show that they fail to satisfy the mandatory requirement. The notices merely state that cause should be shown 'within one week'. This, according to me, merely specify the period within which the cause should be shown to the prior notice under Sec.7. Further, not even the year, month or date is mentioned in any of the notices under Sec.7. They do not even say as to when the period of one week will commence. Thus, in my view, the notices issued under Sec.7 of the Act are not in conformity with the mandatory requirement of Sec.7. When once the prior notice under Sec.7 is held to be illegal, the subsequent notices under Sec.6 of the Act and the further steps taken by the Collector, Tahsildar and other officers pursuant to such notice, have to be necessarily held to be improper and illegal. On this ground alone, both the writ petitions are liable to be allowed.

However, it is also necessary for me to refer to yet another aspect in the present case. As already noticed, the authorities have made a noting in the file that not only possession was taken but also shopping complex was demolished. It has to be straightaway pointed out that the act of demolition is totally without authority and in clear contravention of the provisions of Sec.6(1) of the Act.

It is obligatory on the part of the Collector or his subordinates to issue a written notice to the persons in unauthorised occupation of the land to remove any building or other construction erected. If after such written notice the

building or other constructions erected are not removed, the same is liable for forfeiture. Forfeiture shall be adjudged by the Collector or his subordinates subject to his control and such forfeited property has to be disposed of as the Collector or his subordinates subject to his control may direct.

On a perusal of the files, I do not find any notice having been issued under Sec.6(1) of the Act calling upon the petitioners to remove the building or other constructions. On a perusal of the file, I do not find any written notice having been issued by the Collector or his subordinates calling upon the petitioners to remove the building or other constructions. Consequently, the demolition, admittedly done by the respondent of the shopping complex is not only without jurisdiction or authority but also highhanded. Even unauthorised occupants of Government land are given certain safeguards against eviction and forfeiture of the buildings constructed on the said land under the provisions of the Tamil Nadu Land Encroachment Act. Without complying with the provisions of Secs.7 and 6 of the Act, no action could be taken either for eviction or unauthorised occupants of Government land or forfeiture of buildings constructed on such land."

28. I am told that the above view of mine in W.P.Nos.9977 of 1992 and 1979 of 1993 has received the approval of a Division Bench consisting of K.A.Swami, C.J. and T.Somasundaram, J., in W.A.Nos.1140 and 1141 of 1993, dated 1.11.1993.

29. In the light of the above order, we have to see whether the files produced containing the notices issued the petitioners in W.P.Nos.5659 to 5661 of 1992 are in accordance with the provisions of the Act. A notice under Sec.5 of the Act was issued to the petitioner in W.P.No.5659 of 1992. It does not bear any date. In the said notice, it was mentioned that the property will be forfeited under Sec.6 of the Act and the petitioner was called upon to show cause on or before 1990. There is also some over-writing. This, according to me, hardly satisfies the legal requirement of the provisions of the Act. There cannot be any denial of the fact that the right of hearing given to the unauthorised occupant under Sec.7 of the Act is a valuable right and a prior notice under Sec.7 has to be strictly in conformity with the Act. Even the 'B' Memo issued by the Tahsildar does not bear any date as to

when the Revenue Inspector or Tahsildar inspected the encroachment even though the said memo bears the month and date indicating the enjoyment of the lands by unauthorised occupant.

30. There is another 'B' Memo bearing the month of July, 1991, but without any date, signed by the Tahsildar. But, at the end of the notice (on page 2), I find the following endorsement "*evicted land resumed to Government*" and signed by the Tahsildar on 11.4.1992. The aforesaid endorsement totally falsifies the case of the respondents in their counter that the petitioner in W.P.No.5659 of 1992 voluntarily surrendered the lands and removed his belongings. On the contrary, it lends full support to the case of the petitioner that he was forcibly evicted by the respondents on 11.4.1992. Further, in this case, there is total non-compliance of Sec.6 and 7 of the Act. Hence, I find that the eviction of the petitioner in W.P.No.5659 of 1992 is totally illegal and unauthorised. I also found at page 5 of the file (BMI/769/1401) that the encroachment is about 12 years.

31. So far as W.P.No.5660 of 1992 is concerned, the procedure followed by the respondents is identical. The notice under Sec.5 of the Act does not refer to any date or time within which the petitioner should show cause. It merely mentions within 15 days from the date of receipt of notice. No certain date, as stipulated under Sec.7 of the Act, is mentioned. Here again, the aforesaid notice does not bear any date, month or year. I find 'B' Memo bearing 'July', 1991. At the end of the notice at page 2 it is mentioned as follows: "*evicted land resumed to Government*". I also find a notice under Sec.6 of the Act issued by the 3rd respondent on 20.3.1992 calling upon the petitioner to vacate within 15 days of the receipt of the said notice. There is an endorsement saying that the encroacher was not found in the land and therefore it was served by affixture and the said endorsement is signed by the Village Administrative Officer, Coonoor, on 25.3.1992. Side by side, I find another signature in English bearing the date 19.3.1992. It passes my comprehension as to how the affixture could have been done on 19.3.1992 when the notice itself is signed by the Zonal Deputy Tahsildar on 20.3.1992. The 'B' Memo signed by the Tahsildar falsifies the case of the respondents that the petitioners have voluntarily vacated the land and removed the belongings. It is also seen from page 5 of the file (BMI/853/1401) that the

encroachment is about 12 years.

32. In so far as W.P.No.5661 is concerned, the procedure followed by the respondents is also similar. The notice under Sec.5 of the Act does not refer to any date within which the petitioner should show cause. It merely mentions '1990'. No exact date as provided under Sec.7 of the Act is mentioned. Here again, the said notice does not refer or bear any date or month. Only the year '1990' is mentioned. The Village Administrative Officer, Coonoor, and the Revenue Inspector, Coonoor have signed without any date.

33. I also find in the file a notice under Sec.6 of the Act issued by the Zonal Deputy Tahsildar, Taluk Office, Coonoor, signed by him on 20.3.1992, calling upon the petitioner to vacate within 15 days of the receipt of the said notice. There is an endorsement on the reverse of the notice that the encroacher was not found in the land and therefore, it was served by affixture. The said endorsement is said to have been signed by the Village Administrative Officer, Coonoor Town on 25.3.1992. I also find another signature in English dated 19.3.1992. I am unable to comprehend as to how the signature affixed could have been done on 19.3.1992 when the notice itself was signed by the Zonal Deputy Tahsildar on 20.3.1992. Thus, it will be clear that the 'B' Memo signed by the Tahsildar belies the case of the respondents that the petitioners have vacated voluntarily and removed their belongings from the shops in question. Two signatures of witnesses are also found at the bottom of page 2 of Sec.6 notice but without any date.

34. I find from 'B' Memo that the encroachment is about 11 years and above. No date is found below the signatures of the Village Administrative Officer, Coonoor, Revenue Inspector, Coonoor, and the Tahsildar, Coonoor. In another document (page 5 of the file BMI/773/1401), the Village Administrative Officer, Coonoor and the Revenue Inspector, Coonoor, have signed without dates and the Tahsildar, Coonoor, has signed in green ink and it bears the date as 26.9.1992. Below his signature, I found the following endorsement, signed by the Tahsildar "*Evicted land resumed to Government*". Thus, it is seen, the endorsement of the Tahsildar falsifies the case of the respondents, as specifically mentioned in the counter affidavits of all the respondents, that the petitioners have voluntarily vacated the land and removed their belongings from the shops in question.

35. Consequently, it has to be held that the eviction of the petitioners from the premises occupied by them is totally illegal and unauthorised. As already noticed, the specific case of the respondents that the petitioners have voluntarily vacated the premises and also removed their valuables, runs counter to the documents produced by them. On the contrary, it is manifestly clear from the documents that the respondents have forcibly evicted the petitioners on 11.4.1992 in utter disregard to the provisions of the Tamil Nadu Land Encroachment Act.

36. So far as the petitioners in W.P.Nos.5513 and 5514 of 1992 are concerned, admittedly, the respondents have not followed any procedure prescribed in law. In this connection, I propose to refer to the voluminous public documents maintained by the 2nd respondent and produced by the Advocate Commissioner in respect of which there is no dispute. Both the shops occupied by the petitioners were originally auctioned on 17.6.1990 and the highest bidders to whom the shops were allotted have transferred the allotment to the petitioners. In fact, the resolution of the 2nd respondent dated 30.7.1971 records delivery of possession of Shop No.2 to the petitioner in W.P.No.5513 of 1992. On 20.3.1990, the said writ petitioner has made an application for repair and replacement of the Tin Shed Construction and Zinc Sheet Doors by Rolling Shutters. By the proceedings of the Commissioner dated 3.4.1990, the Municipal Commissioner has granted permission for repairs and replacement. 37. Similarly, shop No.1 occupied by the petitioner in W.P.No.5514 of 1992 was allotted to one Rajendran, who was the highest bidder, and later on, he transferred the same with the permission of the Municipality, to the writ petitioner. The transfer was regularised in favour of the petitioner by the proceedings of the Commissioner of Coonoor Municipality dated 19.5.1992. It is also on record that the aforesaid petitioners have paid professional tax and the electricity service connection stands in their name.

38. So far as the petitioner in W.P.No.5514 of 1992 is concerned, he has also paid the licence fee to the 2nd respondent for carrying on business in Beedi, Cigarettes, Bakeries, etc., and the same is borne out by the xerox copy of the Receipt Nos.5924 and 5925, dated 27.2.1992. Thus, it is clear beyond doubt, that both the petitioners in W.P.Nos 5513 and 5514 of 1992 have been carrying on business in

the respective shops. I am relying on the documents produced by the Advocate Commissioner, which are maintained by the respondents/Public authorities in respect of which there is no dispute. As noticed by me earlier, the respondents have not followed any procedure prescribed by law before evicting the petitioners. It is not open to the respondents to evict the petitioners without following the procedures prescribed by law. Even respondents 1 and 3 in their memo of objections filed to the Advocate Commissioner's report in paragraph 10 have admitted that the petitioners in W.P.Nos.5513 and 5514 of 1992 have taken the bunks in auction from the municipality and the petitioners in W.P.Nos.5659 to 5661 of 1992 have erected shops on the levelled grounds.

39. In the common counter affidavit filed by the 2nd respondent there is no mention about the auction of shops or the recognition of the transfer of the shops except to say in the penultimate paragraph 12 that they never granted any lease and only given the bunk on daily rent of Rs.12.40 and 11.50. No mention is made as to the steps taken by the 2nd respondent to evict the petitioners in W.P.Nos.5513 and 5514 of 1992 from the shops occupied by them. I am unable to accept the contention that the said petitioners have voluntarily vacated the shops on 11.4.1992. Further, the 2nd respondent has deliberately suppressed the fact that Shop Nos.1 and 2 were auctioned in Public auction and were subsequently transferred to the petitioners in W.P.Nos.5513 and 5514 of 1992 and that they have recognised such transfer. To say the least, in the counter affidavit sworn to by Mr.M.Lakshmanan, Commissioner of Coonoor Municipality, many material particulars have been suppressed and he has filed the counter affidavit mechanically and without looking into the municipal records, copies of which were collected and produced by the Advocate Commissioner. In view of these above facts, I hold that the petitioners in W.P.Nos.5513 and 5514 of 1992 have also been illegally and forcibly evicted without following any legal procedure. I may also mention that I have not relied on the report of the Advocate Commissioner and based my conclusions only on the municipal records collected and produced by the Advocate Commissioner along with his report. Therefore, it is unnecessary for me to refer to the memo of objections filed by the respondents to the Advocate Commissioner's report.

40. It is also my duty to mention the manner in which respondents 1 and 3 (Miss.Leena Nair, Collector of the Nilgiris and Mr.V.Ramachandran, Tahsildar of Coonoor Taluk) have exercised their statutory functions entrusted to them in the matter of eviction of the petitioners. It is a matter of regret and pain that the respondents 1 and 3 appear to be oblivious of the statutory procedures to be followed before evicting unauthorised occupants under Sec.6 of the Tamil Nadu Land Encroachment Act. The procedure followed by them in the present case is totally contrary to the provisions of the Act. It is the Revenue Authorities who are entrusted with the responsibility of removing unauthorised encroachments from Government lands and before resorting to summary eviction under Sec.6 of the Act, it is obligatory on the part of the respondents to follow the legal requirements contemplated under Secs.6 and 7 of the Act. That is totally lacking in the present case.

41. The plea of all the respondents that the petitioners have voluntarily vacated the premises on 11.4.1992 and voluntarily removed their belongings, to say the least, is totally contrary to the records and untrue as found by me earlier in paragraphs supra. The respondents viz., the District Collector, Nilgiris, the Commissioner, Coonoor Municipality and the tahsildar, Coonoor have not come forward candidly but instead taken a plea which is totally incorrect and against their own records. It is the duty of the 2nd respondent to produce all the records before the court. But, instead, he has kept them away from the Court. But for the efforts taken by the Advocate Commissioner and the earlier order of this Court, the Municipal records would not have come out at all. I am only pained to notice that the public authorities who are expected to assist the court in rendering justice should act in this fashion.

42. I also find that the respondents have demolished the shops and premises occupied by all the petitioners, which necessarily follows when once the case of the respondents that the petitioners have voluntarily vacated and removed their belongings is disbelieved and rejected. Therefore, I accept the case of the petitioners that the respondents have forcibly evicted all the petitioners and highhandedly demolished the premises. I am unable to accept the contention of the respondents that the case of the petitioners should be disbelieved because 17 other persons who were also occupying

shops have not come before Court and made any grievance.

43. I may refer to the judgment of Hon'ble Mr. Justice P.S. Mishra in *Meera Nireshwalia v. The State of Tamil Nadu*, 1990 Writ L.R. 313 and the following observation made by the learned judge at Page 321:

"A writ court's jurisdiction in these matters is more *ex debito justitiae* than as a rule of law as courts as sentinels of the people's rights, cannot close their eyes to matters which strictly do not fall within the realm of law, or in cases where law is thrown to winds and those who are expected to obey, observe, and follow law, decide to violate it...

Even without recourse to the provisions like Art. 226 of the Constitution of India, courts in India never allowed a straight case where it was found that somebody was dispossessed of a property illegally without following the prescribed procedure of law and ordered for restoration of possession. As to what a court of law in such a situation can do, it spelt out by a Division Bench of the Patna High Court in *Indrasan Rai v. Enayat Khan*, A.I.R. 1952 Patna 317. When it was noticed that in the garb of making prohibitory orders under Sec. 144, Cr.P.C., a person in possession of property was removed and another was put in possession, the court found that the law never envisaged any such power much less any such power in a magistrate or the police. The court examined various authorities on the subject and found observations in this regard in some of the earlier judgments of the Court including *Jai Berche v. Kedar Nath*, I.L.R. 2 Patna 10, Cairns, L.C. in *Rodger v. Comptoir D'Escompte De Paris*, (1871) L.R. 3 P.C. 466 and *Emperor v. Nazir Ahmad*, (1945) 581 W. 57: A.I.R. 1945 P.C. 12, *Dipendra Nath Bakwit v. State of Bihar*, A.I.R. 1962 Patna 101, Cairns, L.C. in *Rodger v. Comptoir D'Escompte De Paris*, (1871) L.R. 3 P.C. 488, the Division Bench of the court said. One of the first and highest duties of all courts is to take care that the act of court does no injury to any of the suitors, and when the expression 'the act of the court' is used, does not mean merely the act of the primary court, or of any intermediate court of Appeal but the act of the court as a whole, from the lowest court which entertains jurisdiction over the

matter up to the highest court which finally disposes of the case'. And thus held, that it was a case in which the court must direct for restoration of possession. The said law has held the field uninterruptedly and it is not necessary to multiply this principle with additional judgments. A Full Bench of the Patna High Court in *Dipendra Nath Bakwit v. State of Bihar*, A.I.R. 1962 Patna 101 (F.B.), however, examined the scope of a writ of *mandamus* which has since been finally determined by the authorities of the Supreme Court and quoted with approval a passage from *Farrison Extraordinary Legal Remedies*, Page 329, dealing with the remedy of *mandamus* for compelling surrender of the properties of a private corporation by the incumbent officer to his successor in office. The quotation runs:

'*Mandamus* is generally recognised as the only speedy and adequate remedy to compel surrender of the insignia, records funds and other property of a private corporation by the incumbent officer who refused to deliver them to his successors in office, when it appears that he does not hold them under any colour of right to the office. The right incidental to the right to compel surrender of the corporate office to the lawful successor. The same principles that govern the right in the case of public officers are applicable to officers of private corporations. While *mandamus* is not the proper remedy to try title of office, an incumbent holding under no colour of right cannot defeat his successor's right to *mandamus* by raising the question of the validity of the latter's title and thus deprive him of the right to possession of the corporate property belonging to the office, on the theory that *mandamus* is not the proper remedy to try title. As in the case of public officers, respondent, being without any colour of right, has no title to try. A *prima facie* right, a right *de facto*, and not *de jure*, is all that is necessary to such cases, or all that is involved. This Court may determine without deciding actual title. Actual title is only incidentally involved, if at all. The right to possession of the corporate property is incidental to the right to the office, not actual title, and when petitioner shows a *prima facie* right thereto, the court merely rests on such *prima facie* title for the time being, without adjudicating the actual title, which is

left to a proceeding in *quo warranto*. Nor is it any defence to say that the property is not in the possession of the officer when it has been voluntarily turned over to some stranger, as it is the duty of the officer to have it in his custody, and if not, to regain it.

In *Sohan Lal v. Union of India*, A.I.R. 1967 S.C. 529, the Supreme Court made certain observations, which in my opinion, are relevant for understanding the scope of a writ of *mandamus*. In a situation like this, one Jagan Nath had been evicted from a premises in contravention of the law. His eviction was, therefore, illegal. The Supreme Court found that his eviction was illegal and therefore, a writ of *mandamus* could issue to or an order in the nature of *mandamus* could be made against the Union of India to restore possession of the property to Jagan Nath from which he had been evicted. The property, however, was not in the hands of the Union of India; instead, it had passed on to a private individual. Whether a *mandamus* could issue in such a situation or not was the issue before the Supreme Court. The Supreme Court observed, 'there is no evidence and no finding of the High Court that the appellant was in collusion with the Union of India or that he had knowledge that the eviction of Jagan Nath was illegal. Normally, a writ of *mandamus* does not issue to or an order in the nature of *mandamus* is not made against a private individual. Such an order is made against a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty (Halsbury's Law of England, Vol.II, Lord Simonds Edition, P.84). If it had been proved that the Union of India and the appellant had colluded and the transaction between them was merely colourable, entered into with a view to deprive Jagan Nath of his rights, jurisdiction to issue a writ or to make an order in the nature of *mandamus* against the appellant might be said to exist in a court.' The observations thus make it amply clear that if the petitioner's dispossession of the house was a result of collusion of something colourable entered into with a view to deprive her of possession of the property between the respondent- officials and respondents 8 and 9, this Court, therefore, shall have jurisdiction to

issue a writ of *mandamus*".

44. The above view of P.S.Mishra, J., has been followed by my learned Brother K.S.Bakthavatsalam, J., in the decision reported in *T.Rajalakshmi v. Coimbatore City Municipal Corporation*, (1992) 1 M.L.J. 568. With respect, I adopt the reasonings of P.S.Mishra, J., and K.S.Bakthavatsalam, J.

45. Accordingly, I issue a writ of *mandamus* directing the respondents to restore the premises occupied by the respective writ petitioners prior to their forcible eviction on 11.4.1992, and put them in possession of their respective premises on or before 16.12.1993. As regards the claim for compensation, all the petitioners are given liberty to approach the appropriate forum. Having regard to my findings that the respondents viz., The District Collector, The Nilgiris, The Commissioner, Coonoor Municipality and the Tahsildar, Coonoor, have exceeded their powers and have acted arbitrarily and high handedly and contrary to the established procedure, I feel that this is a fit case where the petitioners can be awarded costs. Accordingly, a cost of Rs.2,000 is awarded to each of the petitioners, to be paid by the respondents. There will be an order accordingly in all the writ petitions.

R.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.3391 of 1993 25th November, 1993.

Tamil Nadu Handloom Weavers Co-operative Society Limited by Regional Manager, Vellore ...Petitioner v.

M/s.L.P.A.Thanickachala Mudaliar and Sons by Partner P.T.Subramania Mudaliar ...Respondent.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Secs.10(3)(iii) and 10(2)(i) - Petition under, by a partnership firm - One partner alone shown as petitioner - Other partners not impleaded as eo

nominee petitioner - Petition, if maintainable.

In the instant case, the elaborate evidence has been taken by the trial court and in a well considered judgment, the learned Rent Controller had given a clear finding that the requirement of the landlord is *bona fide*. The appellate authority had again considered the facts and given a finding, concurring with the view of the trial court. In these circumstances, the observation of the Apex Court that it would be merely misdescription of the respondents to the application and there can be no doubt that the partners of the firm and before the court though in a wrong name apply to the facts of this case. So, assuming there is misdescription, that by itself cannot result in the dismissal of the application.

[Para. 4]

Case referred to:

M/s. Chhotelal Pyarelal v. Shikharchand, A.I.R. 1984 S.C. 1570: (1984) 4 S.C.C. 343. [Para. 4]

M.N.Muthukumaran, for Petitioner.

P.Sukumar, for Respondent.

The Court made the following

ORDER: This revision petition is directed against the judgment in R.C.A.No.2 of 1993 on the file of the appellate authority (Sub Judge), Arni, confirming the order passed in R.C.O.P.No.15 of 1991 on the file of the Rent Controller (District Munsif), Arni.

2. The respondent has filed petition against the revision petitioner and another under Secs.10(3)(iii) and 10(2)(i) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (Tamil Nadu Act 18 of 1960) as amended (which I shall hereafter refer to as 'the Act'), on the ground of wilful default in payment of rent and requirement for own use. That was resisted by the respondent, who would contend that there was no wilful default in payment of rent and that the requirement of the petitioner was not *bona fide* and that he may take the first floor premises, which is available for occupation. After enquiry the learned Rent Controller had held that there was no wilful default in payment of rent but had held that the requirement of the landlord is *bona fide* and had ordered eviction. Aggrieved by that order, the respondent in the trial court filed appeal in R.C.A.No.2 of 1993. After hearing both sides, the learned appellate authority had confirmed the finding of the Rent Controller and dismissed the appeal. Aggrieved by the same, the respondent in the trial court has come forward with this revision.

3. The learned counsel appearing for the petitioner, would contend that petitioner in the trial court is a partnership firm, represented by the partner P.T.Subramania Mudaliar and that other partners in the firm have not been impleaded as *eo nomine* petitioners and so the petition was not maintainable. He would further submit that the first floor portion of the building is vacant and that if the petitioner in the trial court wants this premises, which is in the ground floor, the revision petitioner can move to the first floor, which is already vacant.

4. With regard to the first submission the learned counsel, would rely upon *M/s. Chhotelal Pyarelal v. Shikharchand*, A.I.R. 1984 S.C. 1570: (1984) 4 S.C.C. 343. That was a case arising out of C.P. and Berar Letting of Houses and Rent Control Order, 1949.

In it, the Apex Court has held as follows:

"Now, there can be no doubt that since the Code of Civil Procedure does not apply to proceedings under the H.R.C. order, no application for eviction can be maintained against a firm in the firm name. The firm is merely a compendious name for the partners constituting it and it is only by virtue of the provisions of O.30 of the Code of Civil Procedure that a firm can sue and be sued in its own name without the partners being impleaded *eo nomine*. It is therefore clear that the firm of *M/s. Chhotelal Pyarelal* could not be sued in the firm name by the respondent in so far as the application for eviction under the H.R.C. order was concerned. But we agree with the Division Bench of the High Court that this cannot by itself result in the dismissal of the application. It would be merely a case of misdescription of the respondents to the application and this misdescription can be corrected at any stage of the proceedings. There can be no doubt that the partners of the firm are before the court though in a wrong name".

In this case, before the Apex Court, a preliminary objection was taken even in earlier stages. But in the instant case, neither in the trial court nor in the appellate court, the revision petitioner had taken the ground that the petition itself was not maintainable. Regarding the maintainability of the petition, the objection should be taken at the first instance itself and such is not the case here. Furthermore, in *M/s. Chhotelal Pyarelal v. Shikharchand*, A.I.R. 1984 S.C. 1570: (1984) 4 S.C.C. 343, the

merits of the case was not at all gone into the Rent Controller and even at the initial stage, this preliminary objection was taken right through till it was ultimately decided by the Apex Court. So the matter was remitted back to the trial court for decision on merits, after allowing the application for amendment. In the instant case, the elaborate evidence has been taken by the trial court and in a well considered judgment, the learned Rent Controller had given a clear finding that the requirement of the landlord is *bona fide*. The appellate authority had again considered the facts and given a finding, concurring with the view of the trial court. In these circumstances, the observation of the Apex Court that it would be merely misdescription of the respondents to the application and there can be no doubt that the partners of the firm and before the court though in a wrong name apply to the facts of this case. So, assuming there is a misdescription, that by itself cannot result in the dismissal of the application. For these reasons, I am unable to accept this submission made by the learned counsel.

5. With regard to the second submission, that is a matter which cannot be gone into within the purview of this petition. The short point of dispute between the parties is whether the landlord is entitled to the demised premises for the grounds relied upon by him or not. It does not relate to other premises, which is not the subject-matter of the lease. Hence, neither this submission can be accepted.

6. In view of the above, this civil revision petition does not deserve admission and shall stand dismissed. Time is given till the end of February, 1994 for vacating the premises.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasa and Abdul Hadi, JJ.

App.Nos. 800 and 841 of 1993

15th December, 1993.

Meera Nirshwalia. Y.M.C.A., International Guest House, Madras

...Appellant

v.

Sukumar Nirshwalia

...Respondent.

(A) Hindu Adoptions and Maintenance Act (LXXVIII of 1956), Sec.18(a) - Wife residing in house owned by husband - Husband trying to evict her - Selling house to third parties - Parties entering into an agreement not to evict wife except by due process of law - Purchasers violating agreement and getting wife evicted from house by heinous and dubious means - Husband, if can be said to be guilty of wilfully neglecting the wife.

In the present case, the husband is guilty of wilfully neglecting the wife to some extent inasmuch as he has exposed her to a proceeding at the instance of a third party by entering into an agreement with the purchasers of the house and directing them to get his wife evicted from the house. No doubt, the agreement provided only for eviction by lawful means but even that, the husband ought not to have done. When there was a dispute between him and his wife regarding the ownership of the house, he should have himself taken the necessary steps to bring it to an end either by negotiation or by a decision of court. He should not give licence to a third party to proceed against his wife without reference to himself. The parties viz, the purchasers happened to be unscrupulous and resorted to methods not approved by law which led to a very grave injury to her mental and physical health. There cannot be a graver act of cruelty than to brand a normal person with insanity and confine her to a mental asylum. The husband was indirectly responsible for it and he cannot escape the consequences by claiming that he made all arrangements to provide her with better facilities inside the asylum and got her released a few days later. Undoubtedly, the incident has caused a deep wound in her mind which may, if at all, take a very long time to heal. Hence, the case will fall under Sec.18(2) of the Act. [Paras. 14 and 18]

(B) *Hindu Adoptions and Maintenance Act (LXXVIII of 1956), Sec. 18(2)(g)* - Wife residing in house owned by husband - Husband trying to evict her from house - Selling it to third parties - Third parties branding her a lunatic and confining her to mental hospital - Wife apprehending physical harm if she lived with husband - Wife, if entitled to live separately and claim maintenance on that ground - Wife not specifically pleading for consideration of her claim under clause (g) - If can be denied relief.

The question in this case is whether the conduct of the husband in entering into an agreement with the purchasers of the house directing them to get his wife evicted from the house would amount to a cause justifying her living separately. The Court has already said that the husband ought not to have exposed his wife to an action by third parties. His thoughtless action has inflicted a deep wound in her. That is justifying cause for the wife living separately from him. She has also expressed before this Court an apprehension that she would be physically harmed if she lives with her husband. Hence, on the facts of this case, it is held that the wife entitled to live separately and claim maintenance from her husband. It is true, she has not specifically pleaded for a consideration of her claim under clause (g). Evidently, no issue has been framed. But the Courts below have allowed her claim under that clause relying on the evidence available. Her claim was that she was entitled to live separately and claim maintenance from the defendant. Merely because she had failed to strictly prove the specific ground, urged by her, she cannot be denied relief, if, otherwise in law, her claim can be allowed on the basis of the evidence let in by the parties. [Paras. 25 and 27]

Cases referred to:

Subbegowda v. Honnamma, A.I.R. 1984 Karn. 41 [Paras. 12, 24]

Balbir Singh v. Shanti Devi, I.L.R. (1970) Del. 21 [Para. 21]

Sundarammal v. Palaniandi Mudali, (1940) 1 M.L.J. 171: 51 L.W. 204: 188 I.C. 32: 1939 M.W.N. 1255: 1939 M.W.N. (CrL) 199: A.I.R. 1940 Mad. 292 [Para. 22]

M. Ponnambalam v. Saraswathi, 1957 M.L.J. (CrL) 213: 1957 M.W.N. 417: A.I.R. 1957 Mad. 693: 1957 CrL.L.J. 1282 [Para. 22]

Kashinath Sahu v. Smt. Devi, A.I.R. 1971 Ori. 295 [Para. 22]

Siramohamedkhan v. Hafisunnisa Yasinkhan, A.I.R.

1981 S.C. 1972. [Para. 23]

Chandrareka v. Secy of State, I.L.R. 14 Mad. 163. [Para. 27]

Secretary of State v. Tripurasundarammal, A.I.R. 1926 Mad. 474. [Para. 27]

Srinivasa Ayyar v. Lakshmi Ammal, A.I.R. 1928 Mad. 216. [Para. 27]

Appeal against the Decree of the Family Court (Principal Judge) Madras dated 28.1.1993 in Original Suit No.67 of 1991.

The Judgment of the Court was delivered by *Abdual Hadi, J.*: These two appeals arise out of the same suit in O.S.No.67 of 1991 on the file of the Principal Family Court, Madras. The plaintiff-wife is the appellant in A.S.No.800 of 1993 which has been filed by her as an indigent person. She also filed the said suit as an indigent person. The defendant-husband is the appellant in A.S.No.841 of 1993.

2. The said suit is for past maintenance for a period of three years prior to the date of the plaint, 1.4.1991 at the rate of Rs.10,000 per month, in all amounting to Rs.3,60,000 and for future maintenance at the same rate, in all amounting to Rs.1,20,000. The court below has granted a decree only at the rate of Rs.1,000 per month. In other words, the court below has granted a decree for Rs.36,000 for the abovesaid three years prior to the date of suit as against the claim of the plaintiff for a total sum of Rs.3,60,000 for the abovesaid three years. The Court below has also granted future maintenance at the same rate of Rs.1,000 from the date of the plaint till the life time of the plaintiff. With reference to the disallowed portion of the plaintiff's claim, A.S.No.800 of 1993 has been filed by the plaintiff. On the other hand, the husband contending that the court below has erred in granting the decree for maintenance has preferred A.S.No.841 of 1993, praying for dismissal of the suit.

3. On the ground the defendant husband has deserted the plaintiff-wife, without any reasonable cause and neglected her wilfully the plaintiff made the abovesaid maintenance claim. But the court below held that there was no desertion of the wife by the husband and that the case would not come under Sec.18(2)(a) of the Hindu Adoptions and Maintenance Act, 1956 (Central Act 78 of 1956) (hereinafter referred to as the Act), which speaks about the abovesaid desertion read with Sec.18(1) of the Act, but the case would come

under Sec.18(2)(g) of the Act which speaks about 'any other cause justifying her living separately' read with Sec.18(1) of the Act. On that ground court accepted the maintenance claim of the wife and granted the abovesaid decree.

4. The plaint allegations may be summarised as follows: The plaintiff was married to the defendant at Bombay on 18.5.1946 and the said marriage was celebrated as per Hindu rites. They have three children all of whom are married and leading independent lives. In 1956, the defendant was allotted a house under the Shenoy Nagar Housing Board L.I.G. Scheme (at Madras). The payment for the said house had to be made on monthly instalments. The defendant was quite irresponsible towards the plaintiff and her family and would disappear for months together. The plaintiff paid towards the abovesaid instalments to the Housing Board. In 1975, the allotment was transferred to the plaintiff's name. But, subsequently, the defendant took the sale deed in his name from the Housing Board. The defendant started threatening to sell the house and the plaintiff opposed the same as she had contributed towards a major share for the purchase of the said house by pledging her jewels. Due to the defendant's conduct, the plaintiff had to file O.S.No.7325 of 1985 of the file of City Civil Court, Madras against the defendant and the defendant undertook not to evict the plaintiff except by due process of law. The defendant, without informing the plaintiff sold the said house by a sale deed dated 30.9.1988 to one Dr.Saleem and his wife. The said purchaser in collusion with the police and others employed a most dubious method of dispossessing the plaintiff by detaining the plaintiff in the Kilpauk Mental Asylum. The plaintiff challenged the said illegal detention and sought compensation from the State Government in W.P.No.15671 of 1991 on the file of this Court. By order dated 20.11.1990, this Court directed the State Government to pay a sum of Rs.50,000 as compensation. By the said order this Court also directed an enquiry into the nature of illegal detention. The purchasers undertook to pay the rent for a flat for the plaintiff. In the appeal against the said order, a bench of this Court had stayed the further proceedings pending appeal. The sum of Rs.50,000 has been deposited in the court by the Government. The plaintiff has filed criminal complaint and a suit against various parties with the help of the legal aid. For the past

several years, the plaintiff had no income and had been depending on the charity of relatives and she is forced to stay in a hostel. All her jewellery have been sold, towards the construction of the abovesaid house. The defendant is bound to maintain the plaintiff, but, failed to do so. He was working in Glaxo Industries a multi national concern and retired as All India Senior Marketing Manager from the said company in 1976. After his retirement he was employed in various capacities. Between 1977-80 he was involved in the sales of management publications. After retirement, the defendant in 1980 took up another assignment as a General Manager (Marketing) in Ruchi Food Products. While he was in Glaxo, he was drawing Rs.7,500 as salary per month inclusive of company quarters with car and other benefits. After retirement, he was drawing an equal sum from Ruchi Food Products. He also sold his Anna Nagar house for a sum of Rs.10,00,000. He has assets worth Rs.20,00,000. He has further invested in lot of stocks and shares. The defendant has deserted the plaintiff without any reasonable cause and has wilfully neglected. The defendant never showed any responsibility towards the plaintiff. She had to manage single handedly for the past so many years. She has no livelihood or income. She does not possess any immovable property. In 1974 defendant deserted the plaintiff. This allegation is made in Para 10 of plaint. (The plaint is dated 1.4.1991).

5. The allegations in the written statement may be summarised as follows: The plaint contains extraneous matters which have no bearing on the central issue relating to the prayer in the suit. Therefore, this written statement would primarily focus on the basic question of alleged desertion on the part of the defendant. The allegation that the defendant has deserted the plaintiff is a blatant lie. It is actually the plaintiff who has deserted the defendant. She has deserted the defendant in 1974 for three years and again from 1984 to date. On both the occasions, the defendant tried his utmost to dissuade plaintiff from staying away from him and requested her to come and stay with him but without success. The defendant even tried through close friends and relatives and also through several letters to plaintiff to persuade her to come and stay with the defendant. But, those efforts met with down right refusal. The defendant even approached Swami Paramathananda (one of Swami Chinayananda's disciples whom she was said to

have held in high esteem, to help in bringing about a reunion. The said Swamiji's help was sought by their son and one of their sons-in-law. All those attempts were in vain. The allegation that the plaintiff has no income or livelihood, even if true, is absolutely of her own making. She has adamantly refused to rejoin her husband even after his *bona fide* request. She has deliberately chosen to stay away from him without justification and is therefore not entitled to maintenance. The defendant is now aged 73 years and in failing health. His potential for gainful employment in the future is virtually nil. The plaintiff being very much younger by about 12 years and in proper health should have as a dutiful wife stayed with the husband. It is true in 1956, the defendant was allotted the abovesaid Shenoy Nagar House under Hire purchase system and all that was required of the defendant was an initial deposit of about Rs.1,400 and monthly instalments about Rs.70 only spread over for a period of 20 years. The plaintiff's allegations regarding these payments as being made by her are false. Her statement that this property was transferred to her name in 1975 is equally false. Though the plaintiff filed O.S.No.7325 of 1985, she later approached the defendant with the offer that if she was not evicted from the suit property except by due process of law, she would not press the suit. Since it was never the intention of the defendant to evict the plaintiff except by due process of law, this undertaking was given and accordingly the suit was dismissed. The defendant had a clear and absolute title over the suit house and hence sold it to the abovesaid purchasers. However, to safeguard the plaintiff against any illegal eviction an agreement was entered into between the said purchasers and the defendant the plaintiff should not be evicted except by due process of law. However, presumably the purchasers violated this agreement and got the plaintiff evicted by the most heinous and dubious means enlisting the services of the Police and the Superintendent of the Mental Hospital, Kilpauk. In consequence the purchasers had to face the abovesaid writ petition. The defendant who was one of the respondents in the said petition, extended full support to the plaintiff. The defendant has no knowledge of the criminal complaint and the suits against the various parties, referred to in the plaint. The allegation that the plaintiff sold all of her jewellery for the construction of the abovesaid house is a

blatant lie, because, the property under the lease-cum-sales scheme comprising an already constructed house on 2 grounds, and the monthly instalment of Rs.70 payable in a period of 20 years, were towards the cost of the property as a whole. No lump-sum payment was involved towards the purchase of the said house and there was no need for the sale of her jewellery. The plaintiff has needlessly brought untold hardship both on defendant and herself by her thoughtless, selfish and errant ways. The defendant was in fact working in Glaxo Laboratories as a Marketing Manager and after retirement, in short spells with Ruchi Food Products and very casually with Viscoti Marketing Services. The plaintiff's statement regarding salaries drawn and assets possessed by the defendant are not true. The maximum disposable income drawn by the defendant was Rs.2,500 per month towards the height of his career, *i.e.*, at the time of his retirement from Glaxo. In reply to the notice dated 3.2.90, by her counsel, this defendant had written a reply dated 14.2.1990 narrating the many acts of omission and commission that the plaintiff had been guilty of. There was no rejoinder to the said reply.

6. The Family Court tried to bring about a settlement between the parties, but in vain, So, it framed the following issues:

(a) Whether the Plaintiff is entitled to maintenance past, present and future as claimed in the suit?

(b) To what relief?

7. The plaintiff examined herself alone as P.W.1 and the defendant also examined himself alone as D.W.1. In its judgment, the Family Court has rightly observed that the question of ownership of the abovesaid Shenoy Nagar house is not relevant to the question of maintenance, which alone has to be decided in the present suit. Documents like Exs.B-1 and A-1 may show that there is a dispute regarding the said ownership and the wife has filed C.S.No.499 of 1990 in this Court and O.S.No.6388 of 1989 on the file of the City Civil Court, Madras. But, those features are not relevant to the present dispute regarding maintenance, as the Family Court rightly held.

8. Regarding the maintenance question, the Family Court, after referring to Ex.B-8 (dated 26.11.1985), a letter from the husband to the wife, asking the wife to come and live with him in his Shenoy Nagar house, observes that there is no question of the

husband deserting the wife. It further refers to a passage in the evidence of P.W.1 and concludes that the crux of the problem is, P.W.1 is under the impression that D.W.1 has sold the Shenoy Nagar House at a far higher price than what the sale deed Ex.B-2 dated 30.9.1988 shows, viz., Rs.3.5 lakhs and that he has secreted the balance. The Court below also observes that the abovesaid O.S.No.7325 of 1985 has been dismissed (on 21.7.1986, *vide* Ex.A-3) on the undertaking given by the husband that he would not evict the wife without due process of law and that such undertaking was given when the husband and wife were living in the said Shenoy Nagar House and that the accusation of desertion came only in 1990 under Ex.B-3, the letter of the plaintiff's counsel to the defendant dated 3.2.1990. Then the Court also refers to some passage in D.W.1's evidence and reiterates that there was no desertion by the husband. Then it observes that after the abovesaid Ex.B-2 sale deed for a sum of Rs.3,50,000, the husband also entered into an agreement Ex.B-5, dated 1.10.1988, by which the husband has given Rs.50,000 out of the sale proceeds, as security deposit to be retained with the purchasers since the wife has not vacated the said house. The learned Judge says that pursuant to the undertaking given in O.S.No.7325 of 1985, the abovesaid Ex.B-5 agreement was entered into, by which the purchasers have to vacate the plaintiff by due process of law. Thereafter, the Family Court refers to the abovesaid writ proceedings, in which the above referred to compensation of Rs.50,000 was given to her by the Government, pursuant to the direction given by this Court since she was illegally detained in the mental hospital between 7.7.1989 to 17.7.1989 owing to the manipulations of the purchasers with the police. But, the Family Court concludes that the abovesaid situation had arisen not due to the conduct of the husband, but due to the execution of the abovesaid sale deed with reference to the abovesaid house owned by the husband. However, the Court below then proceeds to observe that inasmuch as the execution of the sale deed has provided the ground for the misfortune that has fallen on the wife, it has to be concluded that she is entitled to reside separately and claim maintenance from the husband due to a cause, justifying her living separately with the meaning of Sec.18(2)(g) of the Hindu Adoptions and Maintenance Act, 1956 and that the husband may take

appropriate proceedings to get reimbursed (as per law) against the purchasers, who are responsible for the abovesaid state of affairs. Then the court below fixed the quantum of maintenance at Rs.1,000 per month, taking into account the relevant documentary and oral evidence and after concluding that the income of the husband would be Rs.3,000 per month while he is paying a rent of Rs.1,200 per month for another house at Besant Nagar, in which he lives.

9. Since the suit was filed by the plaintiff as an indigent person, the Family Court also directed the defendant to pay the court-fee with reference to the amount decreed, viz., Rs.36,000 and directed the wife to bear the remaining court-fee payable on the disallowed portion of the plaintiff's claim of Rs.3,60,000, viz., Rs.3,24,000. So far as the future maintenance is concerned, the Court below has held that she is entitled to it at the same rate of Rs.1,000 per month till she dies.

10. In view of the very old age of the couple, we also tried to bring about a settlement between them by talking not only with them in camera, but also with their married daughters who are also living in Madras with their children. No doubt we could not talk with the married son, since he is said to be a permanent resident of Poona. But, our efforts were in vain. Even the daughters could not persuade their parents for a settlement.

11. The plaintiff, as party in person, argues that the court below erred in not granting at least Rs.3,00,000 as past maintenance as claimed by her in her evidence as P.W.1, though not the entire sum of Rs.3,60,000 as claimed in the plaint, taking into account the several investments made by the husband as shown by Exs.B-16 and B-19 in banks and other investments as shown by Exs.B-17 and B-18 and the incomes derived therefrom.

12. On the other hand, the learned counsel for the respondent points out that the court below erred in granting the maintenance, under Sec.18(2)(g) of the Act, when there is no such plea in the plaint or any such claim made by the plaintiff while she was in the witness box or when she argued the case. He also reiterates that the husband, as owner of the abovesaid property, had every right to sell the same and it was the wife who invited the disaster by unreasonably refusing to live with the husband, even though the husband tried his best to persuade her to come and live with him. Further, in this connection he also relies on the decision in

Subbe Gowda v. Honnamma, A.I.R. 1984 Karn. 41. He also argues that the court below has erred in granting the maintenance at the rate of Rs.1,000 per month, without taking into account the relevant factors.

13. We have considered the rival submissions. The question mainly centers on the application of Sec.18(2)(a) or Sec.18(2)(g) of the Act, which are no doubt to be read with Sec.18(1) thereof. The material portions of Sec.18 run as follows:

“(1) Subject to the provisions of this Section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) if he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separately.”

Sec.18(2)(a) of the Act rather consists of two parts. While speaking of desertion, it says it may consist of either (1) the husband abandoning the wife without reasonable cause and without her consent or against her wish or (2) the husband wilfully neglecting the wife.

14. On the evidence on record, it is not possible to hold that the husband abandoned the wife without reasonable cause or without her consent or against her wish and thereby deserted the wife. To this extent, the court below is right. But we find that the husband in this case would come under the second type of desertion stated above, that is, wilfully neglecting the wife. This aspect has not been considered by the court below. In the present

case, the husband is guilty of wilfully neglecting the wife to some extent inasmuch as he has exposed her to a proceeding at the instance of a third party by entering into an agreement with the purchasers of the abovesaid Shenoy Nagar house and directing them to get his wife evicted from the house. No doubt, the agreement provides only for eviction by lawful means but even that, the husband ought not to have done. When there was a dispute between him and his wife regarding the ownership of the house, he should have himself taken the necessary steps to bring it to an end either by negotiation or by a decision of court. He should not give licence to a third party to proceed against his wife without reference to himself.

15. The ancient Hindu society has always placed the wife on a high pedestal. It is said that,

“It is said, ‘the house (building) is not the house’. The mistress of the house is said to be the house. A house without the lady of the house is worse than a dreary forest”.

“न गृहं गृहमित्याहुः
गृहिणी गृहमुच्यते ।
गृहं तु गृहिणीहीनं
कांतारादतिरिच्यते ॥”

(PANCHATHANTRAM - Sl.77 in Ch.Labdapranasam).

16. Manava Dharma Sastra or the Institutes of Manu with the Gloss of Kulluka, comprising the Indian system of duties, religious and civil, translated by Sir William Jones and collated with the Sanskrit Text by Grayes Chamney Haughten, Esq.Third Edition, Chapter 3 verses 55 to 60 read as follows:

“55. Married women must be honoured and adorned by their fathers and brethren, by their husbands, and by the brethren of their husbands, if they seek abundant prosperity.

56. Where females are honoured, there the deities are pleased; but where they are dishonoured, there, all religious acts become fruitless.

57. Where female relations are made miserable, the family of him who makes them so, very soon wholly perishes; but, where they are

not unhappy, the family always increases.

58. On whatever houses the women of a family, not being duly honoured, pronounce an imprecation, those houses, with all that belong to them, utterly perish, as if destroyed by a sacrifice for the death of an enemy.

59. Let those women, therefore, be continually supplied with ornaments, apparel and food at festivals and at jubilees, by men desirous of wealth.

60. In whatever family the husband is contented with his wife, and the wife with her husband, in that house will fortune be assuredly permanent."

17. Incidentally we may also point out that the prophet of Islam has said, "The best among you are those who are kindest to their wives". Quran also says, ".....live with them (wives) on a footing of kindness and equity: (Even) if you take a dislike to them, it may be that you dislike a thing and God brings about through it a great deal of good" (Chapter 4: Verse 19 (part). The Prophet has also said, speaking about the daughters generally, "If a man, of whom only daughters are born, brings them up properly, the same daughter will become a covering for him against hell."

18. Thus speak all scriptures in unison how a wife is to be treated, but, how, in the present case, the respondent husband has treated his wife? The parties, viz., the purchasers happened to be unscrupulous and resorted to methods not approved by law which led to a very grave injury to her mental and physical health. There cannot be a graver act of cruelty than to brand a normal person with insanity and confine her to a mental asylum. The husband was indirectly responsible for it and he cannot escape the consequences by claiming that he made all arrangements to provide her with better facilities inside the asylum and got her released a few days later. Undoubtedly the incident has caused a deep wound in her mind which may, if at all, take a very long time to heal. Hence the case will fall under Sec.18(2)(a) of the Act.

19. Here, we may also point out that the Court below is not right in holding, after referring to Ex.B-10 (dated 18.12.1985) which come immediately after the above referred to Ex.B-8 letter of the husband, that the wife was not willing to live with the husband. No doubt, the learned Judge has quoted the following passage from Ex.B-10:

"There is no union of thought, harmony or purpose or identity of interest or a sincere comradeship."

and has held that the cumulative effect of Ex.B-10 is clear and cogent that the wife was not willing to live with the husband. But, we are of the opinion that the other passages found in Ex.B-10 will speak high of the wife and may give an indication how actually the husband was behaving at the time when the said letter was written in 1985: The said passages read as follows:

"....There are noble and heroic souls who find pleasure in giving without any return. They are real benefactor of humanity, whatever be the sphere of their activity. The head of the family obtains certain benefits and advantages. Therefore in return for the same he has to make a corresponding contribution for the benefit of other according to his capacity and the principle of give and take applies to one and all as the fundamental law of nature. Thus no one can make oneself happy by depriving others of their happiness.....

There are some extreme (persons) who are clever and capable of doing anything for their own benefit and to the needy one shut their eyes and manipulate various way to take things without giving anything in return.....

For him who has no sense control over his senses is not possible for him to distinguish good and bad and is indisciplined and there is no hope. They get riverted to the objects of pleasure and go on exchanging endlessly to different objects till they are physically exhausted

Though the man may strive and be ever discerning yet the senses carry him off and his mind by force. Sense control and self discipline are not merely matters of intelligence and reason, but the work of will and emotion. Only after driving away the senses from their respective pleasures involving object mind can be steady. The general principle is to give up extremes and counsels to walk in the middle of the road It is opposed to ascetism and equally to over indulgence. It wants us to strike a balance between the two. You have (to) control your pleasant living of pleasure. (otherwise) There won't be happiness. Your way of pleasant and comfortable life is not pleasing to the law of nature".

At any rate, it cannot be concluded, in the light of Ex.B-10 that the wife was not willing to live with husband, unreasonably or without just cause. In the light of Ex.B-10, the offer made by husband in the light of Ex.B-10, the offer made by husband in Ex.B-8 cannot be taken as genuine and sincere.

20. It can also be said that the court below has not properly appreciated Ex.B-3, dated 3.2.1990, the suit notice given by the wife's Counsel to the husband and Ex.B-4 reply dated 14.2.1990 by the husband. In Ex.B-3 it is stated as follows:

"My client states that she has been living along till 7.7.1989 in the matrimonial home. You have deserted her."

After referring to this passage, the Court below says that the exact time at which the desertion took place according to the wife has not been set out in Ex.B-3. We do not think that there is any warrant for this comment by the Family Court since it is seen from the evidence that on 7.7.1989 only the police illegally took away the wife from the abovesaid Shenoy Nagar house and put her in the mental hospital. In this connection, the evidence of P.W.1 is as follows:

"On 30.9.1985 my husband sold the house under a registered sale deed to one Dr.Salim and his wife. The purchasers colluded with the Police and under dubious method they dispossessed me unlawfully in July, 1989 (7.7.1989). Before that they gave a complaint and the Police took me to Kilpauk and I was under detention on 8.7.1989. Till 17.7.1989 I was there."

Further, in Ex.B-3 it is stated as follows:

"For quite some time you have been very irresponsible towards my client. My client states that you would disappear for days together and not take care of your family at all. My client states that she has been living alone till 7.7.1989..... My client states that all the three children were brought up only by my client and you did not bother about her."

In the reply Ex.B-4, the husband has only stated as follows:

"Your client's statements that for quite some time I have been irresponsible towards her, that I would disappear for days together and not take care of her are all totally false. These charges had already been levelled against me in her suit Nos.7325 of 1985, 6388 of 1989 filed in the City Civil Courts and in her W.P.No.

15671 of 1989 pending before the High Court, Madras. In my counters to these, I have already effectively refuted all these baseless and false charges and I reiterate the same herein also."

Thus the husband did not choose to specifically controvert in Ex.B-4 itself those specific charges made in Ex.B-3. It is also not known how he has refuted those charges in the counters in the other proceedings referred to in the abovesaid passage in Ex.B-4. That apart, the abovesaid allegation that all the three children were brought up only by the wife does not seem to have been denied. Further, in Ex.B-4, the husband himself admits that he came back to Madras in 1976 after his retirement and the wife who was in Delhi rushed back to rejoin him. The relevant passage in Ex.B-4 is as follows:

"Only when I came back to Madras in 1976 after my retirement, she rushed back to rejoin me."

Further, the husband in Ex.B-4 says thus:

"Finally she got involved in some police action and was admitted in the Mental Hospital."

This, he says, as if he knew nothing about what has been done by the purchasers contrary to the terms of Ex.B-5 and as if without reference to him, the purchasers have acted in that way. How much the plaintiff has been wounded because of the abovesaid illegal detention in the Mental Hospital may also be seen from the following passage in her evidence as P.W.1:

"It is not correct to say that I have stayed away from my husband.

Qus: Are you prepared to stay with him now?

Ans: No. No. No. I have been landed in mental hospital. Hence I am not willing to stay with my husband."

So there will be no difficulty in holding that the case will come under the abovesaid second type of desertion spoken to in Sec.18(2)(a) of the Act.

21. Even otherwise, the case would certainly fall under clause (g) of Sec.18(2) which provides that a hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance, if there is any cause justifying her living separately. What is justifying cause will depend on the facts and circumstances of the case. The question has been considered by Mr.Justice Deshpande in *Balbir Singh v. Shanti Devi*, (1970)1 I.L.R. Del. 21. The case arose under Sec.9(1) of the Hindu Marriage Act relating to restitution of

conjugal rights. The said section uses the expression "reasonable excuse". According to that section, when a spouse has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply for restitution of conjugal rights, while considering the meaning of the expression "reasonable excuse", the learned Judge referred to Sec.23(1)(a) of that Act and observed:

"Sec.23(1)(a) of the Act further requires that the Court should be satisfied that the petitioner is not in any way taking advantage of his own wrong before granting any matrimonial relief. In other words, if the conduct of the petitioner itself is such as to give the respondent a reasonable excuse for withdrawal from his society, then the petitioner would be disentitled to the grant of matrimonial relief. This is another consideration showing that the expression "without reasonable excuse" can mean something less than a matrimonial offence or a ground sufficient to obtain a judicial separation, nullify of marriage or divorce. It is, necessary, however, to show that the conduct of the petitioner is in some way blameworthy before it can be held that it constitutes reasonable excuse justifying the withdrawal of the respondent from the petitioner's society. A mere honest difference of opinion between the parties for which the petitioner cannot be blamed would not constitute "reasonable excuse" within the meaning of Sec.9(1). The conduct of the petitioner constituting such reasonable excuse would lie somewhere between these two extremes. What conduct would amount to such "reasonable excuse" would depend upon the facts of particular case."

In that context, the learned Judge referred to Sec.18(2)(a) and (g) of the Hindu Adoptions and Maintenance Act and said:

"The related provision contained in Sec.18(2)(a) and (g) of the Hindu Adoptions and Maintenance Act, 1956, entitles a Hindu wife to live separately from her husband without forfeiting her claim to maintenance, *inter alia*, if the husband is guilty of desertion without reasonable cause or if there is any other cause justifying her living separately. Here again, the wife would be entitled to a separate maintenance from her husband by proving either desertion without reasonable cause on his part or more generally by proving any other cause". The

expression "any other cause" accords in its generality with the expressions "reasonable excuse", "reasonable cause" and "conduct of the parties" considered above. All of these expressions are wide enough to include such conduct of the husband as would be less serious than a matrimonial offence or a ground to obtain judicial separation, nullify of marriage or divorce and yet would be such as to justify the wife in living separately from her husband without verifying her claim to maintenance."

22. In Sec.125(3) of the Code of Criminal Procedure, 1973, the second proviso uses the expression "just ground". That section relates to grant of maintenance to a wife. In the previous code of criminal Procedure, the corresponding, Section was 488. In a case arising under that section Pandrang Row, J. in *Sundararam v. Palaniandi Mudali*, (1940) 1 M.L.J. 171: 51 L.W. 204: 188 I.C. 32: 1939 M.W.N. 1255: 1939 M.W.N. (CrL) 199: A.I.R. 1940 Mad. 292 held that the fact that the wife really has reasonable apprehension of physical ill-treatment is a sufficient or "just" ground for her refusal to accept the offer of her husband to take her back and maintain her. In *M.Ponnambalam v. Saraswathi*, 1957 M.L.J. (CrL) 213: 1957 M.W.N. 417: 1957 CrL.L.J. 1282: A.I.R. 1957 Mad. 693 it was held that it was the responsibility of the husband to protect his wife from the unpleasantness and cruel treatment of his relatives. Adopting the reasoning in the above case, the Orissa High Court held in *Kashinath Sahu v. Smt. Devi and others*, A.I.R. 1971 Ori. 295 that under Sec.18(1)(b) of the Hindu Adoptions and Maintenance Act, it is no answer to a charge of cruelty levelled by the wife to say that it was not the husband himself but his mother who had treated her with cruelty.

23. In a case arising under Sec.125 of the Code of Criminal Procedure, the Supreme Court held in *Siramohamed Khan v. Hafunnisa Yasin Khan*, A.I.R. 1981 S.C. 1972 that if a husband is impotent and is unable to discharge his matrimonial obligations, it would amount to legal and mental cruelty, which would undoubtedly be a just ground contemplated by the second proviso to Sec.125(3). In that context, the court said:

"16. There is however a very formidable circumstance which seems to have been completely overlooked by later decisions while following the previous decisions of the Nagpur or the Madras High Court. Although the Second

Proviso to Sub-sec.(3) of Sec.125 of the Code of Criminal Procedure, 1973 which was also a proviso to the old Sec.488, clearly provided that it is incumbent on the Magistrate to consider the grounds of refusal and to make an order of maintenance if he was satisfied that there was just ground for refusing to live with the husband, yet this salutary provision which was introduced with the clear object of arming the wife with cause of action for refusing to live with the husband as the one which we have in the present case, no legal effect to the legislative will intent appears to have been given by the aforesaid decisions.

17. Another important event which happened in 1949 also seems to have been completely ignored by the recent decisions while following the previous decisions of High Courts. It would appear that by the Code of Criminal Procedure (Amendment) Act 9 of 1949 an additional provision was added after the proviso which may be extracted thus:

"If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him".

18. The object of introducing this provision was clearly to widen the scope and ambit of the term 'just ground' mentioned in the proviso. This provision is not exhaustive but purely illustrative and self-explanatory and takes within its fold not only the two instances mentioned therein but other circumstances also of a like or similar nature which may be regarded by the Magistrate as a just ground by the wife for refusing to live with her husband under the Code of 1973. This provision has been incorporated as Explanation to the second proviso to Sub-sec.(3) of Sec.125.

19. The decisions of the High Courts given prior to the Amendment of 1949 would no longer be good law after the introduction of the Amendment which gives, as it were, a completely new complexion to the intent and colour of the second proviso to Sec.488 (Now Explanation to the second proviso to Sub-Sec.(3) of Sec.125) and widens its horizon. It is, therefore, needless to refer to these decisions or to subsequent decisions which have followed the previous cases.

20. A clear perusal of this provision manifestly

shows that it was meant to give a clear instance of circumstances which may be treated as a just ground for refusal of the wife to live with her husband. As already indicated by virtue of this provision, the proviso takes within its sweep all other circumstances similar to the contingencies contemplated in the Amending Provision as also other instances of Physical, mental or legal cruelty not excluding the impotence of the husband. These circumstances, therefore, clearly show that the grounds on which the wife refuses to live with her husband should be just and reasonable as contemplated by the proviso. Similarly, where the wife has a reasonable apprehension arising from the conduct of the husband that she is likely to be physically harmed due to persistent demands of dowry from her husband's parents or relations, such apprehension also would be manifestly a reasonable justification for the wife's refusal to live with her husband. Instances of this nature may be multiplied but we have mentioned some of the circumstances to show the real scope and ambit of the proviso and the Amending Provision which is, as already indicated, by no means exhaustive".

24. In *Subbegowda v. Honnamma and another*, A.I.R. 1984 Karn. 41, it is held that if the wife's claim for maintenance clearly falls under any of the Clauses (a) to (f) of Sec.18(2), Clause (g) thereof should not be applied. But, it can be sustained under clause (g), even on a ground covered by one or other Clauses (a) to (f) substantially but not fully. The relevant passages in the judgment read thus:

"The wife's claim for maintenance can be sustained under Clause (g) even on a ground covered by one or the other clauses substantially but not fully. We should not take a technical view in construing this provision. In this connection the following observations of the learned Author Raghavachariar in his "Hindu Law", Vol.II (7th Edition) at pages 1204 and 1205 may be noted:

"Under this clause are sought to be brought in all other grounds for lawful separate living which cannot strictly be brought under any other previous clauses. What these clauses are and how far they will justify the court in awarding separate maintenance against the husband are matters left to the judicial discretion of the

court to be exercised in accordance with the principles of justice and equity, principles "which cannot be defined by rules of thumb or well established precepts".....

The expression any other cause justifying her living separately; would, it is conceived takes in a case where the wife's residence in the husband's home is rendered miserable by reason of the existence of his relations like his mother or sister, or others, between whom and the wife there has been to love lost, and for reasons easily imaginable the wife is justified in seeking to live away from such a home. The expression will also comprehend a case where the husband by his addiction to drugs and drinks often indulges in acts which no decent woman would put up with. Such as similar instances justifying the wife living away from the husband and asking for separate maintenance can easily be conceived. The Legislature deliberately uses this elastic expression so that there may be a large margin of judicial discretion vested in the court which may be moulded to suit the circumstances of any particular case".

It is true, as already stated, she has not specifically pleaded for a consideration of her claim under clause (g) Evidently no issue has been framed, But the courts below have allowed her claim under that clause relying on the evidence available. Her claim was that she was entitled to live separately and claim maintenance from the defendant. Merely because she has failed to strictly prove the specific grounds urged by her, she cannot be denied relief, if, otherwise, in law, her claim can be allowed on the basis of the evidence let in by the parties."

25. The question in this case is whether the conduct of the husband in entering into an agreement with the purchasers of the house directing them to get his wife evicted from the house would amount to "a cause justifying her living separately". We have already said that the husband ought not to have exposed his wife to an action by third parties. His thoughtless action has inflicted a deep, wound in her. That is a justifying cause for the wife to live separately from him. She has also expressed before this Court an apprehension that she would be physically harmed if she lives with her husband. Hence, on the facts of this case, we hold that the wife is entitled to live separately and claim

maintenance from her husband.

26. Regarding quantum of maintenance we see no justification at all for interfering with the finding of the court below. As per Ex.B-16 dated 12.11.1992, the husband has a deposit of more than one lakh of rupees in the Bank of Maharashtra and as per Ex.B-19 dated 12.11.1992 he has a deposit of Rs.16,242 in Canara Bank. Further, he has made an investment to the extent of Rs.40,000 in the state Bank of India Mutual Fund. He has also made investment under Ex.B-18 for another sum of Rs.50,000 in the same State Bank of India Mutual Fund. Though he earlier alleged that he has contracted loans, D.W.1, admitted that he had discharged those liabilities. In the above circumstances, there is no good reason to interfere with the finding of the court below that the evidence available shows that the husband's income would be Rs.3,000 per month and even though the husband pays a sum of Rs.1,200 per month by way of rent for the house in which he is presently living, out of the remaining amount he can easily pay Rs.1,000 to the wife inasmuch as the spouses were earlier living with all comforts. No doubt, there is no scope for enhancing the abovesaid quantum to Rs.1,000 per month as claimed by the wife.

27. Since the suit was filed as an indigent person, the court below has directed the wife to pay the court-fee for the abovesaid sum of Rs.3,24,000 which represents the disallowed portion of the claim for past maintenance. Thus, the plaintiff has to pay court-fee, as per the decree of the Family Court, Rs.33,300 to the Government likewise, she has to be directed in this appeal also to pay a similar sum as court-fee, no doubt deducting the sum of Rs.20 paid by her, as court-fee, treating originally this appeal as civil miscellaneous appeal. By an earlier order, this Court has allowed her to convert the civil miscellaneous appeal as a regular first appeal and has also allowed her to prefer the said appeal as an indigent person Under O.33, Rules 10 and 11, C.P.C. We have to direct her to pay court-fee on the disallowed portion of her claim, It is held in *Chandrareka v. Secretary of State, I.L.R. 14 Mad. 16*; *Secretary of State v. Tripurasundarammal, A.I.R. 1926 Mad. 474* and *Srinivasa Ayyar v. Lakshmi Ammal, A.I.R. 1928 Mad. 216* that the plaintiff is bound to pay court-fee for the disallowed part of the claim and it is not open to the court to direct the defendant to pay court-fee exceeding the amount payable on that portion of

the plaintiff's claim which is allowed. But in the present case the court-fee payable would consume her maintenance amount for three years. In view of the peculiar facts of the case and the pitiable condition of the plaintiff we would earnestly recommend that the State Government should consider waiver or remission of the court-fee payable by her both on the plaint and the memorandum of appeal, particularly when it has not been proved that she has got any other assets or income, and she is already aged about 63 years.

28. In the result, both the appeals are dismissed. There will be no order as to costs in A.S.No.800 of 1993. The appellant in A.S.No.841 of 1993 shall pay a sum of Rs.2,000 by way of costs to the respondent in that appeal.

B.S. ---- Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Abdul Hadi, JJ.

A.A.O.No.440 of 1992 and C.M.P.No.7547 of 1992
14th December, 1993.

Dhana Singh ... Appellant
v.
Mrs.Stella and another ... Respondents.

Criminal Procedure Code (II of 1974), Sec.125 - Maintenance awarded to minor son on 17.6.1989 - Minor attaining majority on 2.11.1990 - Order, if becomes ineffective automatically - Remedy open to father.

The order passed by the Family Court on 17.6.1989 does not limit the grant of maintenance to the second respondent (son) till the date of attaining majority. The order merely says that the 2nd respondent must be paid maintenance at the rate of Rs.300 p.m. from 3.11.1988 the order will not vanish automatically on the 2nd Respondent attaining majority. If the appellant is keen on stopping payment of maintenance to the 2nd respondent, he should have applied to the Family Court under Sec.127, CrI.P.C. for appropriate order regarding the modification of the earlier order.

Not having done so, it is not open to the appellant to contend that no warrant can issue for executing the order of maintenance already made on 17.6.1989. However, it is open to the appellant to seek appropriate modification of the earlier order dated 17.6.1989, passed in M.C.No.335 of 1988.

[Para 4].

Appeal against the Order of the Principal Family Judge, Madras, dated 6.5.1992 and made in M.P.No.1067 of 1991 in M.C.No.335 of 1988, C.M.P. No.7547 of 1992.

V.Chandrasekar, for Appellant.

P.Christidas, for Respondents.

The Judgment of the Court was delivered by Srinivasan, J.: This appeal is taken up with the consent of counsel on both sides. It is directed against an order dated 6.5.1992 passed by the Principal Judge, Family Court, Madras, in M.P.No.1067 of 1991 in M.C.No.335 of 1988.

2. M.C.No.335 of 1988 was a petition for maintenance under Sec.125, Code of Criminal Procedure, filed by the respondents herein, the first respondent being the wife of the petitioner and the second respondent being his son, who was minor at the time of filing of the petition. The court below passed the order on 17.6.1989 directing payment of maintenance at the rate of Rs.500 to the first respondent herein and Rs.300 to the second respondent herein with effect from 3.11.1988. The respondents herein filed M.P.No.1067 of 1991 stating that no amount of maintenance has been paid, excepting a sum of Rs.7,210 which was paid pursuant to an order of attachment made in M.P.No.612 of 1989. That petition, M.P.No.612 of 1989 was disposed of on 15.10.1991. The present M.P.No.1067 of 1991 has been filed for recovery of Rs.20,800 being the amount due from 3.8.1989 to 2.10.1991. This petition was filed on 31.10.1991. The court below passed an order on 6.5.1992 directing attachment of salary of the appellant to the extent of Rs.1,000 per mensem. It is the said Order, which is challenged in this appeal.

3. The first contention of learned counsel for the appellant is that in a petition under Sec.125, CrI.P.C., no warrant can be issued by the court for recovery of any amount due under the said section, unless an application has been made to levy such amount within a period of one year from the date on which it became due. The contention appears to be well founded. The petition was filed on 31.10.1991. Hence the respondents will be entitled to claim

maintenance under the warrant only from 1.11.1990 and the amount due for that one year comes to Rs.9,600 counsel on both sides agree that the said sum of Rs.9,600 has since been paid. The court below has directed the appellant to pay a sum of Rs.20,800 and issued the warrant, which is erroneous. The warrant could have been issued only for Rs.9,600 as pointed out above. That amount having been paid already, it cannot be executed further. Hence this contention is accepted inasmuch as the order of the court below is erroneous in directing recovery of arrears in a sum of Rs.20,800 being due from 3.8.1989 to 2.10.1991.

4. The second contention of learned counsel for the appellant is that the second respondent attained majority on 3.11.1990 and thereafter he is not liable to pay any maintenance to the 2nd respondent. There is a fallacy in this contention. The order passed by the Family Court on 17.6.1989 does not limit the grant of maintenance to the second respondent till the date of his attaining majority. The order merely says that the 2nd respondent must be paid maintenance at the rate of Rs.300, p.m. from 3.11.1988. The order will not vanish automatically on the 2nd respondent attaining majority. If the appellant is keen on stopping payment of maintenance to the 2nd respondent, he should have applied to the Family Court under Sec.127, CrI.P.C., for appropriate orders regarding the modification of the earlier order. Not having done so, it is not open to the appellant to contend that no warrant can issue for executing the order of maintenance already made on 17.6.1989. However, it is open to the appellant to seek appropriate modification of the earlier order dated 17.6.1989 passed in M.C.No.335 of 1988. Likewise, it is open to the respondents to seek for execution for the subsequent period commencing from 1.11.1991. It is stated that for that period petition has already been filed. If that be so, the court below is directed to dispose of the same in accordance with law.

5. With the above directions, the appeal is partly allowed and partly dismissed. The parties will bear their respective costs. In view of the disposal of the appeal, C.M.P.No.7547 of 1992 is dismissed.

B.S.

---- Appeal allowed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Pratap Singh, J.

C.R.P.No.863 of 1988 16th September, 1993.

C.Arivanandhan ...Petitioner
v.
A.Gokulakrishnan ...Respondent.

Limitation Act (XXXVI of 1963), Sec.14 - Application - Plaintiff suing on promissory note dated 16.7.1976 on 20.12.1986 - Defendant filing suit for permanent injunction against plaintiff - Plaintiff filing the promissory note in that suit and getting it back only on 30.7.1986 - Section, if can be applied to exclude the period from date on which he produced the promissory note in that suit till the date on which he got return of it in computing limitation.

This suit is one on promissory note. The suit in O.S.No.1491 of 1979 is one for permanent injunction. It would not fall within the ambit of the clause, 'where the proceedings relate to the same matter in issue'. By no stretch of imagination can it be stated that the prior suit relates to the same matter which is in issue in the latter suit. The court is, therefore, of the opinion that it would not fall within the purview of Sec.14 of the Limitation Act.

[Para. 5]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Uthamapalayam, dated 30.12.1987 and made in O.S.No.209 of 1986.

V.Chandrakanthan, for Petitioner.

V.Sairam, for Respondent.

The Court made the following

ORDER: This civil revision petition is directed against the judgment in O.S.No.209 of 1986 on the file of the District Munsif, Uthamapalayam.

2. The short facts are: The petitioner herein has filed a suit on the basis of a promissory note dated 16.7.1976 on 20.12.1986. The revision petitioner claimed that the suit was filed in time because the defendant/ respondent was not a debtor entitled to the benefits of Tamil Nadu Debt Relief Act, that the period, viz., 16.1.1975 to 14.7.1978 was covered by the Tamil Nadu Debt Relief Act and that therefore, the suit could not be laid. His further reason is that he filed the suit promissory note in a proceedings between parties in O.S.No.451

of 1981, that he got back the suit promissory note only on 30.7.1986 and if that period was excluded, the suit filed by him was in time. The said claim of the revision petitioner was resisted by the respondent on several grounds *inter alia* contending that the suit filed by the revision petitioner was barred by limitation.

3. The court below has rejected the plea put forth by the revision petitioner and has found that the suit filed by the revision petitioner was barred by limitation. Therefore, the suit filed by the revision petitioner was dismissed. Aggrieved by the said judgment, the plaintiff/ revision petitioner has come forward with the present civil revision petition.

4. Mr. Chandrakanthan, learned counsel appearing for the revision petitioner would contend that the respondent filed a suit in O.S.No.1491 of 1979 against the revision petitioner herein for permanent injunction, that the revision petitioner had taken up a plea that he was a sub-tenant under the respondent and to substantiate his case, the revision petitioner filed the promissory note in that suit, that the revision petitioner got back the promissory note only on 30.7.1986, that the period from the date on which he produced the promissory note in that suit till the date on which he got return of the promissory note, has to be excluded as per the provisions of Sec.14 of the Limitation Act, 1963, that when it is so excluded, the suit filed by the revision petitioner was in time and that therefore the court below is wrong in holding contra.

5. I have carefully considered the arguments advanced by Mr. Chandrakanthan, learned counsel for the petitioner and Mr. V. Sairam, learned counsel for the respondent. To appreciate the submission made by the learned counsel for the revision petitioner Sec.14 of the Limitation Act needs extraction:

"14. Exclusion of time of proceeding bona fide in court without jurisdiction: (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to

entertain it." [Italics supplied]

This suit is one on promissory note. The suit in O.S.No.1491 of 1979 is one for permanent injunction. It would not fall within the ambit of the clause, which I have underlined in the extracted portion. By no stretch of imagination can it be stated that the prior suit relates to the same matter, which is in issue in the latter suit. I am therefore of the opinion, that it would not fall within the purview of Sec.14 of the Limitation Act. So the court below is absolutely correct in holding so. The said finding cannot be interfered with.

6. In view of the above, this civil revision fails and the same shall stand dismissed. No costs.

B.S. ---- Revision dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No.3359 of 1992 13th August, 1993.

B.K.Jinnah ...Petitioner

v.

K.P.Krishnan ...Respondent.

Civil Procedure Code (V of 1908), O.21, Rule 34(i) - Execution petition by decree-holder for execution of sale deed - Decree-holder ordered to produce fair sale deed - Procedure prescribed under O.21, Rule 34(i) not followed - Propriety.

Sub-rule (1) of Rule 34 of O.21, C.P.C. only says that the decree-holder may prepare a draft and the relevant word used is only 'may' and not 'shall'. That means if the decree-holder does not prepare the draft and delivers the same to the Court, there is no scope for the Court below to follow the other procedure prescribed in the subsequent sub-rules including sub-rule (ii). So the contention of the learned counsel for the petitioner that the court below ought to have followed the procedure prescribed under O.21, Rule 34(i), C.P.C. before ordering the decree-holder to produce the fair sale deed has no merits. [Para 3].

Petition under Sec.115 of Act V of 1908 praying

the High Court to revise the order of the Court of the Subordinate Judge, Tuticorin, dated 9.11.1992 and made in E.P.No.23 of 1992 in O.S.No.33 of 1985.

K.Srinivasan, for Petitioner.

T.R.Rajagopalan, for Respondent.

The Court made the following

ORDER: The judgment-debtor in E.P.No.23 of 1992 in O.S.No.33 of 1985 on the file of Sub-Court, Tuticorin, has come forward with this revision petition. The said E.P. is for executing the specific performance decree obtained in the said suit by the respondent-plaintiff. The said E.P. was filed for execution of the sale deed pursuant to the decree. The impugned order in the abovesaid E.P. is dated 19.11.1992.

2. Even at the outset, I must state that a certified copy of fair order in the said E.P. has not been produced at all by the revision petitioner, even though it has been held by this Court that the production of such copy of the fair order cannot be dispensed with. Anyway, going into the merits of the case, I find from the certified copy of the E.P. petition and orders thereof, filed by the petitioner that on 19.11.1992, the following order has been passed. "Expenses paid. For production of fair deed 7.12.1992".

3. The submission of the learned counsel for the petitioner is that before ordering the decree-holder to produce the fair sale deed the court below should have followed the procedure prescribed under O.21, Rule 34(i), C.P.C. The relevant portion of the said rule runs as follows:

(i) "Where a decree is for the execution of a document - and the judgment-debtor neglects or refuses to obey the decree, the decree-holder *may* prepare a draft of the document - and deliver the same to the court."

(ii) The court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in his behalf.

(iii) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit." (*Italics of the word 'may' is mine*).

The submission of the learned counsel for the petitioner is that the abovesaid procedure has not been followed by the court that. Instead, it has

straightway ordered for the production of fair sale deed and that the decree-holder had not filed any draft sale deed and the draft sale deed has also not been served on the judgment-debtor as required under sub-rule (ii) thereof. But I find that sub-rule (i) only says that the decree-holder "may prepare a draft" and the relevant word used is only may and not "shall". "That means if the decree-holder does not prepare the draft and deliver the same to the court, there is no scope for, the court below to follow the other procedure prescribed in the subsequent sub-rules, including sub-rule (ii). So, the contention of the learned counsel for the petitioner has no merits.

4. Even assuming that when the court below ordered "production of fair deed", it only meant production of draft sale deed and not fair sale deed, then the question of following the procedure prescribed in the abovesaid sub-rule (ii) would only come after 19.11.1992. But the impugned order is only 19.11.1992. So looking it from that angle also no exception can be taken to the impugned order dated 19.11.1992. Therefore, there is no merit in the civil revision petition and it is dismissed with costs.

B.S.

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Petition dismissed.

[Full Bench]

IN THE HIGH COURT OF JUDICATURE AT
MADRAS.

Present: *Venkataswami, Thanikkachalam and Srinivasan, JJ.*

Matrimonial Case No.32 of 1991.

20th August, 1993.

George Jacob Kuruvila

... *Petitioner*

v.

Sapna Shivdas

... *Respondent.*

Divorce Act (IV of 1867), Secs. 18 and 19(1) - Impotency - Marriage between spouses not consummated - On husband's approach for sexual relationship - Wife becoming hysterical throwing tantrums and refusing to have sexual relationship with husband - Refusing to get medical advice - Deserting husband - Husband issuing notice - Wife sending reply accept-

ing all accusations against her - Wife, if can be said to be impotent - Marriage, if can be declared null and void.

It has been held in *A.I.R. 1970 Mad. 237*, that impotency is not necessarily to be confined to the physical inability of one or the other of the spouses to have sexual intercourse. It may cover also such a condition either of the mind or of the physical condition of the person which renders normal sexual intercourse impracticable so as to reach its completion. The basis of the court's interference is not the structural defect but the impracticability of consummation. Disability arising from mental or moral causes is sufficient. In this case, the test prescribed by the Full Bench of this Court in the decision referred to above is satisfied. The court finds that the evidence of the petitioner is sufficient to hold that respondent is impotent. In the circumstances, the decree declaring the marriage between the petitioner and the respondent to be *null and void* is confirmed. [Paras. 3 & 4]

Case referred to:

Koipillai v. Kannammal, A.I.R. 1970 Mad. 237 [Para. 3]

Case referred by the District Judge, Uthagaman-dalam in his letter D.No.1790/1991, dated 12.7.1991 for confirmation by the High Court under Sec.20 of the Indian Divorce Act of the decree dated 3.5.1991 and passed in I.D.O.P. No.26 of 1990.

The Order of the Full Bench was made by *Srinivasan, J.*: The I.D.O.P.No.26 of 1990 was filed by the respondent for divorce under Sec.18 read with Sec.19(1) of the Indian Divorce Act. The petitioner married the respondent on 31.3.1986. Both of them were living together till the second week of July, 1989, but the marriage between the petitioner and the respondent was not consummated. The case of the petitioner is that whenever the petitioner approached the respondent with the intention of having marital company, the respondent became hysterical, threw tantrums and refused to have sexual relationship with the petitioner, that when the petitioner advised the respondent to get medical advice, the respondent refused to see any doctor, that she did not also give any reason to refuse marital company with the petitioner, and that therefore the petitioner had to conclude that the respondent is physically impotent and to presume she is incapable of having sexual intercourse with the petitioner. In July, 1989, she deserted the petitioner and went

away to Madras. The petitioner after waiting for some time sent a notice on 19.11.1989 to the respondent. She sent a reply to the said notice under Ex.A-3, dated 30.11.1989. In the reply notice Ex.A-3, the respondent has stated that she accepts all the accusations against her and that it is open to the petitioner to file legal proceedings for nullity of the marriage.

2. It is under these circumstances, the petitioner was obliged to file the petition for declaring the marriage between the petitioner and the respondent as *null and void*. The respondent remained *ex parte*. The petitioner has given evidence in support of his claim. He has spoken to the effect that the marriage between him and the respondent was solemnized, that the respondent refused to have sexual intercourse with him, that from the date of marriage, till July, 1989 they lived together, that the marriage was not consummated, and that even though the petitioner suggested that the respondent should come and see a doctor for medical check-up, the respondent refused to seek medical advice. The petitioner has filed three exhibits including the notice issued by him to the respondent and the reply notice sent by the respondent to the petitioner. Accepting the evidence of the petitioner, the learned District Judge granted a decree declaring the marriage between the petitioner and the respondent to be *null and void*.

3. The decree has come up before us for confirmation today. It has been held in *M.Koipillai v. Kannammal, A.I.R. 1970 Mad. 237*, that impotency is not necessarily to be confined to the physical inability of one or the other of the spouse to have sexual intercourse. It may, cover also such a condition either of the mind or of the physical condition of the person, which renders normal sexual intercourse impracticable so as to reach its completion. The basis of the court's interference is not the structural defect, but the impracticability of consummation. Disability arising from mental or normal causes is sufficient.

4. In this case, the test prescribed by the Full Bench of this Court in the decision referred to above is satisfied. We find that the evidence of the petitioner is sufficient to hold that the respondent is impotent. In the circumstances, the decree declaring the marriage between the petitioner and the respondent to be *null and void* is confirmed. There will be no order as to costs.

B.S.

Decree confirmed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.4096 of 1987 6th September, 1993.

Paramount Group Pvt. Ltd. ...Petitioner
v.
Tamil Nadu Industrial Investment Corporation Ltd. ...Respondent.

(A) Civil Procedure Code (V of 1908), Sec.37, Explanation - Jurisdiction to execute decree - Mortgage suit filed in Sub Court, Chengalpattu decreed - Area where mortgaged property was situate was brought within jurisdiction of Sub Court, Poonamallee - Later on Original Side Jurisdiction of Madras High Court extended to that area - Execution petition filed in Sub Court, Poonamallee - If maintainable.

Under the first limb of the Explanation to Sec.37 of the Civil Procedure Code, the Sub Court, Chengalpattu will come. Under the second limb, inasmuch as the area covered by the mortgage was brought within the jurisdiction of the Original Side of Madras High Court on 2.9.1985 and inasmuch as this E.P. was filed on 24.3.1986, on the date of filing of the E.P. this area under the mortgage was within the jurisdiction of the Original Side of the High Court and that alone will fall under the second limb of the explanation. The Sub Court, Poonamallee will not come either under the first limb or under the second limb and hence, the court accepts the submission that the Sub Court, Poonamallee has got no jurisdiction to entertain the execution petition. [Para. 3]

(B) Civil Procedure Code (V of 1908), O.21 - Mortgage decree passed - Earlier execution petitions dismissed for non-prosecution - Further, execution petition filed, if can be construed as continuation of the prior petitions.

The earlier execution petitions were dismissed for non-prosecution. There is no material to come to a conclusion that they were dismissed for statistical reasons. So, the court is unable to accept the submission that this E.P. should be construed as a continuation of the prior E.Ps. [Para. 4]

(C) Civil Procedure Code (V of 1908), Sec.21(3) - Question of jurisdiction - Raising in revision before High Court conditions for.

Under Sec.21(3), C.P.C., the two conditions which are required are: (1) The objection was taken in the executing court at the earliest possible opportunity, and (2) there has been a consequent failure of justice. The second requisite is not shown to exist in this case. So, the court is clear that the question of jurisdiction cannot be raised in this civil revision petition. [Para. 7]

Case referred to:

Pathumma v. Kuntalan Kutty, A.I.R. 1981 S.C. 1683. [Para. 7]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Poonamallee, dated 16.9.1987 and made in E.A.No.290 of 1987 in E.P.No.61 of 1986 (in O.S.No.29 of 1971 on the file of the Court of the Principal Subordinate Judge, Chengleput.

Prakash Goklaney, for Petitioner.

R.Viduthali, for Respondent.

The Court made the following

ORDER: This civil revision petition is directed against the order passed in E.A.No.290 of 1987 on the file of the Sub Court, Poonamallee.

2. The short facts are: The respondent had filed a suit in O.S.No.29 of 1971 on the fact of mortgage and obtained a preliminary decree on 4.3.1972 and final decree on 24.4.1976 in the court of Sub Judge, Chengalpattu. He filed some execution petitions, but those were not pursued and they were dismissed for non-prosecution. While, so, Saligramam where the mortgage property is situated was brought within the jurisdiction of Sub Judge, Poonamallee while so Act 42 of 1985 was passed ending the Original Side jurisdiction of Madras High Court to Saligramam and thus Saligramam where mortgage property is situated was brought within the original side jurisdiction of Madras High Court with effect from 2.9.1985. Then this E.P.No.61 of 1986 was filed on 24.3.1986, in Sub Court, Poonamallee. The revision petitioner filed E.A.No.290 of 1987 raising the question of jurisdiction and praying for dismissal of the execution petition. That was resisted by the respondent. After enquiry, the court below had dismissed the E.A.No.290 of 1987. Aggrieved by the said order, the petitioner in E.A.No.290 of 1987 has once come forward with this revision petition.

3. Mr.Prakash Goklaney, the learned counsel appearing for the revision petitioner, would submit that after Act 42 of 1985 came into force with

effect from 2.9.1985, the Sub Court, Poonamallee, has got no jurisdiction to entertain the execution petition. He would submit that by virtue of explanation to Sec.37, Civil Procedure Code, the court of first instance namely the Sub Court, Chengalpattu, on the Original Side of the High Court to which the area covered by the mortgage was transferred, alone, has jurisdiction to entertain the execution petition and not the Sub Court, Poonamallee. He would further submit that the reasoning of the court below that this E.P. must be construed as a continuation of the earlier E.P., and so this must be taken as a pending proceedings on the date of coming into force of Act 42 of 1985 and the further reasoning that Sub Court, Poonamallee, has got jurisdiction to entertain execution proceedings because it will have the jurisdiction to set aside the *ex Parte* decree are all erroneous and cannot be sustained. *Per contra* Mr.R. Viduthalai, the learned counsel appearing for the respondent, would submit that the Sub Court, Poonamallee, has got the jurisdiction to entertain the execution petition and would further submit that by virtue of Sec.21(3), C.P.C., only if this question of jurisdiction was taken at the first instance and if there is failure of justice, this ground can be urged in the revision court and in this case there was no failure of justice and so this ground cannot be urged in the revision court.

4. I have carefully considered the submissions made by the rival counsels I shall first take up the ground put forward by Mr.Prakash Goklaney that under explanation to Sec.37, C.P.C., only the Sub Court, Chengalpattu or the Original Side of the High Court alone has got jurisdiction to entertain the execution petition. For the purpose of convenience, I shall extract the Explanation to Sec.37, C.P.C., which reads as follows:

“Explanation:- The court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that court to the jurisdiction of any other court; but in every such case, such other court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit.”

Under the first limb, the Sub Court,

Chengalpattu, will come. Under the second limb, inasmuch as the area covered by the mortgage was brought within the jurisdiction of the Original Side of Madras High Court on 2.9.1985 and inasmuch as this E.P. was filed on 24.3.1986, on the date of filing of the E.P., this area under the mortgage was within the jurisdiction of the Original Side of the High Court and that alone will fall under the second limb of the explanation extracted above. The Sub Court, Poonamallee, will not come either under the first limb and hence, I accept this submission of Mr.Prakash Goklaney.

5. The next question that falls for consideration is whether the E.P. is to be construed as continuation of the earlier E.Ps., filed by the respondent. The earlier E.Ps., were dismissed for non-prosecution. There is no material to come to a conclusion that they were dismissed for statistical reasons. So, I am unable to accept the submission of Mr.Viduthalai that this E.P. should be construed as a continuation of the prior E.P. The finding of the court below that this E.P. must be construed as a continuation of the prior E.Ps., cannot be sustained.

6. If the *ex parte* order is to be set aside the defendant has to go to the original court. But, that is not a consideration for finding whether a particular court has got jurisdiction to execute the decree or not.

7. Mr.Viduthalai, submits that by virtue of Sec.21(3), C.P.C., the question of jurisdiction cannot be canvassed in this civil revision petition. Sec.21(3), C.P.C., reads as follows:

“21. Objections to jurisdiction: (1) no objection as to the place of suing shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earlier possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earlier possible opportunity, and in all cases where issues are settled, at or before such settlement and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the

executing court with reference to the local limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection was taken in the executing court at the earliest possible opportunity and unless there has been a consequent failure of justice."

In this regard Mr. Viduthalai would rely on *Pathumma v. Kuntalan Kutty, A.I.R. 1981 S.C. 1683*. In the ruling, the Apex Court had occasion to consider the objection to territorial jurisdiction of the court before the Court of Appeal under Sec.21(1), C.P.C. The Apex Court has laid as follows:

"In order that an objection to the place of suing may be entertained by an appellate or revisional court, the fulfilment of the following three conditions is essentials:

1. The objection was taken in the court of first instance.
2. It was taken at the earliest possible opportunity and in cases where issues are settled at or before such settlement.
3. There has been a consequent failure of justice.

All these three conditions must be co-exist. [*emphasis supplied*]

In the instant case, objection to jurisdiction was taken in the first instance. But the revision petitioner had not shown that there has been failure of justice. The ratio of the above ruling is clearly applicable to this case in which we are concerned with the application of Sec.21(3), C.P.C. It would also be relevant to point out that under Sec.21(3), C.P.C., also the two conditions which are required are: (1) The objection was taken in the executing court at the earliest possible opportunity, and (2) there has been a consequent failure of justice. The second requisite is not shown to exist in this case. So, I am clear that the question of jurisdiction cannot be raised in this civil revision petition.

8. In view of the above, this civil revision petition fails and shall stand dismissed.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and S.M.Ali Mohamed, JJ.*

W.P.No.13396 of 1993 25th November, 1993.

Justice S.T.Ramalingam

...Petitioner

v.

The State of Tamil Nadu represented by its Secretary to Government, Public (Special-B) Department, Fort St. George, Madras and another

...Respondents.

(A) High Court Judges (Conditions of Service) Act (XXVIII of 1954), Sec.23 - All India Services (Medical Attendance) Rules (1954), Rule 2, Proviso introduced by G.S.R.No.1175(E), dated 4.11.1986 - Tamil Nadu Medical Attendance Rules (1964), Rule 10(C) as amended by G.O.Ms.No.1023, dated 17.6.1980 - Serving High Court Judge being treated as in-patient in private hospital - His wife suddenly falling ill in the hospital itself and hospitalised - Medical expenses incurred - If restricted by G.O.Ms.No.1023, dated 17.6.1980 - Applicability of G.O.Ms.No.1023 to High Court Judge.

The court has no hesitation in holding that in the case of Judges of this Court who are governed by their own service condition Rules, who notwithstanding the equation by the Amendment Act of 1986 for the purposes of the benefits and facilities of medical treatment with the Cabinet Ministers of the State for the reason that the State Legislature has equated a Minister, the Speaker, the Deputy Speaker or the Parliamentary Secretary and the members of his/her family for the accommodation in hospital and medical treatment and attendance with the highest category of servants employed under the Government of Tamil Nadu, can be subjected to the Rules that are applied to the servants employed under the Government of Tamil Nadu. Any attempt to do so shall be violative of the guarantee under Art.221(2) of the Constitution of India. The framers of the Tamil Nadu Medical Attendance Rules, however, were aware that members of All India Service cannot be subjected to any such provision in these Rules if they are inconsistent with any rules in the All India Services (Medical Attendance) Rules, 1954. They for the said reason, kept themselves pronounced in the statute itself that these Rules shall apply to

persons who are entitled to medical attendance under the All India Services (Medical Attendance) Rules, 1954 only to the extent to which they are not inconsistent with these Rules. It is indeed pathetic, if not obnoxious how the respondents decided to enforce the rule in G.O.Ms.No.1023 (Health and Family Welfare) Department, dated 17.6.1980 in the case of an Honourable Judge of the High Court. The court feels no hesitation in holding that G.O.Ms.No.1023 (Health and Family Welfare) Department, dated 17th June, 1980 is inapplicable to the Honourable Judges of this Court.

[Paras. 26 & 53]

(B) Practice and procedure - Person vested with discretion under law - If can act at his whim.

It is trite law that no person vested with a discretion under a law can act at his whim and use his fiat in deciding who should be benefited by the exercise of discretion and who should not be.

[Para. 30]

Cases referred to:

High Court of Judicature at Allahabad v. Amod Kumar Srivastava, 1993 ALL.J. 525. [Para. 9]

Red Light on the Cars of the Honourable Judges of the High Court v. State, A.I.R. 1993 All. 211. [Paras. 9, 21, 36]

Supreme Court Employees Welfare Association v. Union of India, A.I.R. 1990 S.C. 334. [Para. 14]

M.L.Puri v. Punjab and Haryana High Court, Chandigarh, A.I.R. 1993 P. and H. 287. [Para. 15]

All India Judges Association v. Union of India, A.I.R. 1992 S.C. 165. [Para. 17]

Debi Prasad Sharma v. King Emperor, 70 Ind.App. 216: A.I.R. 1943 P.C. 202. [Para. 17]

Baradakanta Mishra v. Registrar of Orissa High Court, A.I.R. 1974 S.C. 710: (1974) 1 S.C.C. 374: 1973 S.C.D. 981: 1974 S.C.C. (CrL) 128: 1974 CrL.J. 631. [Para. 17]

All India Judges Association v. Union of India, (1993) 3 Scale 502. [Para. 18]

Supreme Court Advocates-On-Record Association v. Union of India, (1993) 5 J.T. 483. [Para. 20]

All India Judges' Association v. Union of India, (1994) 1 M.L.J. (S.C.) 12: (1993) 4 J.T. 618: (1993) 3 Scale 502. [Paras. 21, 30]

Petition under Art.226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records relating to the order of the 1st respondent in

G.O.Rt.No.4189, Public (Special-B) Department, dated 17.12.1992 and quash the same and consequently direct the 1st respondent to sanction Rs.9,784 (Vide Bill No.ICR.06001, dated 18.6.1991) as claimed by the petitioner towards the reimbursement of the medical expenses incurred by him for his wife during 12.6.1991 to 19.6.1991 while he was in service in connection with the treatment taken by her in Apollo Hospitals, Madras. *R.Gandhi*, Senior Advocate assisted by *Miss Ezhilarsi for M/s.R.G.Ravendhiran, M.Bhaskar and Vijayakumar*, for Petitioner.

K.Subramaniam, Advocate General assisted by *K.M.Srirangam*, Government Advocate, for Respondents.

The Judgment of the Court was delivered by *Mishra, J.*: The instant application by a retired Judge of this Court is sadly, but pointedly bringing into focus how the status of the constitutional functionaries such as the Judges of the High Court is viewed and how the High Court Judges are treated by the executive wing of the State of Tamil Nadu. Before the facts, we feel and like to speak about how pre-Constitution and post-Constitution Judges of the High Courts in India have been treated by the Constitution and the law and how they stand in discharge of their constitutional functions.

2. In pre-Constitution days a High Court Judge appointed under the Government of India Act, 1935 held a civil post under the Crown, but Sec.253 thereof was not applied to him. When the Constitution of India came into force and India became a Sovereign Democratic Republic after breaking with the bonds of the Crown, Art.395 of the Constitution specifically repealed the Government of India Act and under Art.376, the Judges of a High Court in any province holding office immediately before the commencement of the Constitution became the Judges of the High Court in the corresponding State on the commencement of the Constitution and thereupon became entitled to such salaries and allowances and such rights in respect of leave of absence and pension as are provided for under Art.221 of the Constitution. Under the Constitution's frame-work, a High Court which exists for each State, is a Court of Record and has all the powers of such a Court including the power to punish for contempt of itself. It consists of a Chief Justice and such other Judges as the President may, from time to time, deem it

necessary to appoint. Every person appointed to be a Judge of a High Court, before entering upon his office has to make and subscribe oath or affirmation according to the form set out for the purpose in the III Schedule to the Constitution before the Governor of the State or some person appointed in that behalf by him. The tenure of office of a Judge is limited by a provision of the Constitution and having once held the office of a permanent Judge of a High Court, he is debarred from pleading or acting in the High Court in which he held office or in a Court subordinate to it. Art.221(1) of the Constitution before the 54th Constitution amendment provided that there would be paid to the Judges of each High Court such salaries as were specified in the Second Schedule of the Constitution and after the 54th amendment, that there shall be paid to the Judges of each High Court such salaries as may be determined by the Parliament or by law and until provision in that behalf is so made, such salaries as are specified in the Second Schedule. Clause (2) of this Article, however, has remained unamended as follows:

"Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and until so determined, to such allowances and rights as are specified in the Second Schedule.

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

A Judge transferred to another High Court is entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and until so determined such compensatory allowance as the President may by order fix. The Constitution has, besides other things, a specific provision that the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of Justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof, sitting alone or in Division Courts, shall be the same as immediately before the commencement of the Constitution and its constitutional authority to issue writs, directions

or orders throughout the territories in relation to which it exercises jurisdiction to any person or authority including in appropriate cases any Government within those territories is recognised under Art.226 thereof. Its superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction, its power to call for returns from such Courts, to make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts, etc. is preserved under Art.227 of the Constitution.

3. The Madras High Court has, however, derived its pre-Constitution powers from the Letters Patent having ordinary as well as Extraordinary Civil and Criminal Jurisdiction and its power, both Original and Appellate as well as infants and lunatics, testamentary and intestate, and has enjoyed a unique distinction of the continuance without any break with such powers including the power to issue writs, etc. in the name of the Crown ever since its establishment in the year 1862, with such amendments as to its powers and jurisdiction which came directly from the Crown and the Acts of the Legislature. The Service Condition Rules exclusively for the High Court Judges, however, were not many because the Crown itself in power never thought of equating the High Court Judges with even the ranks in the Indian Civil Service in the executive wing and by the High Court Judges in India Rules, 1922 made it known that they enjoyed a status which was independent and unenviable.

4. The constitutional provision aforementioned has been followed by the High Court Judges (Conditions of Service) Act, 1954, Act 28 of 1954, which has since undergone several amendments. After defining the 'Judge' to include the Chief Justice, Acting Chief Justice, Additional Judge and Acting Judge of the High Court, the said Act has specified the kinds of leave admissible to a Judge and made provisions as to the leave account and the aggregate leave which may be granted including leave allowances, allowance for joining time, combining of leave with vacation, pensions payable to Judges and family pension, gratuity, provident fund, travelling allowances, conveyance, etc. and facilities for medical treatment and other conditions of service. Sec.23 of the said Act in this behalf provides as follows:

"(1) Every Judge and the members of his

family shall be entitled to such facilities for medical treatment and for accommodation in hospital as may, from time to time, be prescribed.

(2) The conditions of service of a Judge for which no express provision has been made in this Act shall be such as may be determined by Rules made under this Act.

(3) This section shall be deemed to have come into force on the 20th January, 1950 and any Rule made under this section may be made so as to be retrospective to any date earlier than the commencement of this section."

The expressions "prescribed" in Sub-sec.(1) of this Sec.23 and "determined by Rules" in Sub-sec.(2) as well as "any Rule made in this section" in Sub-sec.(3) of this section have to be understood only by knowing the definition of the word "prescribed" in Sec.2(h)(iii)(i), which says "prescribed" means prescribed by Rules made under this Act. Rules notified in this behalf on 24th January, 1956 contain Rule 2 which provides as follows:

"The conditions of service of a Judge of a High Court for which no express provision had been made in the High Court Judges (Conditions of Service) Act, 1954, shall be and shall from the commencement of the Constitution be, deemed to have been determined by the Rules for the time being applicable to a member of the Indian Administrative Service holding the rank of Secretary to the Government of the State in which the principal seat of the High Court is situated:

Provided that, in respect of facilities for medical treatment and accommodation in hospital, the provisions of the All India Services (Medical Attendance) Rules, 1954, in their application to a Judge shall be deemed to have been taken effect from the 20th January, 1950."

Note: Cases of reimbursement of medical charges decided before the commencement of these Rules shall not be reopened unless it is specifically so desired by the Judge concerned."

This provision has undergone a further change by a proviso introduced by G.S.R.No.1175(E), dated November 4, 1986, which reads as follows:

"Provided further that, in respect of facilities for medical treatment and accommodation in hospital--

(a) in the case of Judges of the High Court

other than the Delhi High Court and the Punjab and Haryana High Court, the Rules and provisions as applicable to a Cabinet Minister of the State Government in which the principal seat of the High Court is situated, shall apply;

(b) In the case of Judges, other than the Chief Justices of the Delhi High Court and the Punjab and Haryana High Court, the Rules and provisions as applicable to a Union Deputy Minister, shall apply;

(c) In the case of the Chief Justices of the Delhi High Court and the Punjab and Haryana High Court, the Rules and provisions as applicable to a Union Cabinet Minister shall apply."

This proviso has come to stay as a part of the Rules in the interest and in recognition of the status of the Judges, who are extended some more and specific allowances by the 1986 amendment in the High Court Judges (Conditions of Service) Act, 1954. Such provisions are Sec.22-A in respect of facility of a rent free house to the Judges, Sec.22-B as to the conveyance facilities, Sec.22-C as to the sumptuary allowance and Sec.23-D as to the medical facilities for retired Judges and their family on par and on the same conditions as a retired officer of the Central Civil Services, Class I.

5. Petitioner herein has served as a Judge of this High Court from 12.11.1985 to 30.6.1991. During his tenure as the Judge, he suffered with cardiac problem which resulted in undergoing a by-pass surgery at the Apollo Hospitals, Madras, during the month of June, 1991. While the petitioner was in-patient during the abovesaid treatment, his wife Mrs.Sarala Ramalingam was looking after him all the time and was always at his bed side. On 12.6.1991 when she was besides the petitioner's bed at the said hospital itself, she developed certain sudden ailment. The hospital doctors attended on her and advised her to get admitted as an in-patient in order to provide immediate medical treatment as it was diagnosed that she was suffering from chronic diabetes mellitus, systematic hypertension hypertheroid state and Tietze's syndrome. As advised by the doctors, she was admitted at 5.15 p.m. on 12.6.1991 and after treatment for a continuous period of one week she was discharged on 19.6.1991 at 5 p.m. The above facts are not in dispute. The petitioner incurred expenses of Rs.9,784 towards the emergency treatment given to his wife at the hospital and the hospital realised from him the said amount by bill No.ICR.06001.

The petitioner sought reimbursement of the amount and sent a letter to the Chief Secretary to the Government of Tamil Nadu on 10.10.1991 enclosing the bill in ICR.No.06001 for the sum of Rs.9,784. The petitioner's letter to the Chief Secretary was replied to by the Secretary to the Government, Public (Special-B) Department on 10.2.1992 who asked the petitioner to furnish details of investigations done to the patient in the departments of Bio-chemistry, Haematology, Micro-biology and Radiology. The petitioner obtained these particulars from the Apollo Hospitals and forwarded the same to the Government through the second respondent, namely, the Registrar of the High Court on 21.3.1992 and requested to settle the claim at the earliest. The first respondent has, however, issued orders in G.O.Rt.No.4189, dated 17.12.1992 sanctioning only a sum of Rs.591 towards reimbursement of the medical expenses incurred by the petitioner for his wife from 12.6.1991 to 19.6.1991 while he was in service in connection with the treatment taken by her in Apollo Hospitals, Madras. 6. First respondent has filed a return to the above with the affidavit of the Chief Secretary to the Government, Public Department, who has said that he is well acquainted with the facts of the case from the records. The stand in the counter affidavit is that the proceedings of the first respondent in respect of the reimbursement of the medical expenses on the treatment of the petitioner's wife in the Apollo Hospital are made only under the *bona fide* impression on the existing rules relating to reimbursement of medical expenses. The first respondent has acknowledged that as per Rule 2(a) of the High Court Judges (Conditions of Service) Rules, 1956 as amended by the High Court Judges (Amendment) Rules, 1986, in the case of Judges of the High Courts other than the Delhi High Court and the Punjab and Haryana High Courts, the rules and provisions as applicable to a Cabinet Minister of the State Government in which the principal seat of the High Court is situated, shall apply. For the first time some facts are disclosed in the return as no communication about them has been ever made to the court, that

(1) There are rules known as the Tamil Nadu Legislative Assembly (Medical Attendance and Treatment) Rules, 1964 (Rules evidently made before 1986 amendment to the High Court Judges (Conditions of Service) Rules. The said

1964 Rules contain provisions as to free of charge accommodation in hospitals maintained by the State Government to a Minister. The Speaker, the Deputy Speaker or the Parliamentary Secretary and the members of their family and the medical treatment and attendance on the same terms and conditions as are applicable to the highest category of servants employed under the Government of Tamil Nadu;

(2) The highest category of servants employed under the Government of Tamil Nadu are All India Service Officers;

(3) Every member of the All India Service under Rule 7(1)(a) of the All India Services (Medical Attendance) Rules, 1954, is entitled to free of charge treatment in such Government Hospital in the station or District where he falls ill which hospital in the opinion of the authorised medical attendant provides the necessary and suitable treatment. Also as per Rule 7(2) of the said Rules, where a member of the service is entitled under Sub-rule (1) to free of charge treatment in a hospital any amount paid by him on account of such treatment, shall on production of a certificate in writing by the authorised medical attendant in this behalf, be reimbursed to the member of the service by the Government; Provided that the Government shall reject any claim if it is not satisfied with its genuineness of facts and circumstances of such case, after giving an opportunity to the claimant of being heard in the matter. While doing so, the Government shall communicate to him the reasons in brief, rejecting the claim and the claimant may submit an appeal to the Central Government within a period of 45 days of the date of communication of the order;

(4) As per Rule 4(1) of the said Rules, nothing in these Rules shall be deemed to entitle a member of the service to reimbursement of any cost incurred in respect of medical services obtained by him or to travelling allowance for any journey performed by him otherwise than as expressly provided in these rules;

(5) Also as per Rule 14(ii) of the said Rules, nothing in these rules shall be deemed to prevent the Government from granting to a member of the service, or to a member of the family of a member of the service any concession relating to medical treatment or attendance for

travelling allowance for any journey performed by him which is not authorised by these rules; (6) Also as per Government of India's decisions under Rule 14, so far as the Government is concerned, its inherent power to grant, in suitable and deserving cases, any concession relating to medical treatment or attendance not authorised by the rules is expressly saved by Clause (ii); The expression not authorised must be construed to mean "not sanctioned" or "not justified" by these rules. Clause (ii) can be invoked by the State Government for granting to a member of the Service reimbursement of expenditure incurred by him for the treatment of a member of his family in a hospital other than a Government hospital outside the State, provided very exceptional circumstances justify such action. Clause (ii) does not empower the Government to grant to the members of the All India Services general additional concession not covered by the rules. But they can grant in individual, deserving and suitable cases any concession within or outside the framework of the rules."

On merits, however, without disputing any of the averments of the writ petitioner, the counter proceeds to say that the Government's order dated 17.12.1992 sanctioned a sum of Rs.591 towards the reimbursement of medical expenses incurred by the petitioner for his wife in the Apollo Hospital against Rs.9,784 and cost of admissible medicines purchased in open market for the treatment taken during 12.6.1991 to 19.6.1991, after calling for the remarks of the Director of Medical Education, who in her letter dated 3.11.1992 had furnished the probable expenditure that would have been incurred had the patient taken treatment in a Government Hospital. The defence in main is based on G.O.Ms.No.1023, Health and Family Welfare Department, dated 17.6.1980, in which according to the first respondent, it is clearly stipulated,

- (1) Treatment in private hospitals should not normally be resorted to by Government servants;
- (2) In case where the patient requires specialised treatment in a private hospital in the normal course, the Government servant should apply for prior permission of the Director of Medical Education/Director of Medical Services and Family Welfare and the Directors

should specifically certify that the treatment proposed to be performed in the particular case is of complicated nature and is not available in the Government Medical Institution; and

- (3) In case of emergency for which the treatment has been undergone in a private medical institution, the claim for such treatment after the treatment should be forwarded through the Director of Medical Education in cases when the treatment was had in the city medical institutions or in towns with teaching hospitals or to the Director of Medical Services and Family Welfare when the treatment was had in other medical institutions to the respective administrative departments of the Secretariat. The Director of Medical Education and the Director of Medical Services, as the case may be, should certify whether the patient needed emergent treatment. In genuine cases, the claims will be restricted to the expenditure that would have been incurred had the patient taken treatment in a Government hospital excepting diet charges.

7. We shall advert to the case of the first respondent that it acted strictly in accordance with the rules and decided to pay only such amount of money towards medical expenses incurred by the petitioner for his wife, which the Director of Medical Education found probable and go into the *bona fide* of the stand of the first respondent in this behalf. Let we postpone this aspect of the matter for a while to see how this G.O.Ms.No.1023, dated 17.6.1980 has come to play such a role in the case of reimbursement of the medical bills submitted by a sitting Judge of the High Court. We have already seen that the High Court Judges (Conditions of Service) Act, 1954 has contemplated rules framed by the competent authority and rules in this behalf have been notified and are called "The High Court Judges (Conditions of Service) Rules, 1956 and are applied retrospectively with effect from 26th January, 1950. Sec.24 of the High Court Judges (Conditions of Service) Act has recognised the rule making power in the Central Government and not in the State Government. The Rules, however, extended the application of such rules which applied to the members of the Indian Administrative Service holding the rank of Secretary to the Government of the State in which the principal seat of the High Court is situated and

specifically recognised, in respect of the facilities for medical treatment and accommodation in hospital, the provisions of All India Services (Medical Attendance) Rules, 1954. The services under the Union including the Indian Administrative Service and the services under the States are recognised and contemplated under Part XIV of the Constitution of India. Art.309 of the Constitution says,

“Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State;

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment and the conditions of service of persons appointed to such service and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provision of any such Act”.

Every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union. Art.310 of the Constitution declares holds office during the pleasure of the President and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State, Art.312(2) has particularly declared that the services known at the commencement of the Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under Art.312. There can, thus, be no confusion that the High Court Judges (Conditions of Service) Rules before the introduction of the proviso aforementioned by amendment in November, 1986 extended the application of the All India Services (Medical Attendance) Rules, 1954, to the High Court Judges as it applied to the Indian Administrative Service, a service created by the Parliament of India. Under the scheme of

the rules, thus which existed before the proviso under which the Judges were given facilities extended to a Cabinet Minister of the State Government, the Judges enjoyed such allowances and privileges which were specifically prescribed for them under the Act of Parliament or Rules framed by the Central Government as delegates of Parliament under the Act and if there were no specific provisions or such rules which applied to them for the time being, rules applicable to the members of the Indian Administrative Service holding the rank of Secretary to Government of the State in which the principal seat of the High Court is situated, applied to them and for medical treatment and accommodation in hospital, the provisions of the All India Services (Medical Attendance) Rules, 1954 applied to them. The amendment has, however, brought in a new provision for the Judges in respect of facilities for medical treatment and accommodation in hospital that they shall be applied the same rules and provisions as applicable to a Cabinet Minister of the State Government in which the principal seat of the High Court is situated, except in the case of the Chief Justices and the Judges of the Delhi and Punjab and Haryana High Courts in the case of the former, the rules and provisions as applicable to Union Cabinet Ministers are applied and in the case of the latter, the rules and provisions as applicable to the Union Deputy Ministers are applied.

8. Exercising however, the power under Sec.14 of the Tamil Nadu Payment of Salaries Act, 1951, read with Sec.10 and Sub-sec.(4) of Sec.12 thereof, the State Government have framed rules in the year 1964 and made in effective on and from 6th December, 1962, which has contained a provision,

“Rule 2: A Minister, the Speaker, the Deputy Speaker, the Chairman, the Deputy Chairman or the Parliamentary Secretary shall for himself and the members of his family be entitled, free of charge to accommodation in hospitals maintained by the State Government and also to medical treatment and attendance, on the same terms and conditions as are applicable to the highest category of servants employed under the Government of Tamil Nadu.”

Besides the above, there has been another set of rules framed by the State Government called “The Tamil Nadu Medical Attendance Rules” and made for the purpose of the Government servants

employed under the Government of Tamil Nadu and their family, but extended also to persons who are entitled to medical attendance under the Secretary of State Services (Medical Attendance) Rules, 1938, the All India Services (Medical Attendance) Rules, 1954 and also to the Tamil Nadu State Higher Judicial Officers who are to be treated on a par with the I.A.S. and I.P.S. Officers but only to the extent to which they are not inconsistent with these Rules. Rule 10 of these Rules as respects medical attendance and treatment has contemplated that a person entitled to free medical attendance when admitted into a Government hospital for treatment will be allowed free medical and surgical treatment and free nursing as is normally provided by the hospital with its own staff, equipment and apparatus, and he will be supplied free of charge medicine, sera, vaccines, etc., which are ordinarily stocked in the hospital and which are required for his treatment irrespective of the cost of the drugs. This rule has a proviso to the effect that the procedure in regard to the recovery or reimbursement, of course in respect of special medicines supplied from the hospital stock or purchased by the Government servants will be regulated by Rule 29 which prescribes that in-patients whether entitled to free medical attendance or not, shall pay the cost of special and expensive drugs as laid down under the Rules. Rule 10(c) before amendment contemplated as follows:

"In places where there are no Government Hospitals, but where there are Panchayat Union or private hospitals or dispensaries (modern medicine or Indian) the State Government Servants of Group A & B, the Government Servants of Group C & D and these employees of the local bodies who draw salaries not exceeding Rs.300 per mensem and their families may take treatment straightaway in such institutions. The expenditure incurred by them in that connection including the cost of special and expensive drugs purchased by them on the prescription of the doctor-in-charge of Panchayat Union medical institution be reimbursed subject to the production of relevant vouchers and subject to the scrutiny of the relative bills by the authorised medical attendant in respect of treatment undergone in institutions of modern medicine. At a time, treatment can be taken either under modern medicine or any of the Indian systems of medicines and treatment

should not be taken simultaneously under both the modern and Indian systems or under two systems coming under Indian system of medicines."

The amending Rule 10(c) by G.O.Ms.No.1023, dated 17th June, 1980 has provided the basis of the case of the first respondent which reads as follows:

"It has been observed by the Government that the claims for reimbursement on the expenditure incurred by the Government employees towards the treatment taken in private hospitals are on the increase though facilities for treatment are available in Government institutions. On grounds of compassion, reimbursement is being allowed in certain cases even though the claims do not strictly satisfy rules. According to Rule 10(c) of the Tamil Nadu Medical Attendance Rules, treatment in private hospitals should not be resorted to and that in case of emergency, an emergency certificate from the Authorised Medical Attendant should be produced to the effect that the removal of the patient to the Government Hospital would have endangered the life of the patient. It should also be certified that such treatment is not available in the Government hospitals. It has also been observed that necessary certificates are also not being produced by the claimants but the individuals take treatment on their own initiative at the Christian Medical College Hospital, Vellore, or Railway Hospital, Madras. Even though the facilities for heart diseases are available in the Government General Hospital, Madras, which is a premier institution in the State, Government Servants resort to treatment outside for such ailments."

Hence, the Government after careful consideration consider that the existing guidelines require revision. In the place of the existing guidelines referred to in Rule 10(c) of the Tamil Nadu Medical Attendance Rules, the following should be substituted:

- "(1) Treatment in private hospitals not normally be resorted to by Government servants.
- (2) In case where the patient requires specialised treatment in a private hospital in the normal course the Government servants should apply for prior permission of the Director of Medical Education/Director of Medical Services and Family Welfare and the Directors

should specifically certify that the treatment proposed to be performed in the particular case is of complicated nature and is not available in the Government Medical Institution.

(3) In case of emergency for which the treatment has been undergone in a private medical institution, the claims for such treatment after the treatment should be forwarded through the Director of Medical Education in cases when the treatment was had in the city medical institutions or in towns with teaching hospitals or to the Director of Medical Services and Family Welfare, when the treatment was had in other medical institutions to the respective administrative department of the Secretariat. The Director of Medical Education and the Director of Medical Services as the case may be, should certify whether the patient needed emergent treatment. In genuine cases the claims will be restricted to the expenditure that would have been incurred, had the patient taken treatment in a Government Hospital excepting diet charges.

(4) The views of the Director of Medical Education/Director of Medical Services and Family Welfare will be final.

3. The Heads of Departments, Collectors and the Department of Secretariat, etc., therefore requested to observe the above rules strictly in future.

4. This order issues with the concurrence of the Finance Department vide its U.O.No.1822/FS/P/80, dated 5.5.1980."

9. We have no reason to think that the administration of the State of Tamil Nadu has been unaware of the status which the Judges in this Court enjoyed before the days of the Constitution and the attempts of the Constitution makers to secure a constitutional and independent status for the Judges of the High Court. The High Court today is a creation of and functions under the Constitution and is constituted of a Chief Justice and the Judges and it will be indeed harsh to suggest that the executive Government of the State is not aware of the High Court's constitutional independence in the administration of justice like the independence of the legislature in its field. A Full Bench of the Allahabad High Court in *High Court of Judicature at Allahabad v. Amod Kumar Srivastava*, 1993 All.L.J. 525, has only reiterated what has always been recognised by all concerned that

the dispensation of justice by the High Court is its constitutional function and is termed as regal or sovereign power. It exercises primary and unalienable function of the State, which cannot be left for any other person. In a recent Bench decision the Allahabad High Court in *Red Light on the Cars of the Honourable Judges of the High Court v. State*, A.I.R. 1993 All. 211, to which we shall refer again later, has expressed in another context, but we find suitable to express our view in agreement thereof that a Judge of a High Court who is a person appointed under Art.217 of the Constitution by the President of India and functions under the Constitution is a person of distinction holding a high office of dignity and honour and the word "Hon'ble" is always prefixed before his name. The Rules which are subordinate legislation cannot determine the status of constitutional appointees and functionaries and a subordinate legislation also cannot be interpreted in a manner relegating the status and dignity of constitutional appointees and functionaries by saying that they in spite of being high dignitaries are not so high dignitaries. Can those who have to implement a statute take to themselves the authority to decide what should be given to X and what should be given to Y, if both X and Y are by law made equals? It is this aspect of the case that must receive answer. A proper answer to this can be had by finding out whether the Government of the State have treated the Cabinet Ministers and Judges as equals in the matter of reimbursement of the medical bills or have applied two standards.

10. Our examination of the provisions of the Acts and the Rules that are applied to the High Court Judges have also taken us to other aspects in which the Executive Government of the State has chosen to make its own standard of treatment to the Judges of this Court and one such case which has recently been decided by one of us is the case of the Drivers of the staff cars allotted to the Hon'ble Judges of this Court in *P.Perumal and 28 others v. State of Tamil Nadu*, W.P.No.15014 of 1992 dated 24.9.1993. The executive took notice of the law to allot a staff car to the Judges of this Court as under Sec.22-B of the High Court Judges (Conditions of Service) Act, 1954 only after a delay of three years and promoted some office assistants as Drivers of such vehicles, which they allotted to them, but sanctioned no allowance as provided to the Drivers of the staff cars allotted to the Ministers in

the Government of the State, Secretaries to Government, Government Whip and for V.V.I.Ps. to the State Guest House. The Drivers of the staff cars allotted to the Hon'ble Judges of this Court, found that their counterparts in the Secretariat under the establishment control of Public (MV) Department and allotted to the Ministers, Secretaries to Government, Government Whips and V.V.I.Ps. were given all route bus passes to enable them to attend work at the call of the Ministers, Secretaries to Government, Government Whip and V.V.I.Ps. They represented and the Hon'ble the Chief Justice directed the Registrar of the Court and accordingly the Registrar of the Court wrote to the State Government, vide letter No.3664/A/91 Estt. I(A4), dated 4.10.1991 and again on 24.3.1992 conveying the Court's view that the Government should extend the same benefit of the allowance of all route bus passes to the drivers allotted to the Hon'ble Judges of this Court. These letters were replied to by the Deputy Secretary to Government, Home (Services I) Department on 28.7.1992, who stated,

1. that the Registrar, High Court is classified as one of the Heads of Department in the Tamil Nadu Financial Code, and as per orders in G.O.Ms.No.1015, Finance Department, dated 27.10.1986, the drivers working in the Registry eligible only for two way bus passes for the journey from the residence to the place where the vehicle was parked and back like drivers attached to other Heads of Department; and
2. the nature of the duty discharged by the drivers in the Secretariat was entirely different from that of the High Court and that the Drivers under the establishment control of Public (MV) Department are attached to Ministers, Secretaries to Government, Government Whip and V.V.I.Ps. and their is onerous. They are expected to attend the work then and there and at short notice. They have to remain at work at late night also. Whereas in the case of Drivers of the High Court, their work is very limited and their work cannot be compared with that of the Secretariat Drivers."

11. The Hon'ble the Chief Justice directed the Registrar of the Court to write once again and Vide D.O.Letter No.3664/A/91/Estt.I, dated 4.8.1992, the Registrar informed the Government that since the Hon'ble Judges of this Court have

enjoyed the facilities and amenities in all aspects as provided to the Hon'ble Ministers of the Government of Tamil Nadu, the Drivers attached to the Hon'ble Judges are treated on par with the Drivers attached to the Hon'ble Ministers and therefore, they should also be provided with the same facilities as provided to the Drivers attached to the Hon'ble Ministers of the Government of Tamil Nadu. In this letter, the Registrar pointedly stated that the Drivers attached to the Hon'ble Judges are expected to attend to the work then and there and at short notice, that they attend to the residence and office and return to their residence only after completing the work assigned to them by the Hon'ble Judges and they also go to the workshops or their residence after leaving the vehicles in office or in the workshop for repairs, etc. that they have no fixed hours of duty and they have to remain at work at late night also, that they also report for duty at the residence of the Hon'ble Judges even on holidays including public holidays for which they do not claim compensatory casual leave or honorarium or overtime allowance and that their work is onerous.

12. One would expect with such categorical statement in the letter of the Registrar of the Court, who only conveyed to the Government as directed by the Hon'ble the Chief Justice that the drivers of the staff cars allotted to the Hon'ble Judges of this Court should be granted all route bus passes, that the Government would revise its opinion and correct its mistake in treating that, (1) the Drivers of the staff cars allotted to the Hon'ble Judges are under the control of the Registrar of the High Court and that (2) the Registrar of the High Court is likely any head of the department of the Government of the State and that in the case of the Drivers of the staff cars allotted to the Hon'ble Judges, the work is limited. But the Government reply this time by the Secretary to Government, Home (Courts) Department, not only reiterated what had been earlier stated on their behalf in the letter by a Deputy Secretary, but added,

"The Government examined the proposal of the High Court.... and agree that the Drivers of Cars attached to the High Court should be issued the two way bus pass for the journey from their residence to the place where the vehicle is parked and back. The expenditure on this account should be met from the contingencies of the High Court."

13. Allowing the writ petition vide judgment dated 14.9.1993, it is observed:

"The High Court Judges (Conditions of Service) Act, 1954 has received a substantial amendment with effect from 1.11.1986 which has defined a 'Judge' to mean a Judge of a High Court including the Chief Justice, the Acting Chief Justice, an Additional Judge and an Acting Judge of the Court. Sec.22 which provides that every Judge shall receive such reasonable allowance to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as may, from time to time, be prescribed. This has got a boost by the provision in Sec.22-B which has provided that every Judge shall be entitled to a staff car and one hundred and fifty litres of petrol every month or the actual consumption of petrol per month, whichever is less. There is no contemplation in this section that the staff car and 150 litres of petrol per month or the actual consumption of petrol whichever is less, is provided only for the Judge's travel from his residence to the Court and back home after the Court hours. The entitlement is specific and unambiguous that every Judge shall be having a staff car and he shall be entitled to consumption of a maximum of 150 litres of petrol each month, the consumption in excess however of 150 litres will be not at the cost of the State..... One has to note the statement in the counter-affidavit of respondents 1 and 2 with anguish that we have still in the Government of the State of Tamil Nadu the idea that the Registrar of the High Court is like any head of a Government Department and that while considering how the service conditions of the drivers of the High Court should be treated, their case is clubbed with the case of the drivers of the other Government Departments who are subjected to a certain condition of service of their own. According to the counter-affidavit, the Government has found a good reason for giving duty passes to the drivers attached to the Public (Motor Vehicles) Department, Ministers, Government Whip, etc. because of the nature of the duty discharged by them. According to the return, "....The Ministers etc., are having jurisdiction all over the State, the duties and

responsibilities of the drivers attached to them differ entirely from the drivers of the High Court".

The respondents have, however, not stated what do they think of the duties of the drivers of the staff cars provided to the Hon'ble Judges and what do they know about the jurisdiction of the Hon'ble Judges of this Court. It is difficult to believe that the Government of the State of Tamil Nadu is not aware of the nature of the jurisdiction, function and power of the Hon'ble Judges of this Court and the Constitutional duties they perform. Ministers in the State of Tamil Nadu have jurisdiction over territories in the State, Hon'ble Judges of this Court have complete control of the administration of justice in the State of Tamil Nadu as well as the State of Pondicherry, with areas scattered beyond the territories of the State of Andhra Pradesh and Kerala. The Government of Tamil Nadu, which has got the responsibility under the High Court Judges (Conditions of Service) Act and the Constitution of India, to reimburse such costs as are reasonably incurred by the establishment of the High Court, Madras, cannot be unaware of the constitutional status of the Hon'ble Judges of the court and the fact that they have the administrative freedom under Art.235 of the Constitution and their jurisdiction is not confined to the precincts of the High Court alone but extends to the entire State of Tamil Nadu and besides the State of Tamil Nadu to the entire territory of the State of Pondicherry. In their counter-affidavit, respondents 1 and 2 have said categorically that to enable the drivers attached to the Ministers to attend to office or residence of the Ministers and similarly to enable the drivers attached to the Government whips and officers to attend to office or residence, the Government has sanctioned for issue of particular person bus duty passes valid for all city routes and that the duty of the drivers of the High Court is entirely different, without, it seems, even examining the contents of the letter of the third respondent who conveyed the view and the administrative decision of the Hon'ble the Chief Justice that the drivers attached to the Hon'ble Judges performed duties on all days of the week, attended them at their residences, took the car to workshops

and maintained the same in good order to facilitate their official and private travels as commanded by them.

It is really sad that the fifth decade of our independent democratic polity, we are required to remind a State Government that Art.229 of the Constitution of India has recognised in the Chief Justice of the Court or such other Judge or officer of the Court, as the Chief Justice may direct, the authority to make appointments of officers and servants of a High Court, and subject to the provisions of any law made by the Legislature of the State to decide and prescribe the conditions of service of officers and servants of a High Court, except that the rules made thereunder, as they relate to salaries, allowances, leave or pension, require the approval of the Governor of the State."

14. After quoting a passage from the judgment of the Supreme Court in the case of *Supreme Court Employees Welfare Association v. Union of India*, A.I.R. 1990 S.C. 334 and adopting the same by substituting Art.74(1), by Art.163(1) and Art.146(2) by Art.229(2) of the Constitution, the judgment in the case of *P.Perumal and 28 others v. State of Tamil Nadu*, W.P.No.15014 of 1992 dated 24.9.1993, has proceeded to state that the rules framed by the Chief Justice of the High Court should normally be accepted by the Government and the question of exchange of thoughts and views would arise only when the Government is not in a position to accept the Rules relating to salaries, allowances, leave or pensions of the staff of the High Court, it has also observed that it is clearly a mistake both of fact and of law in not recognising the jurisdiction of the Hon'ble Judges of this Court co-extensive with the territory of the State when in fact the Hon'ble Judges of this Court exercise jurisdiction not only in the State of Tamil Nadu, but also in the State of Pondicherry and in equating the drivers under the administrative control of the Registrar of this Court with the drivers of the Heads of the Departments of the Government. It is further observed:

"Appreciating the facts and the law, particularly the constitutional position of the Chief Justice of the Court under Art.229 of the Constitution of India, lead to the irresistible conclusion that the Government of the State have failed to discharge their constitutional obligation by not acknowledging the duties of

the drivers of the cars attached to the Judges of this Court and treating them as drivers under the Registrar of the Court and thus under any Head of the Department of the Government,...."

15. In a recent judgment, the Punjab and Haryana High Court has in the case of *M.L.Puri v. Punjab and Haryana High Court, Chandigarh*, A.I.R. 1993 P. and H. 287, found itself placed to consider a public interest litigation because the Government neglected staff cars and left cars which were not road-worthy and dependable to be used by the Judges of the Court and also to examine whether the security of the Judges was neglected by the Government. A Bench of the Court in its judgment has said:

"It is quite evident that Sec.22-B of the Act confers a statutory right on the Judge to claim conveyance facility and is entitled to a staff car. Sec.22-B of the Act casts a statutory obligation on the State to provide staff car to the Judges. Implicit in this facility is the requirement that the car allotted for use as such must, both in its class and state of repair, be such as is fit for use for this purpose, in keeping with the high status of the Judge of a High Court. In other words, it must always be in a good running condition, not one which on account of normal wear and tear or other defect ceases to be a safe or reliable vehicle, having the propensity to break down on a journey."

16. The Punjab Court has also observed:

"A High Court Judge is entitled to proper security. The High Court Judges decide criminal cases daily some of which are of hard-core criminals. They cannot discharge their judicial functions without proper security. The adequacy of the security of the Judges should be decided by respondent Nos.1 and 2 in consultation with the Chief Justice of the High Court"

17. The above, however, is not a High Court's own disposition of either the status of a Judge of the High Court or the need of providing to him a car in good condition. In *All India Judges Association v. Union of India*, A.I.R. 1992 S.C. 165, the Supreme Court has observed:

"We must indicate with all the emphasis at our command that the system has to be saved as for a civilised society an enlightened independent judiciary is totally indispensable. The High Courts must take greater interest in the proper functioning of the subordinate judiciary.

Inspection should not be a matter of casual attention. The Constitution has vested the control of the subordinate judiciary under Art.235 in the High Court as a whole and not its Chief Justice alone. Every Judge should, therefore, take adequate interest in the institution which is placed under the control of the High Court. We may point out that is what Lord Atkins said in *Debi Prasad Sharma v. King Emperor*, 70 Ind.App. 216: A.I.R. 1943 P.C. 202. And it has been approved by a Constitution Bench in *Baradakanta Mishra v. Registrar of Orissa High Court*, A.I.R. 1974 S.C. 710: (1974)1 S.C.C. 374: 1973 S.C.D. 981: 1974 S.C.C. (CrL.) 128: 1974 Cr.L.L.J. 631. It should be remembered by all the Judges of the High Court, viz. that the administrative control of the subordinate courts of the State vests not in the Chief Justice alone, but in the court over which the Chief Justice presides."

18. In the above case in review reported in *All India Judges Association v. Union of India*, (1993)3 Scale 502, the Supreme Court has stated about the status of a member of the Judicial Service of the State in these words:

"The judicial service is not service in the sense of 'employment'. The Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the state power are the ministers, the legislators and the judges and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the Judges from judicial staff. The parity is between the political executive, the legislators and the judges and not between

the Judges and the administrative executive, a contrast to the opposite a folly which unfortunately the State of Tamil Nadu has not been able to overcome."

19. The Supreme Court has in this judgment has further said:

"This distinction between the judges and the members of the other services has to be constantly kept in mind for yet another important reason. Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary and no price is too heavy to secure it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties, is to impair and whittle away justice itself."

20. The usual refrain whenever any issue as to the extension of the basic allowance of the Honourable Judges of the High Court or the Judges of the other courts in the Government of the State is that if a demand for the Judges is conceded by the Government, the members of the other services will start making demand for similar service conditions. This has been nailed by the Supreme Court in the review judgment in these words:

"It is high time that all concerned appreciated that for the reasons pointed out above there cannot be any link between the service conditions of the judges and those of the members of the other services. It is true that under Art.309 of the Constitution, the recruitment and conditions of service of the members of the subordinate judiciary are to be regulated by the Acts of the appropriate legislature and pending such legislation, the President and the Governor or their nominees, as the case may be, are empowered to make rules regulating their recruitment and the conditions of service. It is also true that after the Council of States makes the necessary declaration under Art.312, it is the Parliament which is empowered to create an All India Judicial Service which will include post not inferior to the post of District Judge as defined under Art.236. However, this does not mean that while determining the service

conditions of the members of the Judiciary, a distinction should not be made between them and the members of the other services or that the service conditions of the members of all the services should be the same. As it is, even among the other services, a distinction is drawn in the matter of their service conditions. This Court has in the judgment under review, pointed out, that the linkage between the service conditions of the judiciary and that of the administrative executive was an historical accident. The erstwhile rulers constituted only one service viz., the Indian Civil Service for recruiting candidates for the judicial as well as the Administrative Service and it is from among the successful candidates in the examination held for such recruitment, that some were sent to the administrative side while others to the judicial side. Initially, there was also no clear demarcation between the judicial and executive services and the same officers used to perform judicial and executive functions. Since the then Government had failed to make the distinction between the two services right from the stage of the recruitment, its logical consequences in terms of the service conditions could not be avoided. With the inauguration of the Constitution and the separation of the State power distributed among the three branches, the continuation of the linkage has become anachronistic and is inconsistent with the constitutional provisions. As pointed out earlier, the parity in status is no longer between the judiciary and the administrative executive but between the judiciary and the political executive. Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged. The failure to grasp this simple truth is responsible for the contention that the service conditions of the judiciary must be comparable to those of the administrative executive and any amelioration in the service conditions of the former must necessarily lead to the comparable improvement in the service conditions of the latter."

21. The executives interference and its extension in the administration of justice has led to the constitution a Bench of nine Judges of the Supreme Court and in the case of *Supreme Court*

Advocates-on-record Association v. Union of India, (1993) 5 J.T. 483, the independence of judiciary as an essential attribute of the rule of law has emphasized once again by pointing out:

"Independence of Judiciary is the *sine qua non* of democracy. So long as the judiciary remains truly distinct from both the Legislature and the Executive, the general power of the people can never be endangered from any quarters. Montesquieu in his book "Spirit of Laws" observed "there is no liberty, if the power of judging be not separated from the legislative and the executive powers". The framers of the Constitution made it known in an emphatic voice that separation of judiciary from executive, which is the lifeline of 'independent judiciary' is a basic feature of the Constitution. Dr.B.R.Ambedkar in his speech in the Constituent Assembly on June 7, 1949 observed as under:

"I do not think there is any dispute that there should be separation between the executive and the judiciary and in fact all the articles relating to the High Court as well as the Supreme Court have prominently kept that object in mind".

22. The above thus will give a sanction to the observation by us above as in the case of *Red Light on the Cars of the Hon'ble Judges of the High Court v. State*, A.I.R. 1993 All. 211, that the last bulwark of a State is its Court of Justice and:

"the stream of administration of justice which is a sacred one like river Ganges emanates from the Constitution which unlike other rivers, flowing from the same source has in itself a potentiality of cleansing mechanism not allowing pollution to overcome it, leading to stagnation of rule of law. The mechanism is based on dignity and honour conferred on the Hon'ble Judges by assigning distinct and sovereign position under the Constitution. They are constitutional appointees and functionaries possessed of faith of the people which cannot be allowed to receive shock at any hand. They command respect and obedience from all irrespective of political or religious belief or faith of the people. Slightest disrespect to the system or its constituents may lead to disastrous effect annihilating the very fabric of rule of law. Anything which erodes the faith of the people in the rule of law may be not only

fatal to the system but may also be a dangerous obstruction of justice requiring proper treatment so as to maintain the majesty of law."

The observations of the Supreme Court in the *All India Judges' Association and others v. Union of India and others*, (1994) 1 M.L.J. (S.C.) 12: (1993) 4 J.T. 618: (1993) 3 Scale 502, that judicial independence cannot be secured by making mere solemn proclamations about it, it has to be secured both in substance and in practice, it is trite to say that those who are in want cannot be free, self-reliance is the foundation of independence—give the support base to the view which we propose to take.

23. Any attempt thus even by remote devices to make the Judges of the court uncomfortable; to make them plead with the executive Government for something which naturally and obviously should come to them, is/will be an act of interference in the independence of judiciary, an act almost touching the core, the power of the court under Art.215 of the Constitution of India.

24. Adverting to the case in hand and since we have in the course of the hearing of this case, found from the administrative records of this Court several acts of obvious disregard of the executive to the constitutional obligation as to, (1) medical and other allowances payable to the Hon'ble Judges of this Court, (2) security and other facilities like maintenance of the staff car, etc., and non-implementation of the provisions of their official residences and maintenance thereof, and (3) the sufferings to the administration of justice created mainly on account of the failure of the executive Government in not making provisions of the essential items like electronic typewriters, standard papers for typing and printing of the judgments of the court, etc. we have heard learned counsel for the petitioner and learned Advocate General and Mr.K.M.Srirangan, learned Additional Government Pleader in matters not only confined to the medical allowance, but also other allowances, etc. Learned Advocate General as well as learned Additional Government Pleader have assisted the court, we think we must record, in full and to the satisfaction of the court in all respects, and while not conceding that there has been neglect of the cause of the court by the executive Government, have fairly acknowledged wherever it has been found in the records and in the files of the State Government that there has been any particular failings, and conveyed without reservation that

the executive Government shall readily and willingly undo any wrong if already done and shall adopt such a course in future that may be found in keeping with the constitutional position of the Hon'ble Judges of this Court and the requirements of the statutes in this behalf.

25. Since the case before us has been in respect of the claim of a sitting Judge who has since retired, falling strictly under Sec.23 of the High Court Judges (Conditions of Service) Act, 1954 read with the rules in this behalf that is Rule 2 along with the proviso introduced by G.S.R.No.1175 (E), dated November 4, 1986 published in Gazette of India Extraordinary to Part II Section 3, Sub-section (1) dated November 4, 1986 we propose first to deal with this aspect.

26. We have already referred to the relevant provisions and found that in respect of the conditions of service of a Judge of a High Court, for which no express provision has been made in the Act or under the Rules framed thereunder, the rules for the time being applicable to a member of the Indian Administrative Service holding the rank of a Secretary to the Government of the State in which the principal seat of the High Court is situated apply. In respect, however, of the facilities for medical treatment and accommodation in hospitals, the All India Services (Medical Attendance) Rules, 1954 applied with effect from 26.1.1950, but after the amendment aforementioned in the case of Judges of the High Courts other than the Delhi High Court and the Punjab and Haryana High Court, the rules and provisions as applicable to a Cabinet Minister of the State Government in which the principal seat of the High Court is situated, have been made applicable and in the case of the Chief Justices of the Delhi High Court and the Punjab and Haryana High Court, the rules and provisions as applicable to a Cabinet Minister of the Union Government have been made applicable and to the Judges of these courts, the rules and provisions as applicable to a Union Deputy Minister have been made applicable. The amendment thus has clearly indicated that the Judges are required to be treated not on par with persons, who are governed by All India Service (Medical Attendance) Rules after 4.11.1986, but on par with the Cabinet Ministers of the Government of the State. The rule before amendment had already given to the Judges of the High Court benefits or facilities for medical treatment

and accommodation in hospitals under the provisions of the All India (Medical Attendance) Rules, 1954. In Tamil Nadu, however, under the Tamil Nadu Payment of Salaries Act, 1951 as regards the salary and other allowances of Ministers, Rules are framed, which say that a Minister, the Speaker, the Deputy Speaker, or the Parliamentary Secretary shall for himself and for the members of his family be entitled to free of charge accommodation in hospitals maintained by the State Government and also to medical treatment and attendance, on the same terms and conditions as are applicable to the highest category of servants employed under the Government of Tamil Nadu. The rule is silent about any treatment to the Minister, the Speaker or the Deputy Speaker or the Parliamentary Secretary for himself and the members of his family in any hospital other than the hospitals maintained by the State Government. But as to medical treatment and attendance. It has provided that they shall be given medical treatment and attendance on the same terms and conditions as are applicable to the highest category of servants employed under the Government of Tamil Nadu. It is conceded before us and it is not in doubt that the expression "highest category of servants employed under the Government of Tamil Nadu", has been understood by the respondents to mean cadre of officers, who are governed by the All India Service Medical Attendance Rules, 1954. It cannot be disputed as we have observed earlier that the State Legislature has got the competency to enact the law as to salaries and allowances of Ministers, the Speaker and the Deputy Speaker, Parliamentary Secretary, etc. The Parliament alone, however, is competent as we have already noticed, to create one or more All India Services including All India Judicial Service common to the Union and the States and make provisions by law as to the conditions of service of such persons. The Judges of the High Court as constitutional authorities stand apart by specific provisions in this behalf in the Constitution and the Parliament alone by or under a law is empowered to determine what allowances and other service conditions for them should be made. On a strict interpretation of these provisions, it is possible to hold that the Ministers, Speaker, etc., of the State Government, who are subjected to the Medical Attendance Rules framed under the Tamil Nadu Payment of Salaries Act, are not entitled to

the medical treatment and attendance on the same terms and conditions as are applicable to the members of the All India Services and they, that is to say, the Ministers, etc. are entitled only to the terms and conditions as are applicable to the services employed under the Government of the State of Tamil Nadu that is to say, the members of the highest category of a service of the State of Tamil Nadu. It will not be possible even by stretching the provisions as in the Constitution of India and the laws made by Parliament to equate a holder of a post in All India Service with that of a holder of a post in a State service except by a statute creating such equality and/or by such provisions which are intended to be made applicable to the members of All India Services as well as the members of the State Government Services. The Tamil Nadu Medical Attendance Rules are intended to apply to the persons, who are entitled to the facilities and the benefits under the All India Service (Medical Attendance) Rules as well only to the extent to which they are not inconsistent with the Rules thereunder. Since the Tamil Nadu Medical Attendance Rules are applicable to the Government Servants employed in the Government of Tamil Nadu that is to say, the wholetime Government servants belonging to Groups A and B, who appear to be the highest ranking Government Servants in the State and under the Tamil Nadu Legislative Assembly (Medical Attendance and Treatment) Rules, 1964 applicable to the Ministers, they have been given the same facilities as are given to the highest category of servants employed under the Government, they (Ministers and others) are governed by these Rules. When these Rules thus permitted only treatment in the Government Hospitals and accommodation in the Government Hospitals free of charge and the amendment, the sheet anchor of the defence that is G.O.Ms.No.1023, Health and Family Welfare Department, dated 17.6.1980 in Rule 10(c) of the Tamil Nadu Medical Attendance Rules restricted any allowance by way of reimbursement of the charges incurred for treatment undergone by a person in a private medical institution to the extent that would have been incurred, had the patient taken treatment in a Government Hospital excepting diet charges, no Minister, Speaker or any other person who is governed by the Tamil Nadu Medical Attendance Rules and the Tamil Nadu Legislative Assembly

(Medical Attendance and Treatment) Rules, 1964, could get anything beyond the limit prescribed under these Rules except by a violation thereof and by extending the eligibility of such persons under the All India Service (Medical Attendance) Rules, 1954. We have no hesitation in holding that in the case of Judges of this Court who are governed by their own service condition Rules, who notwithstanding the equation by the Amendment Act of 1986 for the purposes of the benefits and facilities of medical treatment with the Cabinet Ministers of the State for the reason that the State Legislature has equated a Minister, the Speaker, the Deputy Speaker or the Parliamentary Secretary and the members of his/her family for the accommodation in hospital and medical treatment and attendance with the highest category of servants employed under the Government of Tamil Nadu, can be subjected to the Rules that are applied to the servants employed under the Government of Tamil Nadu. Any attempt to do so shall be a violation of the guarantee under Art.221(2) of the Constitution of India. The framers of the Tamil Nadu Medical Attendance Rules, however, were aware that members of All India Service cannot be subjected to any such provision in these Rules if they are inconsistent with any rules in the All India Services (Medical Attendance) Rules, 1954. They, for the said reason, kept themselves pronounced in the statute itself that these Rules shall apply to persons who are entitled to medical attendance under the All India Services (Medical Attendance) Rules, 1954 only to the extent to which they are not inconsistent with these Rules. It is indeed pathetic, if not obnoxious how the respondents decided to enforce the rule in G.O.Ms.No.1023, Health and Family Welfare Department, dated 17.6.1980 in the case of a Honourable Judge of the High Court.

27. Learned Advocate General as well as learned Additional Government Pleader, have brought to our notice certain files relating to the medical reimbursement bills of Ministers of the State, All India Service Officers and the Hon'ble Judges of this Court. In the case of the latter two, who in our opinion, cannot be subjected to a rule, which is inconsistent with All India Services (Medical Attendance) Rules, 1954 (inconsistency we shall demonstrate a little later), reimbursement for treatment in private medical institutions have been confined to the rule in G.O.Ms.No.1023, Health

and Family Welfare Department, dated 17.6.1980. In the case of the former, that is to say, the Ministers of the State, who in our opinion, are subject to Tamil Nadu Medical Attendance Rules and, therefore, this G.O.Ms.No.1023, Health and Family Welfare Department, dated 17th June, 1980 has not been applied.

28. Learned Advocate General as well as Additional Government Pleader have not been able to bring to our notice even one medical reimbursement file of a Minister of the Government of the State in which the payment for treatment in a private hospital has been limited to the Rules in G.O.Ms.No.1023, Health and Family Welfare Department, dated 17.6.1980. The three files (vide File No. G.O.Rt.No.3141, Public (P.S.B.), dated 5.10.1990, G.O.Ms.No.539, P.S.B., dated 7.5.1992, 1384, dated 4.12.1992 and G.O. (D) 76, P.S.B., dated 22.3.1993 dealing with the medical reimbursement for treatment in a private hospital of the Ministers of the State show that in one case for a bill under Rules 2 and 6 of the Tamil Nadu Legislative Assembly (Medical Attendance and Treatment) Rules, 1964 for a sum of Rs.46,841 for treatment in a private hospital at Madras in August and September, 1990, Rule 14(ii) of the All India Services (Medical Attendance) Rules, 1954 was invoked, but not the Rule in G.O.Ms.No.1023, Health and Family Welfare Department, dated 17.6.1980 and the bill was settled in full by the State Government.

29. Other two bills are cases where it is difficult to find any Government order of sanctioning reimbursement of the bills of the Minister's treatment and accommodation in a private hospital. They are said to have claimed advances for treatment abroad and as demanded by them, money has been paid and it is said, on return and after the treatment as claimed by them, they have reimbursed/refunded the excess taken by them in advance. No one seems to have been ever aware either of the requirements of the Tamil Nadu Medical Attendance Rules or even the requirements of All India Services (Medical Attendance) Rules. There are no orders anywhere in any of these two files to show that at any level of the Government, there has ever been any application of any of the Rules including the Rule as in G.O.Ms.No.1023, Health and Family Welfare Department, dated 17.6.1980. We have known that a person, who makes the law is obliged to abide by it and the famous saying is

that the law is above one who makes it. The Tamil Nadu Legislature has made the Tamil Nadu Payment of Salaries Act and the Government of Tamil Nadu, obviously representing the Council of Ministers, has framed the Tamil Nadu Legislative Assembly (Medical Attendance and Treatment) Rules. They have put the Ministers, the Speaker, the Deputy Speaker and the Parliamentary Secretary on the same terms and conditions as are applicable to the highest category of servants employed in the Government of Tamil Nadu. They have framed the Tamil Nadu Medical Attendance Rules. They have amended the said Rules by G.O.Ms.No.1023, Health and Family Welfare Department, dated 17.6.1980. But they have always been, it seems, above the law, which they themselves have framed in this behalf.

30. We postponed the demonstration of the inconsistency of the provisions in the Tamil Nadu Medical Attendance Rules and in particular in G.O.Ms.No.1023, Health and Family Welfare Department, dated 17.6.1980 which we may now take up. The All India Services (Medical Attendance) Rules, 1954 applied to the Judges of the High Courts before the amendment in the High Court Judges (Conditions of Service) Rules in 1986 and which we are inclined to assume, will continue to apply for the reason that the rules framed under the Tamil Nadu Payment of Salaries Act, 1951 for the medical attendance bills of the Ministers and others, if applied to them, appear to deny what they must legitimately get in terms of the said Rules. Application of the rules that reduce the allowances already granted to the Judges is not permissible under Art.221(2) of the Constitution of India. These Rules framed by the State Legislature are to be applied to members of the services serving in connection with the affairs of the State. They cannot, for the reason of the constitution of the All India Services and the service conditions determined by the All India Services Act, 1951 apply to the members of All India Services. The rules that are framed by the Central Government under the said Act prescribes for the appointment of the Authorised Medical Attendant, who the Rules stipulate has to be a principal Medical Officer appointed by the Government to attend their medical needs in the station or district where they are working. A Medical Officer, who in rank is equal or immediately junior to such principal Medical Officer and who

is attached to any hospital or dispensary in the station where such principal Medical Officer is posted, is also made competent to attend to their medical needs, if there is no principal Medical Officer appointed by the Government for the station at which or the district in which the member of the service is posted. There is a proviso which stipulates that the principal Medical Officer shall be the officer appointed by the Government as the Authorised Medical Attendant. The Authorised Medical Attendant under these Rules is competent to take decision whether the case of a patient is of such a serious or special nature as to require medical attendance by some person other than himself. In such a situation, he is required to obtain beforehand, the approval of the Chief Administrative Medical Officer of the State, except the case where the delay involved would entail danger to the health of the patient. In that case, with the prior approval of the Chief Administrative Officer or in the case of an emergency, the Authorised Medical Attendant without the approval of the Chief Administrative Officer may send the patient to the nearest specialist or any other medical officer by whom, in his opinion, medical attendance is required for the patient or if the patient is too ill to travel, summon such specialist or other medical officer to attend upon the patient. Where a patient is sent to a specialist or other medical officer, he shall, on production of a certificate in writing by the Authorised Medical Attendant in this behalf, be entitled to travelling allowance for the journey to and from the headquarters of the specialist or other medical officer. These Rules, have undergone several interpretations and clarifications by the Central Government (the Rules themselves stipulate, the power to interpret in the Central Government). The Central Government, as far back as 17th July, 1964, clarified that if the Authorised Medical Attendant is of the opinion that suitable facilities for hospital are not available, or the condition of the patient is such that he cannot be shifted to the hospital without risk of deterioration in his health, he may give treatment to the member of the Service or the member of his family at his residence. In cases where illness is not severe or the disease is of a chronic nature, the patient should consult the Authorised Medical Attendant, either at his consulting room, if it has been so maintained or in the hospital as an out-door patient, and further

that ordinarily a member of the service is expected to receive treatment from the Authorised Medical Attendant, but in exceptional circumstances, reimbursement of the cost of medical treatment incurred on the advice of the private practitioner can be reimbursed by the State Government, if the State Government are satisfied of the existence of special circumstances in which treatment could not be had through the Authorised Medical Attendant and the refusal to reimbursement of such cost is likely to cause undue hardship to the officer. This power is available in Rule 14, which says,

- "Nothing in these rules shall be deemed to—
- (i) entitle a member of the service to reimbursement of any cost incurred in respect of medical services obtained by him, or to travelling allowance for any journey performed by him otherwise than as expressly provided in these rules, or
 - (i-a) entitle a member of the service to reimbursement of any cost incurred in respect of:
 - (a) such preparations which are not medicines, but are primarily used as food, tonic, toilet or disinfectant, and
 - (b) such expensive drugs, tonics, laxatives and other elegant and proprietary preparations (for which drugs or equal therapeutic value are available) as may be notified by the Central Government;
 - (ii) prevent the Government from granting to a member of the service, or to a member of the family of a member of the service any concession relating to medical treatment or attendance or travelling allowance for any journey performed by him which is not authorised by these rules."

The above rule with the clarification alone will guide the Government in deciding whether the claim of a member of any All India Services should be granted. It is trite law that no person vested with a discretion under a law can act at his whim and use his fiat in deciding, who should be benefited by the exercise of discretion and who should not be. The clarification has put forward two requirements. The two requirements are: (1) satisfaction that the treatment could not be had through the Authorised Medical Attendant and (2) refusal to reimbursement is likely to cause undue hardship to the officer.

31. There is no limit prescribed for the amount

upto which the controlling officer can allow reimbursement, but in a case falling under Rule 14(ii) above, sanction of the Government will be necessary. To clarify, however, that the 'Government' for the purpose of the rule, should not always be the 'Government of India', excepting cases where any clarification is required, the Government of India has said in a letter dated 10th August, 1964 (G.I. MHA, letter No.7/10/63-AIS (III) (G.I.MHA, letter No.7/2/65-AIS(III), dated 20th April, 1965) that the State Government are the competent authority to regulate such procedural matters and the State Government are themselves competent to grant to an All India Service Officer serving in connection with the affairs of the State any concession relating to medical attendance or treatment which is not authorised under the Rules.

32. We have seen thus that the Rules put no limit upon the discretion of the competent authority to regulate and prescribe no procedure how such reimbursement should be claimed and what should be found satisfied before the reimbursement is ordered in cases not covered by the Rules. We have also seen that a role is envisaged under the Rules for the Authorised Medical Attendant and the Government of the State, is competent to notify who the Authorised Medical Attendant will be for any station or district.

33. In the proviso to the definition of an "authorised medical attendant", the rule, however, has called, in the absence of no principal Medical Officer appointed by the Government for a particular station, the principal Medical Officer appointed for the district in which the station or district is situated, as the Authorised Medical Attendant. These rules, however, do not recognise the role of any other authority in the Government except the authority that is envisaged for the officers superior in rank to the Authorised Medical Attendant. The Government of the State is given a role in sanctioning or authorising the reimbursement of the expenses incurred for the accommodation, treatment and travelling when found necessary as required by the ailment for which treatment is sought. A vital role is conceded, however, for the State Government to play in granting to a person to whom the Rules apply, any concession relating to medical treatment or attendance or travelling allowance. We have gone in some details into the Rules only to find for ourselves whether the legislative intention in

amending in particular the rule as regards reimbursement of medical charges was/is to give to the Hon'ble Judges of this Court something more than the All India Services (Medical Attendance) Rules, 1954, had/has given. We have noticed that before the amendment, the Hon'ble Judges of this Court enjoyed all facilities for medical treatment and accommodation in hospital in accordance with the All India Services (Medical Attendance) Rules, 1954. This equation, the framer of the Rules, intended to change and thus came G.S.R.No.1175(E), dated November 4, 1986 saying,

"in respect of facilities for medical treatment and accommodation in hospitals - in the case of Judges of the High Courts other than Delhi and Punjab & Haryana High Courts, the rules and provisions as applicable to a Cabinet Minister of the State Government in which the principal seat of the High Court is situated shall apply."

We have also seen that a set of rules have been in existence in Tamil Nadu, which were/are framed under the Tamil Nadu Payment of Salaries Act (XX of 1951), which contain a prescription that the Ministers and members of their family would/will be entitled to accommodation free of charge in hospitals maintained by the State Government and also to medical treatment and attendance on the same terms and conditions as are applicable to the highest category of servants employed under the Government of Tamil Nadu. It obviously cannot be conceived that the notification dated 4.11.1986 amending the High Court Judges (Conditions of Service) Rules, intended in any manner to bring down the scale of the medical facilities which the Hon'ble Judges of this Court were already enjoying. The amendment had/has got the obvious intendment of improving the facilities for medical treatment and accommodation in hospital and to give to the Hon'ble Judges of the High Court something better and more than the provisions of the All India Services (Medical Attendance) Rules, 1954 had/has given to them. The rule makers could obviously not entertain any idea of reducing the facilities for medical treatment and accommodation in hospital to the Judges for, any such thing, we have already found, would/will be in the teeth of Art.221(1) of the Constitution of India.

34. There is a significant use of the word 'provision' in the expression "the rules and provisions"

as applicable to a Cabinet Minister of the State Government in the notification G.S.R.1175(E), dated 4.11.1986. The Oxford Dictionary defines the word 'provision' to mean,

"providing; provided amount of something; supply of good, eatables & drinkables; legal or formal statement providing for something, clause of this, appointment to benefice not yet vacant; ordinances for checking king's misrule drawn up by barons under Simon de Montfort in 1258; to supply with."

If the intention was/is to give to the Judges of the High Court only that much which is prescribed by the rules framed by the State Legislature for Cabinet Ministers, the word "provisions" was/is not necessary. We have been assisted by the learned Advocate General and the learned Additional Government Pleader, in order to get full information as to whether in the case of Ministers, the rules framed under Act XX of 1951 were ever applied. When questions how reimbursements were made to the Cabinet Ministers came up for discussion in the course of the hearing of the case it is found that at no time these Rules were ever extended to them. The learned Additional Government Pleader has made a reference to a rule in the Tamil Nadu Financial Code, for making grants and concessions at the Government's discretion and contended that the Government have used only this power in the case of the Ministers. We need not pursue our enquiry into this aspect any further for, it is almost conceded that the Cabinet Ministers have enjoyed everything and have always been treated above the rules which they have framed for themselves. If the executive has not subjected the Cabinet Ministers to the inhibitions under the Rules, how can they put the Judges of the High Court under such rules? The High Court Judges (Conditions of Service) Rules after amendment have extended to the High Court Judges all facilities for medical treatment and accommodation in hospital which are given to the Cabinet Ministers. It is hardly pertinent for the Government to subject the medical reimbursement bills of the Hon'ble Judges of this Court to such set of rules, which they could never apply to the Ministers.

35. Had the case of the petitioner been an isolated or sole example of such treatment by the executive to the medical reimbursement bill of a High Court Judge, we would have chosen to close the matter on the basis of the information furnished to us by

the learned Additional Government Pleader that since the hearing of the instant petition, the petitioner's bills have been sanctioned in full. It has been brought to our notice in the course of the hearing by the learned Advocate General and learned Additional Government Pleader that medical reimbursement bills of several other Hon'ble Judges have been subjected to the same kind of treatment. There may be/are outstanding reimbursements for more than years where perhaps even implementation of the Rules in the case of the bills, would have been found unnecessary. Some of them, more than a year old, have been pending (sanctioned only after the hearing of the instant case is concluded). There are still, however, cases where special sanctions under Rule 14(2) of the All India Services (Medical Attendance) Rules, 1954, have been restricted under G.O.Ms.No.1023, Health and Family Welfare Department, dated 17.6.1980. In such cases, there is obviously a violation of the constitutional mandate and denial of a right recognised in every Judge of this Court by the High Court Judges (Conditions of Service) Act, 1954 as amended from time to time and the Rules framed thereunder.

36. We, however, record with satisfaction that the Government of the State has chosen, it has been so represented before us by the learned Advocate General and by the learned Additional Government Pleader, to rise above the bureaucratic inhibition and the political/popular Government of the day, is willing to extend everything that is necessary and to which the Judges of the Court are entitled, by dint of their constitutional status and by prescriptions under the High Court Judges (Conditions of Service) Act, 1954, as amended from time to time and the Rules framed thereunder. We are conscious at the same time, how so eminent a Judge may be, he should keep his requirements in limits and should expect only such perquisites which are essential and which are granted to him in accordance with law. If the Judges are not given what is necessary and due to them, there is a chance of their compromising with their independence and surrendering the very basis of the independent existence of a judicial system in the country. If they are given more than necessary and due and accept they obviously fall a prey to temptation. A correct balance can be achieved by the executive Government of the State by recognising all such necessary requirements and

making available to the Judges without waiting for demands from them and the Judges accepting any perquisite only after being satisfied that it is necessary and that it is due to them.

37. We have indicated earlier in the course of the hearing of the case about matters how Judges of this Court are treated for the purpose of security, how they have been provided the Official accommodation and furnishings, how they have been provided with staff cars and how their cars are maintained, how the Government fix their accommodation when they go in circuit work to the districts and such other stations of the State, and how many provisions which are overdue for a proper and effective functioning of the Court are neglected and how in the present day system, the court is functioning with constraints as against the shortage of staff, type-writers, standard stationery including judgment paper and how a promise for installation of a fax machine has remained unfulfilled, etc. We have primarily concerned ourselves in the instant case with the case in hand and heard learned counsel for the parties but in course of the hearing also informed about other matters. We think, it is not necessary to deal in any detail with every such item of discussion in the course of the bearing of the case, but to some such items, which need immediate attention and about which as we have already observed earlier, there is a complete consensus, we may advert to.

38. There has been a meeting held at the State Guest House, Chepauk on 22.4.1991 during the period when the State was ruled by the Governor with the aid and advice of the Advisors appointed for the said purpose. The then Hon'ble the Chief Justice, the two Advisors to the Governor, the Principal Secretary (Home), the Secretary to Government, Public, the Secretary to Government, P.W.D., the Registrar of the Court and the Chief Engineer (Buildings), P.W.D., participated in the said meeting. There is a mention therein as item 3 on furnishing of the residences of the Judges that the same would be decided after the elected Government assumed office. It seems, nothing moved in the Government of the State, but the High Court Judges (Conditions of Service) Rules were subjected to an amendment, repealing Rule 2-B, which has provided that the value of free furnishing including electrical appliances provided free of rent in an official residence allotted under Sec.22-A of the Act, in the case of

the Chief Justice, would be Rupees five thousand more than the scale provided to a Cabinet Minister of the State Government and to a Judge of a High Court at the scale as provided to the Cabinet Minister, was amended and furnishing for the Chief Justice was fixed at Rs.1,00,000 only and for the other Judges, Rs.70,000 only. It is known, however, to all concerned that the Public Works Department is yet to provide to many of the Hon'ble Judges refrigerators, geysers and like electric appliances in many houses occupied by them. There has been, it means, some demand for the sanction of the additional cars and as the minutes of this meeting reveal, in supersession of all earlier orders, the Government sanctioned the following number of cars.

"Chief Justice - One A/c. Contessa Car.

- One A/
c. Ambassador Car.

Judges - One non A/c. Ambassador Car each.

Registrar - One non A/c. Ambassador Car.

Protocol - One non A/c. Ambassador Car.

- Three spare cars for
use of Judges and
visiting V.I.Ps.

(not to be used
as staff car)."

At this meeting, it was also resolved that whenever Government bungalows were not available for allotment to Judges as official residence, private bungalows could be taken on rent and placed at the disposal of the Judges and since the Act and the Rules did not stipulate any ceiling on rent for private bungalows, the resolution said, "however in the interest of economy, the present ceiling of Rs.3,000 will be increased to Rs.5,000 per mensem with effect from 1.4.1991. The Chief Engineer, P.W.D., will fix suitable private bungalows for the Judges upto this level. If the rent is to be higher than the ceiling limit, prior Government's sanction will be necessary. In case private bungalow owners demand advance, the Chief Engineer may be authorised to make such payments subject to a maximum of six months rent."

39. The amendment to the High Court Judges (Conditions of Service) Act introduced provisions as to facility of rent free house and conveyance facilities saving,

"Every Judge shall be entitled to a staff car and one hundred and fifty litres of petrol every month or the actual consumption of petrol per month whichever is less."

The type of the car, the period for which a car should be used and thereafter changed, the fittings and furnishings provided in such cars, etc., are not stated in the Act or the Rules. There has, however, been a general consensus that the Judges cars should be fitted with such items as are not in the realm of luxury but are necessary for providing much needed comforts and necessary security and seclusion while travelling. It is one thing to say that Judges' cars have not been brought to that level and another when by a Government notification, it was conceded vide, G.O.Ms.No.742, Public, dated 3.5.1988 that the Judges' cars will be provided with the same facilities as are provided to the Cabinet Ministers of the State Government, and by a subsequent notification, certain extra fittings were made available to the Cabinet Ministers only, and the Cabinet Ministers' cars were/are put to fittings of such lights and glasses as the Government notification described were/are necessary for security reasons. The Government has also issued another notification dated 16.11.1990, and introduced a prohibition that except those enumerated in the notification, others will not be entitled to use revolving red light in their vehicles. This notification has included in the list of such privileged persons, all the Ministers, some policemen and at least two Secretaries. Judges of the High Court are not included in it except the Chief Justice. The Government has reiterated the same once again on 5.5.1992, but has made a mention this time, that

"The proposal for the grant of permission to use revolving red light in the vehicles of the following officials is under the consideration of the Government.

(1) District Collector.

(2) Hon'ble Judges of the High Court.

(3) Certain Police Officers."

How Government have assumed this power and why are different questions, which questions we shall examine separately. How the Government, however, value the Judges of this Court can be inferred from the equation, they have to stand for their turn with the District Collectors. The Motor Vehicles Act, 1988, which holds the field and under which the Motor Vehicles Rules, 1989 have

been framed are the only statutory provisions which are known to give competence or authority for various action as respects the motor vehicles. The State Government's competence to make rules under the said Act is confined to matters covered by the Central Rules. Rule 108 of the Central rules reads as follows:

"Use of red or white lights: No motor vehicle shall show a red light to the front or light other than red to the rear;

Provided that the provision of this rule shall not apply to-

- (i) the internal lighting of the vehicle, or
- (ii) the amber light, if displayed by any direction indicator or top light;
- (iii) a vehicle carrying high dignitaries as specified by the Central Government or the State Government from time to time or a vehicle escorting such vehicle;
- (iv) the blinker type of red light with purple glass fitted to an ambulance van used for conveying patients; or
- (v) to a vehicle having a lamp fitted with an electrical bulb, if the power of the bulb does not exceed seven watts and the lamp is fitted with frosted glass or any other material which has the effect of diffusing the light."

The prohibition is imposed by the rule aforementioned upon the use of red or white lights. The Central Government or the State Government, can specify in exercise of the power under clause 3 of the proviso aforequoted vehicles carrying high dignitaries so that the prohibition is not applied to such vehicles. We are not required to make an independent study of this aspect of the law as a Bench of the Allahabad High Court in a recent judgment in *Red Light on the Cars of the Hon'ble Judges of the High Court v. State*, A.I.R. 1993 All. 211, has gone into this question and has said as follows:

"Undoubtedly there could be two categories of public functionaries-

- (a) one those appointed under the Constitution on the post office, contained in the Constitution and function thereunder.
- (b) other, those appointed under some statute of the rules, regulations of the bye laws, as the case may be framed thereunder or the rules framed under the Constitution and function on the post created thereunder and are specified under Rule 108.

The question regarding coverage of the Hon'ble Judge under the category (a) (supra) is not *res integra*.

Who are the dignitaries or High dignitaries is not defined under the 1988 Act or the 1989 Rules or under the 1939 Act or the 1940 Rules and as such dictionaries may be resorted to discover what these might be.....

Thus a judge of a High Court who is a person appointed under Art.217 of the Constitution by the President of India functions under the Constitution is a person of distinction, holding a high office of dignity and honour and the word 'Hon'ble' is always prefixed before his name.....

The learned Chief Standing Counsel fairly did not advert to any other interpretation. It remained undisputed that the Hon'ble Judges of the High Court by virtue of their constitutional status are high dignitaries. According to him also no such interpretation to Rule 108 of 1989 Rules which lowers down the status and dignity of the constitutional appointees and functionaries including the Hon'ble Judges of the High Court can be given."

The court found invalid any attempt on the part of the executive Government of the State or the police to interfere with the use of the revolving red light in the vehicle of the Hon'ble Judges and pointed out,

"So far as the position of Hon'ble Judges of the High Court, the constitutional appointees and functionaries, is concerned, there would be no contrary effect under Rule 108 of the 1989 Rule regarding the use of red light on the top of the vehicles by them being High dignitary requiring no specification, but of course the other persons, who are not the constitutional appointees and functionaries would not be entitled to use the red light at the top of the vehicles used by them, unless under 3rd clause of proviso to Rule 108 of the 1989 Rule, they are specified."

40. What appears to be, however, an insult to the institution of the Judges by the Executive is a correspondent on the subject whether the staff cars allotted to the Judges of this Court should be fitted with halogen head lamps as are provided to the cars of all the Cabinet Ministers for better illumination, when Ministers are on tour and also for security measures. The Government's reply is

as terse as one may find from one, who treats the institution with contempt. The Government's letter dated 5.8.1993 has been forwarded by the Superintendent, Motor Vehicles Maintenance Department. The Government's letter reads as follows:

"I am directed to invite the attention to the reference cited and to state that the Registrar, High Court, has proposed that as in the case of Ministers, the Cars of the Judges may also be fitted with halogen head lamps. In this connection, I am to state that the Ministers have been allowed this facility since they undertake intensive tour. Further on security grounds also, this has been provided to them. As such compelling reasons do not extend in the case of Judges. I am therefore to state that there is no reason to accept the proposal."

41. It is not known who in the executive hierarchy has acted in the name of the Government and has directed for the above communication, who has taken the decision and when that Judges are not required to undertake intensive tour and who has taken the decisions that Judges of this Court do not need such halogen head lamps and other fittings for the reason of security? Without being self-placating, we can say with confidence that Judges have more reasons to undertake intensive tours than the Ministers except the latter's tours for political, social or personal activities, which it is common knowledge, they take more often than the official tours. Judges do not go on tours for political or social orders. They do go on tours and mostly official tours for inspection and other purposes, for which they are not required to take orders from any other authority and details about which no one can ask and details of which are alone relevant and form part of the administrative records of the High Court.

42. As to security, we will have a word how the executive Government and the police in the State of Tamil Nadu have stretched it beyond all limits. We can say with confidence, this time not using our words but what is said by the Supreme Court as to the reasons of security of the Judges of the subordinate Courts in *All India Judges' Association and others v. Union of India and others*, (1993)4 J.T. 618, as under:

"It would be appropriate to remind all concerned of the distinct nature of the duties that a judge is called upon to discharge, the society's expectations of the conduct of the

judge, the life-style of the judge, the occupational hazards to which he is exposed and of the need to keep judges above their essential wants. We can do better than to quote in this behalf, relevant excerpts from David Pannick's book "Judges", after omitting those which have already been referred to earlier. Although the observations made there are in the context of English judges, they are equally, if not more, applicable to the judges in this country; "The reasons which judges must give to justify their decisions can be gnawed over at their leisure by the teams of lawyers trained and generously paid to extract for the purpose of an appeal, every morsel of error.....The judge has 'the burden of resolving, day after day and week after week, a long succession of issues, each one of which occupies the professor-critic for months and even years of specialized study.'"

"The English judge has no clerks or assistants to research or write his judgments. The barristers who argue the case before him will 'vary much in their ability'. Sometimes they help but often they may be a hindrance to the just determination of the issues...."

The judge has burdensome responsibilities to discharge. He has power over the lives and livelihood of all those litigants who enter his court...His decisions may well affect the interests of individuals and groups who are not present or represented in court. If he is not careful, the judge may precipitate a civil war...or he may accelerate a revolution.. He may accidentally cause a peaceful but fundamental change in the political complexion of the country."

"Judges today face tribulations, as well as trials, not contemplated by their predecessors.....Parliament has recognised the pressures of the job by providing that before the Lord Chancellor recommends anyone to the Queen for appointment to the Circuit Bench, the Lord Chancellor 'shall take steps to satisfy himself that the person's health is satisfactory'.... This seems essential in the light of the reminiscences of Lord Roskill as to the mental strain which the job can impose... Lord Roskill added that, in his experience, the work load is intolerable: seven days a week 14 hours a day....."

"Only in England could the Vocation of the

judge be described as 'something like a priesthood' or 'analogous to Royal Family', requiring practitioners to 'seclude themselves' in various ways...."

"In England we expect the judge to adopt a respectable lifestyle, free from any hint of the unusual, let alone the deviant."

"In 1950 a Member of Parliament....recommended an even greater degree of judicial isolation.....So effective is the isolation of our judiciary that the personalities and characteristics of our judges are unknown to laymen..."

"The English judge ensures in a quiet but effective manner that his pay accords with his status. He avoids the public display of militancy. Judge Rank Coffin of the US Court of Appeals complained in 1985 about the inadequacy of 'compensation' for judges. In the previous few years, he lamented, judicial salaries had become so insufficient that only the mediocre or the wealthy would henceforth be willing to take judicial appointments. Perhaps disappointing pay levels help to explain why a clinical psychologist was helping judges in Massachusetts to cope with stress....He also provided counselling to enable the retired judge 'to maintain self-esteem'...."

"He (Judge) is a symbol of that strange mixture of reality and illusion, democracy and privilege, humbug and decency, the subtle network of compromises, by which the nation keeps itself in its familiar shape."

"The qualities desired of a judge can be simply stated: 'that if he be a good one and that he be thought to be so'. Such credentials are not easily acquired. The judge needs to have 'the strength to put an end to injustice' and 'the faculties that are demanded of the historian and the philosopher and the prophet.'"

"It is unlikely that men and women will ever cease to wound, cheat and damage each other. There will always be a need for judges to resolve their disputes in an orderly manner. As people grow ever less willing to accept unreservedly the demands of authority, the judiciary like other public institutions, will be subjected to a growing amount of critical analysis. The way in which 'Judge & Co.' is run a matter of public interest and will increasingly become a matter of public debate."

43. The Supreme Court has also reminded us what the Law Commission in its 14th report had said in connection with the work of the judicial officers--

"The great responsibility of the work which a judicial officer is called upon to discharge needs no emphasis.... judicial integrity is of the greatest importance and to expect persons discharging responsible functions to live on low salaries not commensurate with their office and responsibility is unrealistic and ignores present day living conditions. Elsewhere, we have also dealt with the difficulties which judicial officers, as a class, have to face in the matter of securing residential accommodation and how, in some parts of the country, a very high percentage of their salary has to be spent towards house rent alone. Considering these facts and circumstances, we are of the view that the scales of pay should be substantially higher than it is at present in order to enable an officer to maintain a proper standard of living and avoid obligations which may be embarrassing to him in the discharge of his duties...."

44. In a nutshell, it will be no exaggeration if it is said that the High Court Judges are high dignitaries, who by virtue of their office and the nature of work that is to say dispensation of justice, exercise a regal or sovereign function; their work forms part of a constitutional duty of the State and they discharge inalienable functions of the constitutional Government, which no one else is entitled to perform. They are to be faithful and true to the duties of their office and to function without fear or favour, affection or ill-will and act only to uphold the Constitution and the laws framed thereunder. They have to be aloof to some extent from others. These and other acts which Judges perform make them the object of regard and respect of others. Their functions as demanded by their office make them important for the society. No one in the Government's bureaucratic set-up can ignore their position as such. How and why then some one in the Government of the State thought it proper to say that the staff cars of the Judges will not be fitted with such lights and glasses which are needed for security reasons and they should not be by dint of their position and status recognised as such category of people, who should be given security and protection from such quarter who may desire to interfere with their independent functioning as Judges? We are

constrained to observe, even though we do not desire to relax the refrains which the Judges deciding a case must follow, the decision of the executive Government that they are yet to take a decision whether the staff cars used by the Hon'ble Judges of this Court should be fitted with red revolving lights, and the decision taken by them that the Judges' cars should not be fitted with halogen lamp and such other lights and glasses, which are provided to the cars of the Ministers of the State Government for security reasons, are wholly arbitrary beyond their competence and most uncalled for.

45. The communication in the letter dated 2.9.1993 referred to above in reply to this Court's letter dated 26.8.1992, however, has ignored altogether the specific informations conveyed to the Director, Motor Vehicles (Maintenance) Department that (1) there are reports that some of the original parts of the Hon'ble Judges' cars are removed in the workshop when sent for repair; (2) the drivers of the staff cars of the Hon'ble Judges are not allowed to see what is being done to the cars in the workshop; (3) works Managers of the workshop are used to give evasive replies and make no report to the High Court as to what fittings are provided and what not and why?

46. How inconvenient the Judges of the Court have been feeling about the state of disrepair of the cars in the workshop and how, for the Registry of the Court, it has become almost impossible to secure maintenance of the staff cars allotted to the Hon'ble Judges of this Court, however, are reflected in the various resolutions passed by the Judges of this Court at the Full Court Meetings and the direct communication to the Government on the subject that the court will prefer nominating a workshop and getting staff cars repaired at such workshop than handing over cars for repairs to the Government workshop. The court's proposal, in this behalf, it seems, has received resistance at the instance of the Director, Motor Vehicles Maintenance Department, who has in a communication to the Government said,

"Government have fixed the ceiling on expenditure according to age of the vehicle. If the vehicle owning officer is permitted to entrust the work without referring the M.V.M.D., then the vehicle owning officer will indiscriminately spend on the vehicle without analysing the need, justification of works proposed. Also the

reasonableness of the rates offered could not be arrived by them as they may not be aware of the technical knowledge of the proposed job and this will result in more expenditure leading to excess expenditure than the ceiling.

As already vehicle owning officers have been given enough powers (vide G.O.Ms.No.2503, Tpt., dated 18.9.1991) for attending any immediate minor nature of repairs the existing *status quo* may be continued."

The Government have sought the opinion of the court on the objections to the above proposal by the Director, Motor Vehicles Maintenance Department.

47. There can be no objection to keep the expenditure on maintenance of the staff cars at the minimum level. There can also be no objection to the Directorate performing necessary repairs. There can be no objection to the executive Government of the State taking the entire responsibility of maintaining in proper order and of the standard the cars used by the Judges of this Court. If they do what they are expected to do, no one can object. It is only the experience of undoing, instead of doing by the alleged removal of some original parts of the court's vehicles at the workshop, low standard of repairs and almost leaving the vehicles un/disrepaired and in cases where the repair work should have been completed within a period of hours, detention/retention of the vehicle in the workshop for days and months, that the Judges at a meeting thought they should intervene and see that at least in the matter of maintenance of the cars used by them, they are not made to suffer.

48. Along with the staff cars provided to the Hon'ble Judges of this Court, is the provision for 150 litres of petrol. The Government's decision reflected in minutes of the meeting dated 28.2.1992 aforementioned, has acknowledged two A/c.cars allotted to the Hon'ble the Chief Justice, one non A/c.Ambassador car to each Hon'ble Judge, one non A/c.Ambassador car to the Registrar, one non A/c. Ambassador car to the Protocol and three non A/c. Ambassador cars for use of Judges and visiting V.I.Ps. - called as spare cars and has thus complied with the requirements of the 1986 amendment to the Act, which has given to the Judges including the Chief Justice staff car with 150 litres of petrol per month. The Government has given to the Registrar of the court one car and three spare cars for use of Judges and visiting V.I.Ps.,

obviously, recognising the Registrar's status as an officer of the court and extending accordingly to him the same facilities as are given to the Judges of this Court. The three spare cars which are for use of Judges and visiting V.I.Ps. obviously cannot run without petrol and should be maintained as the cars of the Hon'ble Judges. These additional cars are to be used as spares when needed by the Judges for extra work and for the visiting V.I.Ps., for which purpose 150 litres of petrol per month may be the normal consumption. How and in what manner these spare cars are being used, however, is a matter to be internally resolved by the Court.

49. A Full Court meeting of the Court has resolved to urge to the Government that instead of the present system of the petrol provided at the Government petrol station, amount equivalent to the value of petrol subject to a maximum of 150 litres (on the certificate of the consumption of petrol under the authority of the Hon'ble Judges), be paid. The Judges of the court have done so for the obvious reason of serious inconvenience in filling of the car tanks at the petrol bunk of the State Government in the Secretariat even during times when the Judges are either not in the City or living at a long distance from the Secretariat. The Government have the obligation to provide a maximum of 150 litres of petrol, any more or excess requirement of the Judge is no responsibility of the Government. The Government by accepting the above, will save the Judges from a regular inconvenience.

50. The minutes dated 22.4.1991 we have already noticed, record that where Government bungalows are not made available for allotment to the Judges of this Court, private bungalows will be taken on rent and allotted to them. The Judges who are living in their own houses are receiving the standard House Rent Allowance of Rs.2,500. Some of the Judges of the court are not given any official residence and they are also not living in their own houses. In their case, the Government have got to provide a Government accommodation free of rent and such Government accommodation can be had only by conversion of private houses in their occupation as Government accommodation. The Judges in such cases are entitled to ask the Government to pay to their landlord the amount determined in terms of the resolution at the meeting dated 22.4.1991 and there is no reason why the Government should not

honour its own commitment. Since we think the assurance at the Bar on behalf of the respondents that there will not be unreasonable delay in these matters is enough, we do not say more on it.

51. The above are items which appear to us of immediate concern and then of course if the issue of security provided to the Judges about which some specific observations are necessary. We do say and reiterate that all citizens moving on the roads of the city of Madras and on highways beyond the city limits are all to observe the rules of the road and Ministers and Judges and/or any other person are no exception. There may, however, be reasons of security and in such cases, road signals may stand altered and the persons so earmarked for security may be given a danger free passage. This, however, will require not only the identification of the person in danger and the need of the security, but also from whom he or she has any threat or danger. It is not understandable, who in the Government and in the police hierarchy of the State of Tamil Nadu, has found that movement of the Judges in their cars, while any such VVIP/VIP receiving security is moving, will also be a danger to the security of such person. We have already noticed and we reiterate that Judges of this Court by dint of their position and regal and sovereign authorities stand as a class in themselves and not belong to all such categories of people and they, for that reason, themselves are entitled to all needed and necessary security. The experiences of the Judges of this Court, which are not denied and disputed are many which cause concern; they have on many occasions, been stopped at traffic signals for the reason of the passage of some VVIP/VIP convoy and/or diverted to other routes. When we emphasize the need of the security to the Judges, we also emphasize that as a rule and in keeping with the status of the Judges of this Court, they cannot be equated with such unidentifiable dangerous persons in a crowd, who should be kept away from the convoy of the VVIP/VIP. The security requirements of the Judges are already placed in several communications addressed to the appropriate quarters in the Government. It is not denied that the Judges of this Court have not been given adequate security.

52. There are various areas of the functioning of the Court in which the executive has not shown its due concern, such as the provisions of a fax machine, new electronic type-writers,

computerisation of the records, etc., and several other items such as increase in the number of the subordinate staff like bailiffs in the office of the Deputy Sheriff, Personal Assistants to the Additional Registrars, Steno-typists to the Deputy Registrars/Assistant Registrars and Private Secretaries to the Hon'ble Judges, etc. There is a pressing need to ensure accommodation to the Hon'ble Judges on their visits to stations other than the headquarters. While, in respect of what has been specifically dealt with by us, we are inclined to issue specific directions for such other matters which are not specifically covered by our discussions in the judgment and in respect of which no specific directions are issued by us, we think, it will be appropriate that immediate steps are taken by the second respondent/Registrar of this Court to acquaint the Hon'ble the Chief Justice, with the desire of the court, that a meeting should be convened at the behest of the court, in which, on behalf of the court, besides the Hon'ble the Chief Justice, two seniormost Hon'ble Judges and any other Hon'ble Judge or Judges nominated by the Hon'ble the Chief Justice participate and the Government is represented by the Chief Secretary, the Secretary to Government, Home (Police), the Secretary to Government P.W.D. and the Secretary to Government, Public. Information of such meeting should also be given to the Chief Minister of the State, who may nominate anyone of her Ministers to participate at that meeting. The Registrar of the High Court may act as a convenor of the meeting. The meetings should take up all matters and decide in one session or more than one, but expeditiously as determined by the Hon'ble the Chief Justice.

53. Having considered the case thus in all such aspects in which learned counsel for the parties have addressed us and looked into the materials placed before us by the Registry of the Court as well as the concerned Government Departments, we feel no hesitation in holding that G.O.Ms.No.1023, Health and Family Welfare Department, dated 17th June, 1980 is inapplicable to the Hon'ble Judges of this Court. The first respondent is bound to extend to the Hon'ble Judges of this Court all facilities as to medical treatment and accommodation in hospitals, etc. as are provided to the Cabinet Ministers, irrespective of any constraints of the Rules aforementioned including the Rules framed under the

Payment of Salaries Act, 1951.

54. The first respondent is duty bound to honour the status and the sovereign and independent position of the Hon'ble Judges of this Court by directing all concerned that,

(1) the staff cars allotted to the Hon'ble Judges of this Court shall be fitted with red revolving lights, halogen headlight and all such equipments and furnishings as are provided for the reason of security to the Cabinet Ministers of the State Government;

(2) their cars shall not be subjected to any traffic regulation imposed for the reason of the security of any other person including the diverting of their vehicles to other routes for the said reason.

(3) that the Judges' security is met equally to that of a Cabinet Minister at their residences, the court premises and other stations other than the headquarters when they are on visits to such stations as well as in the public.

(4) that the Judges' cars are maintained with the same standard and alertness as that of the cars of the Cabinet Ministers and as desired by the court, repairs to the said cars are entrusted to the workshop nominated by the High Court.

(5) that orders are issued permitting the staff cars allotted to the Hon'ble Judges of this Court to take petrol at any private Petrol bunk and undertaking to reimburse the price of not more than 150 litres of petrol on certificate in this behalf under the authority of the Hon'ble Judges concerned; that

(6) orders are issued to attend to the requirements and maintenance of the official residences of the Hon'ble Judges as indicated in the judgment above and that

(7) Judges, who have not been provided with a Government bungalow and who do not like to reside in their own houses, are provided with a private house in accordance with the minutes of the meeting dated 22.4.1991.

55. We record in the end our appreciation to the learned counsel for the parties for the assistance rendered to us and the co-operation extended by the Registry of the court and the various departments of the Government of the State. We, however, have felt the need of the directions aforementioned and accordingly ordered. We have also felt the need of some corrective steps to see that the functioning of the court is not affected by the

lack of resources. We accordingly suggest constitution of a committee as above. We give no direction in this behalf only because, in our view, none will know more about the requirements of the Hon'ble Judges of this Court as well as the Court than the Hon'ble the Chief Justice of the court.

56. In the result, the petition is allowed. The respondents are directed to comply with the directions and observations in our judgment at the earliest. In view of our judgment, the second respondent may represent the medical reimbursement bills of the Hon'ble Judges, which have been denied on the ground of G.O.Ms.No.1023, Health and Family Welfare Department, dated 17th June, 1980 and sanction pending bills of the Hon'ble Judges of this Court accordingly without any delay. Compliance of the implementation of the directions aforementioned should be reported by the first respondent to the second respondent/Registrar of the Court, no sooner the Government orders are issued. The second respondent is directed to circulate all such communications from the first respondent to all the Hon'ble Judges of this Court. Let relevant extract of the judgment be circulated to the Hon'ble the Chief Justice. There shall be no order as to costs in this petition.

B.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.702 of 1988 21st September, 1993.

Arulmigu Soundiamman Deity Koil, Arachipatti Street, Srivilliputhur ...*Petitioner*
v.

B.Gopal Raja ...*Respondent.*

Tamil Nadu City Tenants' Protection Act (III of 1922). Sec. 9(1) (b) - Fixation of price for demised property - Material date in appeal or revision - Pendency of such appeal or revision - Stay of further proceedings granted - Date of order contemplated by section - Matter taken in appeal and then in revision to High Court - Material date - Held to be

date of order of High Court.

The decision of the court on the minimum extent, if taken by way of appeal or revision and that decision is either confirmed or modified and if, thereupon a stay of further proceedings is granted during the pendency of such appeal or revision, only the date of the order contemplated in the third sentence of Sec.9(1)(b) of the Tamil Nadu City Tenants' Protection Act, 1922 will be the date of the order of the appellate court or the revisional court. Now since the matter has been taken in appeal and revision, the order of the revisional court would be the material date for the purpose of Sec.9(1)(b) of the Act and the price shall be fixed with reference to this day. [Para. 9]

Cases referred to:

M.Arasan Chettiar v. S.P.Narasimhalu Naidu Estate Trust, A.I.R. 1980 Mad. 305. [Para. 9]

M.Ramaswamy Pillai v. Hazarath Sayed Shah, A.I.R. 1992 S.C. 2295. [Para. 10]

Petition under Sec.115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Srivilliputhur, dated 16.11.1987 and made in C.M.A.No.11 of 1982 (O.P.No.2 of 1981, Principal District Munsif Court, Srivilliputhur).

P.K.Gopal Raj, for Petitioner.

R.Alagar, Senior Counsel for M/s.A.Sivaji and G.Govindan, for Respondent.

The Court made the following

ORDER: This civil revision petition is directed against the judgment in C.M.A.No.11 of 1982 on the file of the Court of the Subordinate Judge, Srivilliputhur, confirming the order passed in O.P.No.2 of 1981 on the file of the Court of the District Munsif, Srivilliputhur.

2. The short facts are: The respondent had claimed the benefits of Sec.9 of the Tamil Nadu City Tenants' Protection Act against the revision petitioner in O.P.No.2 of 1981 and that claim was resisted by the revision petitioner. After enquiry, learned District Munsif had held that the respondent is entitled to the benefits of Sec.9 of the Act and further held that the entire demised property is necessary for the enjoyment of the tenant and had also fixed the value of the same at Rs.34,000 and also directed deposit of the amount within a period of six months from the date of the order. Aggrieved by the said order, the revision petitioner took up the matter in appeal in C.M.A.No.36 of 1982 before the Court of the Subordinate Judge,

Srivilliputhur and the learned Subordinate Judge, after hearing both sides, had confirmed the finding of the trial court and had dismissed the appeal. Aggrieved against the same, this civil revision is filed.

3. Learned counsel for the petitioner Mr. Gopalraj, would submit that the court below should have fixed the minimum extent and then alone fixed the price thereof, but it has passed a composite order both regarding the minimum extent required and had fixed the value thereof. He would further submit that the minimum extent required has not been correctly fixed by the trial court and hence the matter may be remitted back to the trial court. He would further submit that as per a clause in the lease deed, the respondent is bound to give the entire area for Sivarathiri Celebrations for one day and thus it would amount to using of the property for a religious purpose and thus it is inalienable. He would further submit that the material date for the purpose of fixing the value by taking into account the three years prior to the date would be the date of the order of the court below or the revisional court as the case may be and so price must be fixed by taking the date of the last order and fixing the value by taking into account the relevant factors within a period of three years prior to the date of the last order.

4. *Per contra*, Mr. Alagar, learned Senior Counsel appearing for the respondent would submit that the revision petitioner had not disputed about the minimum extent required by the tenant which has been set forth in paragraph 4 of the petition and so the present claim that minimum extent of area was not correctly fixed for the user of the property is not correct. He would further submit that the clause regarding the application on the part of the tenant to allow the landlord to use the property for Sivarathiri celebration would not amount to making the entire property being used for the religious purpose. He would fairly submit that in case, the court deems it fit, the area in which the 'Peedam' is situated and the area from the 'Peedam' upto the road situated on the northern side may be left out from the remaining property and the rest of the property may be directed to be sold to the respondent. He would further submit that the date on which the entitlement of the tenant to purchase the property is the material date and three years prior would be the relevant period which should be taken for the purpose of arriving at the value of

the property.

5. I have carefully considered the submissions made by the rival counsels, I shall first take up the question as to which would be minimum extent required for the convenient enjoyment of the tenant for the purpose of the rice mill and for which purpose the lease was entered into. The lease agreement is marked as Ex.A-1. From the Commissioner's plan filed in the lower appellate court, it is clear that apart from the portion occupied by the rice mill, a portion has been earmarked as a godown and the rest of the place has been earmarked as drying yard. Both the courts below have discussed at length about this aspect of the case and have come to the conclusion that they are all required for the purpose of which it was leased. In view of the above, I am unable to accept the submission made by the learned counsel for the petitioner that the entire extent was not needed for the convenient enjoyment. The purpose for which the demise was given is to be taken into account, while considering the minimum extent required. The purpose for which the lease was given was for the running of a rice mill and flour mill. While so, the area mentioned above is a necessary adjunct to the purpose for which the demise was given. It is a finding of fact based on the available evidence that the remaining space was required for the convenient enjoyment of the rice mill and the flour mill and I do not find any reason to interfere with the same, subject to what I would refer to hereunder.

6. Learned counsel for the respondent would point out that in paragraph 4 of the petition it is stated in clear terms as to how the entire extent would be required for the convenient enjoyment of the lease. He would further submit that there was no specific denial of the same in the counter statement. In paragraph 7 of the counter statement it is stated that several allegations contained in paragraph 4 of the petition are concocted for the purpose of this case. There is no detailed denial. But, any way I consider that denial would be sufficient for the purpose of the case. But, yet on facts in view of the concurrent acceptable findings of the courts below, I could not differ excepting to a small extent which I shall refer to presently.

7. On a perusal of the commissioner's plan, it is seen that there is one 'Peedam' in the demised premises. In the commissioner's report in paragraph 4, he has stated that the measurement of this

'Peedam' was 2' x 2'. This 'Peedam' was in existence at the time of the commissioner's visit. In the lease deed, there is a specific clause wherein it is stated that there would be celebration during Sivarathiri day for this swamy within this 'Peedam'. From the above, it would be clear that the space occupied by the 'Peedam' was not required for the convenient enjoyment of the lease. There is a road on the northern side of this 'Peedam'. For the purpose of access to this 'Peedam' the extent upto the northern road will have to be left out for coming to the 'Peedam'.

8. Learned Senior Counsel for the respondent fairly submitted that he would even persuade his client to leave a space of three feet on the east, west, north and south of the 'Peedam' and the pathway upto the northern road. So, an extent of three feet on all the sides of the 'Peedam' and also a pathway upto the road on the northern side a width of 6' is to be excluded from sale. Regarding the submission made by learned counsel for the petitioner that the entire property should be left out because it was used for religious purpose on a single day, viz. on Sivarathiri day, I am unable to accept this contention, since the entire property has been demised for commercial purpose and the right which was retained was only for one day and it would not convert the entire premises as one used for religious purpose so as to make a further claim that it cannot be alienated.

9. Regarding the price to be fixed, learned counsel for the petitioner would rely upon a ruling of a Division Bench of this Court in *M. Arasan Chettiar v. S.P. Narasimhalu Naidu Estate Trust*, A.I.R. 1980 Mad. 305, in which after the discussion of the entire law on this point, the principles which emerge are set out. The relevant portion of the decision is as follows:

"For the purpose of disposing of this application, the court must first decide upon the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. Any such decision of the court, from the very nature of the case, can only be by means of an order and the date of that order will be the relevant date for the purpose of fixing the price mentioned in the third sentence in Sec.9(1)(b). If the decision of the court on the minimum extent is taken up further by way of appeal or revision and that decision is either affirmed or modified and if

there had been a stay of further proceedings during the pendency of such appeal or revision, naturally the date of the order contemplated in the third sentence in Sec.9(1)(b) will be the date of the order of the appellate or revisional court."

The decision of the court on the minimum extent, if taken by way of appeal or revision and that decision is either confirmed or modified and if, thereupon a stay of further proceedings is granted during the pendency of such appeal or revision, only the date of the order contemplated in the third sentence of Sec.9(1)(b) of the Act will be the date of the order of the appellate court or the revisional court. Now since the matter has been taken in appeal and revision, the order of the revisional court viz. this Court, viz. to-day would be the material date for the purpose of Sec.9(1)(b) of the Act and the price shall be fixed with reference to this date.

10. Learned Senior Counsel Mr. R. Alagar, would submit that the decision reported in *M. Arasan Chettiar v. S.P. Narasimhalu Naidu Estate Trust*, A.I.R. 1980 Mad. 305, cited supra is not good law in view of the ruling rendered by the Apex Court in *M. Ramaswami Pillai v. Hazarath Sayed Shah*, A.I.R. 1992 S.C. 2295. In that case, the Division Bench ruling of this Court referred to supra was not placed before the Supreme Court. In that case in paragraph 10, the Apex Court has stated that the court shall first decide the minimum extent of land which may be necessary for the convenient enjoyment of the tenant and the minimum extent of land according to the average market value of the three years immediately preceding the date of the order. The Apex Court has stated that while determining the aforesaid price of the land, the price shall be reckoned at the average market value of the three years immediately preceding the present order, viz. the order of the Apex Court. In that case, it is to be mentioned that they have not given the date of the order of the trial court as the material date for fixing the value of the property. So, I am unable to accept the submission of learned Senior Counsel for the respondent.

11. In view of the abovesaid two factors, viz. (i) The 'peedam' and three feet, on all the four sides of 'peedam' and a pathway to the 'Peedam' with a width of six feet, upto the road on the north, should be left out and excluded and the remaining area of the demised premises alone is the

minimum extent required for the use of the tenant. For carrying out the above area to be excluded, and (ii) for fixing the price for the remaining area, the price to be reckoned at the average market value of the three years, immediately preceding the date of this order, viz. 21.9.1993, the matter is to be remitted back to the court below. 12. The civil revision petition is allowed to the above extent and the matter is remitted back to this Court below. The trial court is directed to restore the case on file and dispose of it of according to law and in the light of the observations made in this order, expeditiously. There will be no order as to costs.

B.S. ----- Revision allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.No.977 of 1993 and W.P.No.20256 of 1992
22nd September, 1993.

Dr.V.Nagarajan ...Appellant
v.
The Registrar, University of Madras and another
...Respondents.

(A) *Madras University Act (1923), Sec.19(b) - University Statutes, Chapter IX, Statute 5 - Syndicate of the University, if can suspend a teacher pending inquiry.*

Power to suspend includes power to suspend pending inquiry and also direct suspension as penalty in terms of the regulations. It is also established principles of law that the power to suspend or dismiss is inherent in the appointing authority and as such it is not possible to hold that there is no power to suspend pending inquiry. Sec.19(h) specifically confers upon the Syndicate power to suspend. Statute 5 of Chapter IX of Statutes and Ordinance, in addition to that, provides for the mode of imposition of suspension as penalty. Therefore, the contention of the learned counsel for the appellant/petitioner that there is no power

vested in the Syndicate to place the appellant/petitioner under suspension pending inquiry cannot be accepted. [Para. 6]

(B) *Madras University Act (1923) - Fundamental Rules, Rule 53 - University teacher suspended pending inquiry - No specific provision in the Act or Statute for payment of subsistence allowance - Suspended teacher entitled to full pay and allowance.*

No provision either in the Act or in the statute is brought to the notice of the court providing for payment of subsistence allowance during the period of suspension pending inquiry. No doubt, the Order of suspension dated 30th November, 1992 states that during the period of suspension the appellant/petitioner will be paid subsistence allowance admissible under Fundamental Rule 53(i). It is submitted on both sides that Fundamental Rules of the Government of Tamil Nadu are not extended to teachers of the University. Therefore, the Fundamental Rules cannot be applied to the teachers of the University. Therefore, it is clear that in the absence of any specific provision in the statute or in the Act providing for payment of subsistence allowance during the period of suspension, the University has to pay the full pay and allowance. [Para. 9]

Cases referred to:

P.R.Nayak v. Union of India, A.I.R. 1972 S.C. 554. [Para. 6]

B.R.Patel v. State of Maharashtra, A.I.R. 1968 S.C. 800. [Para. 8]

Writ Appeal under Clause 15 of the Letters Patent against the order of Kanakaraj, J., dated 24.8.1993 and made in the exercise of the Special Original Jurisdiction of the High Court in W.M.P.No.29180 of 1992 in W.P.No.20256 of 1992, etc.

K.P.Krishna Shetty, for Appellant.

P.Jyothimani, for Respondents.

The Judgment of the Court was delivered by K.A.Swami, C.J.: During the course of hearing of this appeal, it is submitted that the arguments on the validity of the order dated 20.8.1993 passed in W.M.P.No.29180 of 1992 filed in W.P.No.20256 of 1992 will be the same as in the main W.P.No.20256 of 1992. In view of this, by consent of both sides, we have also taken up W.P.No.20256 of 1992 for final disposal along with this appeal.

2. Heard the writ appeal and the writ petition for final disposal.

3. The writ appeal is preferred against the order

dated 24th August, 1993 passed in W.M.P.No.29180 of 1992 filed in W.P.No.20256 of 1992. Learned single Judge has refused to stay the order of suspension dated 30th November, 1992 challenged in the writ petition however, he has directed that 50% of the salary shall be paid to the appellant/petitioner as subsistence allowance.

4. In the writ petition, the appellant/ petitioner has sought for quashing the official Memorandum D-1(B)/TE/92/3678, dated 30th November, 1992 passed by the Syndicate of the University of Madras placing the appellant/ petitioner under suspension.

5. The appellant/ petitioner is a Director of the Centre for continuing Education and Extension, University of Madras. The Syndicate of the University resolved to place the appellant/ petitioner under suspension pending in inquiry contemplated into the grave charges and to refer all the matters related to the appellant/ petitioner to the Special Syndicate Committee consisting of the following members:

1. Thiru.V.Srinivasan (Convener)
2. Thiru.V.V.Nathan
3. Tmt.Kavinilavu Dharmaraj
4. Prof.R.V.Dhanapalan
5. Prof.A.P.Kamalakara Rao
6. Thiru.A.Devaraj
7. Prof.T.R.Balakrishnan.

The Syndicate has also referred to the events that have led to its resolution to place the appellant/ petitioner under suspension. Those events as stated in the resolution are as follows:

"312 (Sec.D.1/B)

A-53 & A-68 considered the minutes of the meeting of the Special Committee held on 27th August, 1992 to enquire into the matters of Dr.V.Nagarajan alleged to be Directors of two Companies without permission from the Syndicate and of his evaded replies to this Office letters to clarify his position.

(i) *Resolved to accept the recommendations* of the Special Committee in the above minutes. Considered the first recommendation of the Special Committee to the Syndicate for taking appropriate action based on its findings that there is *prima facie* evidence to show that Dr.V.Nagarajan, has violated the University Rules as per the Statute 10 of Chapter IX, Volume I of the University of Madras Calendar engaging in remunerative work in two

companies viz., M/s.TANC Computer Pvt. Ltd. and M/s.House of Computer Software System Pvt. Ltd., taking note of the legal opinion that he has violated the Madras University Employees Conduct Rules 11(a) and also considered (Item No.68) his suppressing the facts that he has a partnership firm viz., M/s. Hi-Tech.Computer Systems against which a court case appears to be pending for alleged default of payment to the Indian Bank, Thousand Lights branch and he appears to have given a written statement confirming the above fact that his firm viz., M/s.Hi-Tech, Computer Systems, had several transactions with the Bank, but at the same time his giving a letter to the University dated 21.9.1992 denying that such companies ever started any activities and are defunct".

Pursuant to the aforesaid resolution, the Registrar of the University has conveyed the Order of suspension by the communication dated 30th November, 1992 produced at page 1 of the typed set of papers, which reads thus:

"Whereas an enquiry into grave charges against Dr.N.Nagarajan, Professor, Department of Adult and Continuing Education, University of Madras is contemplated;

And whereas in the circumstances of the case it is necessary in the public interest to place the said Dr.V.Nagarajan, Department of Adult and Continuing Education under suspension from service. Now therefore, under the resolution of the Syndicate of this University dated 27.11.1992, the said Dr.V.Nagarajan, is with immediate effect placed under suspension from service, until further orders. During the period of suspension, the said Dr.V.Nagarajan, will be paid subsistence allowance and dearness allowance admissible under F.R.53(i).

He will in addition be paid the admissible compensatory allowances. The Head Quarters of the said Dr.V.Nagarajan during the period of suspension shall be at Madras and the said Dr.V.Nagarajan shall not leave the headquarters without obtaining the previous permission of the authority concerned".

The aforesaid order of suspension has been challenged on the following Grounds:

(i) that there is no provision contained in the Madras University Act, 1923 (hereinafter referred to as the Act) and the laws of the

University, placing a teacher under suspension pending inquiry, therefore, there is no power vested in the Syndicate to place the appellant/petitioner under suspension pending inquiry.

(ii) that the order of suspension is arbitrary and the same is passed without any basis.

(iii) that there is no provision contained in the Act or the laws of the University regarding payment of subsistence allowance during the period of suspension, pending inquiry and as such, the direction in the order of suspension that the appellant/petitioner shall be paid the subsistence allowance as per F.R.53 is also without the authority of law. Inasmuch as in the absence of any specific provision as to payment of subsistence allowance, the appellant/petitioner is entitled to full pay and allowance.

Ground No. (i): It is contended that Sec.19(h) of the Act does not empower the Syndicate to place the appellant/petitioner who belongs to the teaching staff of the university, under suspension pending inquiry, that Sec.19(h) has to be read with Statute 5 of Chapter IX of the Statutes and Ordinances and so read, there is no power in the Syndicate to place the appellant/petitioner under suspension pending inquiry. We are of the view that the interpretation tried to be placed by learned counsel for the appellant cannot at all be accepted. Sec.19 provides for the powers of the Syndicate. It opens with the words, the Syndicate shall have the following powers, namely (a) to (g)(h) to suspend and dismiss the University Professors, Readers and Lecturers and the Teachers and servants of the University. Statute 5 of Chapter IX of the Statutes and Ordinance reads thus:

“The Syndicate shall have power, upon sufficient cause shown and after due investigation by a resolution approved of by not less than two-thirds of the members of the Syndicate, to suspend any Teacher of the University from office and from the emoluments thereof in whole or in part for any period not exceeding one year, or to require him to retire, or to deprive him of office and during the suspension of any teacher to make provision for his work, provided no such sentence of suspension, etc., shall have effect until approved by His Excellency the Chancellor”.

As Statute 5 only provides for suspension as penalty for a period of one year and as Sec.19(h) does not specifically provide for suspension pending enquiry, the expression ‘suspension’ found in Sec.19(h) of the Act should be read only as conferring power on the Syndicate to order suspension as a penalty and not empowering the syndicate to place a teacher under suspension pending inquiry. There is no warrant for interpreting Sec.19(h) in the manner suggested by learned counsel for the appellant. Power to suspend includes power to suspend pending inquiry and also direct suspension as penalty in terms of the regulations. It is also established principles of law that the power to suspend or dismiss is inherent in the appointing authority and as such it is not possible to hold that there is no power to suspend pending inquiry. In fact, it has been stated in *P.R.Nayak v. Union of India*, A.I.R. 1972 S.C. 554, that the order of suspension without affecting the right of a civil servant to receive other emoluments lies within the general inherent competency, of the appointing authority. Again, in *B.R.Patel v. State of Maharashtra*, A.I.R. 1968 S.C. 800, it has been specifically stated that on general principle, every employer would have a right to suspend an employee in one of the two ways. He may be suspended pending departmental inquiry or pending criminal proceedings which may be called interim suspension. The Government may proceed to hold a departmental inquiry and after being found guilty, order suspension as penalty, if the rules so permit. In such case, the suspension will be as a penalty. Therefore, the power of suspension is inherent in the general power of the Appointing Authority. However, in the instant case, Sec.19(h) specifically confers upon the Syndicate power to suspend. Statute 5 of Chapter IX of Statutes and Ordinance, in addition to that, provides for the mode of imposition of suspension as penalty. Therefore, we are of the view that the contention of the learned counsel for the appellant/petitioner that there is no power vested in the Syndicate to place the appellant/petitioner under suspension pending inquiry cannot be accepted. In addition to this, we may also refer to a Division Bench decision of this Court in *C.Arumugham v. The University of Madras and another*, W.A.No.946 of 1989, dated 20.11.1989. That was also a case of suspension pending inquiry. With reference to Sec.19(g) and (h) of the Act and Clause 2(g) and

(h) of Chapter XII of the Statutes, a Division Bench of this Court has observed thus:

"We also do not see any force in the said submission of the learned counsel for the appellant that under the statute governing the appellant's service, there is no power given to the Syndicate to place the appellant under suspension pending enquiry. A reference to the Madras University Act and the statute shows that the syndicate has the power to make appointments of Professors and others, which power would include the power to take disciplinary action and place an employee under suspension pending inquiry. The Madras University Act and the statute framed thereunder specifically give the power to the Syndicate to suspend as well as dismiss an employee. Reference in this connection may be usefully made to Sec.19(g) and (h) of the Madras University Act and Clause 2(g) and (h) of Chapter XII of the statute".

It is contended that the decision in paragraph No.3 of the judgment (extracted above) is not the ratio of the case. Therefore, it can only be treated as obiter. It is not possible to accept such a contention. In fact, the question that arose in that case was as to whether pending inquiry, reader could be suspended. With reference to the provisions contained in Sec.10(g) and (h) of the Act and Clause 12(g) and (h) of Chapter XII of the Statutes. This Court held that such a power resided with the Syndicate. Therefore, that is the ratio of the said decision.

7. Learned counsel for the appellant placed reliance on another Division Bench decision of this Court in *Tamil Nadu Medical Counsel and another v. P. Andree, W.A.No.865 of 1992, dated 19.1.1983*. In that case, a Division Bench of this court held that there was no power vested in the Medical Council to place the respondent therein under suspension pending inquiry. The decision rested on the provisions contained in Sec.10(1) of the Tamil Nadu Medical Registration Act, read with bye-laws 69 and 70 of the bye-laws. With reference to those provisions, the Division Bench stated thus:

"The second contention of the learned counsel for the appellants is that bye-law 70 of the bye-laws of the Madras Medical Council provides that subject to the provisions of Sec.10(1) of the Act, the President or the Vice-President,

when he acts as President, may impose any of the penalties specified in bye-law 69 on any members of the establishment referred to in Sec.10(1) of the Act and as suspension is one of the penalties enumerated in bye-law 69 the President has the power to place the respondent under suspension even pending enquiry into the charges framed against him or contemplation of disciplinary proceedings. There is no merit in this contention of the learned counsel for the appellants. Bye-law 69 enumerates various penalties which may be imposed upon the members of the establishment employed under Sec.19(1) of the Act and the penalty of suspension is one of the penalties which may be imposed upon the members of the establishment for good and sufficient reasons. It must be remembered that the suspension contemplated under bye-law 69 can be imposed only as a measure of punishment after holding an enquiry into the charges framed against the member of the establishment employed under Sec.10(1) of the Act. Bye-law 69 does not empower the President to place a member of establishment, under temporary suspension pending disciplinary proceedings or contemplation of the disciplinary proceedings. Admittedly, in the present case, not even charges have been framed against the respondent. In these circumstances, it has to be held that neither bye-law 69 nor bye-law 70 empowers either the second appellant herein or the Executive Committee of the Tamil Nadu Medical Council to place the respondent under suspension pending disciplinary proceedings or contemplated of disciplinary proceedings. Therefore, the learned single Judge is quite right in holding that the second appellant herein, the Executive Committee is not competent to place the respondent under temporary suspension and therefore, the impugned order is liable to be quashed. In view of the above discussion of ours, we see no infirmity in the order of the learned single Judge warranting interference in this writ appeal. There is no merit in this writ appeal and the same is liable to be dismissed and accordingly the writ appeal is dismissed. No costs".

In this regard, it may be relevant to state that Sec.10(1) of the Tamil Nadu Medical Registration Act does not, in specific terms, empower the medical

counsel suspension of an official, pending inquiry. It specifically provides,

The council shall appoint a registrar who shall act as Secretary of the council and who shall also act as treasurer, unless the council shall appoint another person as treasurer. Every person so appointed shall be removable at the pleasure of the council. Thus, it does not contain any provision for placing the person under suspension, pending inquiry. Bye-laws also do not provide for it. That being so, as already pointed out, the decision turned upon the provisions contained in Sec.10(1) of the Tamil Nadu Medical Registration Act, 1914 and the bye-laws framed thereunder. Therefore, the same cannot at all be applied to the case on hand, wherein the Act and the statutes specifically confer power upon the Syndicate to suspend the teacher or other members of the staff of the varsity. Hence, we are of the view that there is a power vested in the Syndicate to place under suspension a member of the teaching staff and also the establishment staff, pending inquiry. Accordingly, Grounds No.(i) is rejected.

Ground No. (ii): It is also not possible to hold that the order of suspension has been passed in arbitrary exercise of power. We have already reproduced the entire resolution of the Syndicate. The contents of the resolution go to show that the appellant/petitioner being a member of the teaching staff of the University used his services as alleged in the resolution and engaged himself in remunerative work in two companies, M/s.TANC Computers Private Limited and M/s.House of Computer Software System Private Limited and also M/s.Hi-Tech.Computer Systems. Therefore, it is not possible to hold that the Syndicate has acted without any basis and arbitrarily in placing the appellant/ petitioner under suspension. Hence, ground (ii) is rejected.

Ground No. (iii): No provision either in the Act or in the Statute is brought to our notice providing for payment of subsistence allowance during the period of suspension, pending inquiry. No doubt, the order of suspension dated 30th November, 1992 states that during the period of suspension, the appellant/ petitioner will be paid subsistence allowance and dearness allowance admissible under F.R.53(i). It is submitted on both sides that fundamental rules of the Government of Tamil Nadu are not extended to the teachers of the University. Therefore, the Fundamental Rules cannot at all

be applied to the teachers of the University. In the aforesaid *B.R.Patel v. State of Maharashtra, A.I.R. 1968 S.C. 800*, while considering this aspect of the matter, it has been observed thus:

"The general principle therefore is that an employer can suspend an employee pending an inquiry into his misconduct and the only question that can arise in such suspension will relate to payment during the period of such suspension. If there is no express term relating to payment during such suspension or there is no statutory provision in any enactment or rule the employee is entitled to his full remuneration for the period of his interim suspension. On the other hand, if there is a term in this respect in the contract of employment or if there is a provision in the statute or the rules framed thereunder providing for the scale of payment during suspension the payment will be made in accordance therewith. This principle applies with equal force in a case where the Government is an employer and a public servant is an employee with this qualification that in view of the peculiar structural hierarchy of Government administration, the employer in the case of employment by Government must be held to be the authority which has the power to appoint the public servant concerned. It follows therefore that the authority entitled to appoint the public servant is entitled to suspend him pending a departmental enquiry into his conduct or pending a criminal proceeding, which may eventually result in a departmental enquiry against him. But what amount should be paid to the public servant during such suspension will depend upon the provisions of the statute or statutory rule in that connection. If there is such a provision the payment during suspension will be in accordance therewith. But if there is no such provision, the public servant will be entitled to his full emoluments during the period of suspension. On general principle therefore the Government like any other employer would have a right to suspend a public servant in one of two ways. It may suspend any public servant pending departmental enquiry or pending criminal proceedings, this may be called interim suspension. The Government may also proceed to hold a departmental enquiry and after his being found guilty order suspension as a

punishment if the rules so permit. This will be suspension as a penalty. As we have already pointed out, the question as to what amount should be paid to that public servant during the period of interim suspension or suspension as a punishment will depend upon the provisions of the statute or statutory rules made in that connection”.

Therefore, it is clear that in the absence of any specific provision in the statute or in the Act providing for payment of subsistence allowance during the period of suspension, the University has to pay the full pay and allowance. Hence, ground No.(iii) is upheld.

10. For the reasons stated above, the writ petition is disposed of in the following terms:

(a) No ground to interfere with the order of suspension. However, the direction contained in the order of suspension as to payment of suspension as to payment of subsistence allowance is set aside.

(b) During the period of suspension, pending inquiry, the appellant/petitioner shall be paid full pay and allowance.

In view of the disposal of the writ petition, the interim order passed therein comes to an end. Therefore, the writ appeal becomes infructuous. It is dismissed as infructuous. In the facts and circumstances of the case, there shall be no order as to costs. W.P.No.257 of 1993 as directed by the learned single Judge be posted for hearing before the learned single Judge on 14.12.1993.

B.S. ----- Petition allowed partly/Appeal dismissed on infructuous.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *Janarthanam, J.*

W.P.No.21384 of 1993 and W.M.P.No.33505 of 1993
9th December, 1993.

S.Shadrach Paul ...*Petitioner*
v.

The Registrar, High Court, Madras and others
...*Respondents.*

Constitution of India (1950), Art.226 - Alternative remedy - Promotion to post of Sheristadar - Writ of certiorarified mandamus for - Remedy provided for in Tamil Nadu Judicial Ministerial Service Rules, Rule 11 - Not availed of - Writ, if can be issued.

Admitted fact is that the petitioner had not availed of the remedy of provision as had been provided for under Rule 11 of the Tamil Nadu Judicial Ministerial Service Rules. The reason for not availing of such a remedy as projected by the learned counsel for the petitioner was that of such a remedy is availed of there is every likelihood of the petitioner attaining the age of superannuation..... by sands of passage of time running out by the time and ultimate decision is arrived at therefor. That itself may not be a ground for avoidance of such a remedy and resorting to the present action under Art.226 of the Constitution of India.

[Para. 4]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records in order in A.No.754/93, dated 27.10.1993 of the 2nd respondent herein quash the same and direct the respondents 1 and 2 herein to promote the petitioner herein as Sheristadar in category I in class IV of Tamil Nadu Judicial Ministerial Service Rules, 1953, etc.,

R.Antony Xavier, for Petitioner.

The Court made the following

ORDER: One S.Shadrach Paul (petitioner), erstwhile Head Clerk, District Court, Madurai, had been selected and appointed as Sheristadar (category 1 of Class IV of the Special Rules for the Tamil Nadu Judicial Ministerial Service - for short 'TNJMS Rules') District Court, Madurai by the Principal District Judge, Madurai-20 (second respondent) in his order A.No.314/93 dated 14th May, 1993. On an administrative appeal preferred by one S.Rathinasabapathy (third respondent), erstwhile Sheristadar, Sub Court, Dindigul, this Court set aside the same by order in RCC.No.171/93/C1, dated 4.10.1993 and remitted back the matter for fresh consideration according to law.

2. On remand, Principal District Judge, Madurai, taking into consideration the relevant materials, by his order in A.No.754/93, dated 27.10.1993, selected the third respondent for being appointed as Sheristadar, District Court, Dindigul. The

petitioner, aggrieved by the said order, without resorting to the statutory remedy of revision, as provided for in Rule 1 of the T.N.J.Ms. Rules, resorted to the present action, impleading also the Registrar of this Court as the first respondent, praying for issue of a writ of *certiorarified mandamus* to quash the same and direct respondents 1 and 2 to promote him as Sheristadar in Category 1 of Class IV thereof.

3. He also filed W.M.P.No.33505 of 1993 for stay of all further proceedings, pending disposal of this writ petition.

4. Admitted fact it is that the petitioner had not availed of the remedy of revision, as has been provided for under Rule 11 of the T.N.J.Ms. Rules. The reason for not availing of such a remedy, as projected by learned counsel for the petitioner, was that if such a remedy is availed of, there is every likelihood of the petitioner attaining the age of superannuation which event is to take place in June, 1994, by sands of passage of time running out by the time and ultimate decision is arrived at therefor. That itself may not be a ground for avoidance of such a remedy and for resorting to the present action under Art.226 of the Constitution of India. He may very well avail of such a revision and urge the authorities concerned to dispose of the same in a matter as expeditiously as possible, taking into consideration the paramount factor of impending superannuation at only of himself but also of the promotee. Pertinent it is to note at this juncture, that this aspect of the matter had been stressed in the very proceedings of this Court, whilst remitting the matter back to the second respondent requiring him/to arrive at a decision as quickly as possible. On the same analogy the petitioner, by availing of such a revision, may make a request to the competent authorities of this Court to give expeditious disposal of the revision, if any, to be preferred by him. Such a request if made, the authorities of this Court are also bound to consider the same, in the peculiar facts and circumstances of the case.

5. For the above reasons, the writ petition deserves dismissal even at the admission stage and the same is accordingly dismissed. Consequently W.M.P. is also dismissed.

B.S.

---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.2002 of 1986

11th August, 1993.

Jagadeeswaran

...*Petitioner*

v.

Federal Bank, Pollachi Branch, Coimbatore District and another

...*Respondents.*

Civil Procedure Code (V of 1908), Sec.51 - Decree-holder applying for execution of decree - Judgment-debtor resisting petition putting forth plea of no means - Decree-holder, if should proceed against immovable properties first.

The submission that immovable properties may be proceeded with first and then the revision petitioner may be proceeded with is untenable. It is the choice of the decree-holder viz., the 1st respondent to proceed with against either in the property or the person that was permitted by law.

[Para. 4]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Pollachi, dated 23.9.1985 and made in E.P.No.523 of 1984 in O.S.No.1155 of 1981 and prays that the same may be set aside.

P.G.Xavier for M/s.P.Shanmugam and K.Sugana, for Petitioner.

G.Joseukkur, for Respondent No.1.

The Court made the following

ORDER: This civil revision petition is directed against the order in E.P.No.523 of 1984 in O.S.No.1155 of 1981 on the file of District Munsif, Pollachi.

2. Short facts are: The 1st respondent had filed suit against the revision petitioner, the second respondent and one Padmavathi, arraying them as defendants 2, 3 and 4 respectively and obtained money decree. To realise the decree debt, the 1st respondent had filed E.P.No.523 of 1984, praying for arrest of the revision petitioner and the 2nd respondent Raghavan. Later the 1st respondent had given up the 2nd respondent Raghavan. The revision petitioner, who was the 1st respondent in the court below has resisted the execution petition, putting forth a plea of no means. After enquiry, the learned District Munsif had rejected the plea of no means and ordered arrest. Aggrieved by the

same, the 1st respondent in the court below has come forward with this revision petition.

3. Mr.P.G.Xavier, the learned counsel appearing for the revision petitioner, would submit that the properties may be proceeded with 1st and then if not satisfied, the revision petitioner may proceed with for arrest. I have heard Mr.G.Joseukkur, the learned counsel appearing for the respondent on the above aspects.

4. I have carefully considered the submissions made by rival counsels. The court below had relied upon Ex.A-1, which is a financial statement given by the revision petitioner himself, duly signed by him. He has given his asset as 20 acres of coconut garden worth Rs.1 lakh. That would prove the means of the revision petitioner to pay the decree debt. His plea of no means cannot stand in the face of Ex.A-1. While so, the court below is correct in finding means of the revision petitioner and ordering arrest. The submission that immovable properties may be proceeded with first and then the revision petitioner may be proceeded with is untenable. It is the choice of the decree-holder viz., the 1st respondent to proceed with against either the property or the person, that was permitted by law. While so, I am unable to accept the submission made by Mr.Xavier. The order of the court below does not call for any interference.

5. In view of the above, this civil revision petition fails and shall stand dismissed. No costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No.12 of 1993 4th November, 1993.

A.Alangaram ...Petitioner
v.

A.Ganesan ...Respondent.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.14(1)(b) - Petition for eviction under - Petitioner not averring in petition that building was

required for the immediate purpose of demolishing it - Such demolition was to be made for the purpose of erecting a new building on the site of the building sought to be demolished - Petition, if maintainable Building admitted to be old and tiled - If sufficient to satisfy requirements of section.

In the present case, the necessary averments which should be there under Sec.14(1)(b) of the Act have not been made at all in the present R.C.O.P. On the other hand it is only averred that the landlord is doing business in the adjacent building and the petition building is required since the landlord is in need of an office room and that, *therefore*, the landlord intends to pull down the entire existing structure including the petition schedule building'. So, not only could it be stated that what is required under Sec.14(1)(b) has not been pleaded but it could also be stated that the only reason pleaded in the petition is something extraneous to what is required under Sec.14(1)(b) of the Act. It is a settled principle of law that no amount of evidence can be looked into on a plea which was never put forward. The mere fact that the petition-building is a tiled building would not by itself satisfy the abovesaid requirement under Sec.14(1)(b) on enunciated by the Supreme Court in *P.Orr and Sons (P.) Limited v. Associated Publishers (Madras) Limited*, (1990)2 L.W. 547. The mere fact that the building was old is not enough to satisfy the requirements under Sec.14(1)(b) of the Act.

Cases referred to:

P.Orr. and Sons (P.) Limited v. M/s.Associated Publishers (Madras) Limited, (1990)2 L.W. 547. [Paras. 2, 4, 12]

S.B.Noronam v. Prem Kumari, A.I.R. 1980 S.C. 193. [Para. 6]

Ruth Margaret Gonsalves v. K.T.M.Presses by its Proprietor, Kumar, 100 L.W. 258. [Para. 6]

Narubai v. Shama Rao, A.I.R. 1956 S.C. 593; 1956 S.C.A. 959; 1956 S.C.C. 321; 1956 S.C.J. 655; 1956 S.C.R. 451; 1956 An.L.T. 1029. [Para. 9]

Shyam Lal Agarwal v. Ratwan Lal Malviya, A.I.R. 1991 S.C. 353. [Para. 11]

Petition under Sec.25 of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by Act 23 of 1973 and Act 1 of 1980 praying the High Court to revise the order of the court of the Appellate Authority (Subordinate Judge), Nagercoil, dated 20.7.1992 and made in R.C.A.No.19 of 1988 (H.R.C.O.P.No.45 of 1985,

dated 14.3.1988 on the file of the Rent Controller (Principal District Munsif Court), Nagercoil. *P. Peppin Fernando*, for Petitioner. *M. Chidambaram*, for Respondent.

The Court made the following

ORDER: The tenant under the Tamil Nadu Buildings (Lease and Rent Control) Act, (hereinafter referred to as 'the Act'), who has failed in both the courts below, is the petitioner in this civil revision petition against the concurrent eviction order passed under Sec. 14(1)(b) of the Act.

2. The main argument of the learned counsel for the petitioner is that there is neither plea, nor proof regarding the dilapidated condition of the petition-building, which, according to the learned counsel, is absolutely required to be pleaded and proved pursuant to the recent decision of the Supreme Court reported in *P. Orr. and Sons (P.) Limited v. M/s. Associated Publishers (Madras) Limited*, (1990) 2 L. W. 547. On the other hand, the learned counsel for the respondent-landlord, in this regard, contends that the pleading should not be construed strictly and that at any rate even assuming that the abovesaid plea is not in the petition it was in contemplation between the parties and therefore, the evidence in that regard could be looked into and that the courts below have come to the right conclusion on the evidence recorded. He also cited several decisions, which according to him, would support his abovesaid submission.

3. In the light of the abovesaid rival submissions it is necessary to set out the material portions of the plea as found in the R.C.O.P.

"The respondent is the tenant of the building NMC No. 12/49 from the last 15 (fifteen) years.....

The building is a non-residential building and the respondent is doing business therein.....

The petitioner is doing business in timber adjacent to the schedule building. For the convenience of the petitioner's business, the petitioner is in need of an office room. The petitioner, *therefore*, intends to pull down the entire existing structure including the petition Schedule building and reconstruct a pucca building." [*Italics supplied*]

But, as per Sec. 14(1)(b) of the Act, eviction could be ordered only if "the building is *bona fide* required by the landlord for the *immediate* purpose of demolishing it and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished".

[*emphasis supplied*]

4. While interpreting the abovesaid Sec. 14(1)(b), the Supreme Court in the above referred to *P. Orr. and Sons (P.) Limited v. M/s. Associated Publishers (Madras) Limited*, (1990) 2 L. W. 547, has held as follows:

"We accordingly hold that Sec. 14(1)(b) is satisfied only if the building is *bona fide* required by the landlord for the "immediate", i.e., *direct, sole* and timely purpose of demolishing it with a view to erecting a new building on the site of the existing building.....

but the *essential and overriding* consideration which, in the general interests of the public and for the protection of the tenants from unreasonable eviction, the legislature has in mind is the condition of the building that *demands timely demolition by reason of the extent of damage to its structure making it uneconomical or unsafe to undertake repairs*. While the condition of the building by itself may not necessarily establish the *bona fide* requirement under Clause (b), that condition is not only one of the various circumstances which may be taken into account by the Controller, but it is the essential condition in the absence of which it would not be possible for the landlord to prove that he has a *bona fide* requirement which is timely, directly and solely for the purpose of demolition of the building. The Act does not accept the requirement by the landlord as a *bona fide* requirement within the meaning of the provision unless the condition of the building, in the context of the relevant circumstances, requires demolition." [*Italics supplied*]

5. In the above background, it is clear that in the present case, the necessary averments which should be there under Sec. 14(1)(b) of the Act have not been made at all in the present R.C.O.P. On the other hand it is only averred that the landlord is doing business in the adjacent building and the petition building is required since the landlord is in need of an office room and that, *therefore*, the landlord intends to pull down the entire existing structure including the petition schedule building'. So, not only could it be stated that what is required under Sec. 14(1)(b) has not been pleaded but it could also be stated that the only reason pleaded in the petition is something extraneous to what is required under Sec. 14(1)(b) of the Act.

6. Further, when some imperfect language is used

in the pleadings then it could be said that the language should be liberally construed. But, that is not the case here at all. There is a total absence of requisite plea, as stated above. Hence, the decisions in *S.B. Noronah v. Prem Kumari*, A.I.R. 1980 S.C. 193 and *Ruth Margaret Gonsalves v. K.T.M. Presses by its Proprietor, Kumar*, 100 L.W. 258, cited by the learned counsel for the respondent in this regard have absolutely no application to the present case.

7. No doubt, the learned counsel for the respondents points out that admittedly the petition-building is a tiled building. But, even the said averment is not there in the abovesaid petition or the schedule therein. Further, the mere fact that the petition-building is a tiled building, would not by itself satisfy the abovesaid requirement under Sec.14(1)(b) as enunciated by the Supreme Court in the decision referred to above.

8. The learned counsel for the respondent also contends that the courts below have held that the petition-building is aged 50 years. But, even here I must state that there is no such plea in the petition. Further, merely because the age of the building is 50 years, it cannot be automatically concluded that the requirement under Sec.14(1)(b) of the Act is satisfied. The learned counsel for the petitioner drew my attention to Rule 11 of the Tamil Nadu Buildings (Lease and Rent Control) Rules, 1974, which requires that in any application under the Act, *inter alia* the date on which the construction of the building was completed must be stated. According to him, if this is stated, it would have given the age of the building, but it was also not stated in the R.C.O.P.

9. It is a settled principle of law that no amount of evidence can be looked into on a plea which was never put forward. No doubt, even if strictly speaking the relevant plea is not there in the petition, if at least the said plea was in contemplation of the parties when they go to trial, the court could take into account the evidence recorded in that regard. (*Vide: Narubai v. Shama Rao*, A.I.R. 1956 S.C. 593; 1956 S.C.A. 959; 1956 S.C.C. 321; 1956 S.C.J. 655; 1956 S.C.R. 451; 1956 An.L.T. 1029). But, in the present case, even when P.W.1, the only witness on the side of the landlord, was examined he did not whisper at all anything about the actual condition of the petition-building or the damaged or dilapidated nature thereof. That shows that the abovesaid aspect was not in the contemplation of

the parties also even when they went to the trial. So, strictly speaking, there is no necessity for me to consider the entire evidence recorded in the present case, regarding the abovesaid aspect.

10. Anyway since the learned counsel for the respondent made some attempt to point out something in this regard from the evidence recorded. I shall consider it also. He points out that Ex.A-3 petition notice mentions that the petition building is "old", and to that Ex.A-3 notice, there was no reply by the tenant, nor there is any explanation why no reply was given. But, the mere fact that the building was old, is not enough, as already pointed out by me earlier, to satisfy the requirements under Sec.14(1)(b) of the Act. In the present case, not only the landlord has not examined any independent witness, but he has not also sought for appointment of a Commissioner to inspect the petition-building to assess the dilapidated or damaged condition of the building, so that the court could come to a conclusion that the building is *bona fide* required for the immediate purpose of demolition.

11. Apart from Ex.A-3 which only speaks of the building being old, there is absolutely no documentary or oral evidence regarding the abovesaid aspect, which is required to be proved under Sec.14(1)(b) of the Act. The decision in *Shyamal Agarwal v. Ratwanlal Malviya*, A.I.R. 1991 S.C. 353, cited by the learned counsel for the respondent has no application to the present case as it dealt with the Madhya Pradesh Accommodation Control Act, in which the corresponding relevant provision was different. The Supreme Court also observed there in the context of the relevant provision under the abovesaid enactment as follows:

"There is no statutory requirement that while considering the *bona fide* need of the landlord for reconstruction of the accommodation the building must necessarily be in a dilapidated condition requiring repair or demolition. Unlike other Rent Control Laws the Madhya Pradesh Accommodation Act does not expressly provide for any such condition."

12. Therefore, it is clear that the courts below have clearly erred in arriving at the decision they have reached, without properly noting the exposition of law in this regard by the Supreme Court in the above referred to *P.Orr. and Sons (P.) Limited v. M/s. Associated Publishers (Madras) Limited*, (1990) 2 L.W. 547. Accordingly, the civil revision petition is

allowed, the orders passed by both the authorities below are set aside and the R.C.O.P. is dismissed. However, in the circumstances of the case, there will be no order as to costs.

B.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thangamani, J.*

C.R.P.No.2178 of 1993 15th October, 1993.

Rajam Abraham ...*Petitioner*
v.
Shantha ...*Respondent.*

Civil Procedure Code (V of 1908), O.26, Rule 9 - Commissioner, appointment of - Request for by dependant - If could be made only filing of written statement.

If it is to be held that only after filing of the written statements, Commissioner could go, it would not be possible for a defendant to immediately bring to the notice of the court essential facts and materials in his favour by taking out a commission. For filing Written statement, defendant will have to consider every pros and cons involved in the suit and he will have to go through the documents relied on by the plaintiff or to be relied on by him. For that, it would necessarily take time when defendant receive summons of a case or comes to know of a suit instituted against him, he can immediately rush to the court and ask for a Commissioner to be deputed to make local inspection. If the court is to wait till written statement is filed, the defendant is likely to be deprived of the previous opportunity of bringing facts and materials to the notice of the court which are of great relevance for proper and just decision of the case. In certain cases urgent commission will be the need of the hour. Defendant's right to take an urgent commission cannot be defeated on the ground that he has not filed Written statement. [Para. 4]

Case referred to:

John v. Kamarunnisa, A.I.R. 1989 Ker. 78. [Para. 4]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Kodaikanal, dated 10.5.1993 and made in I.A.No.167 of 1992 in I.A.No.153 of 1992 in O.S.No.35 of 1992.

V.Radhakrishnan, for Petitioner.

P.L.Narayanan, for Respondent.

The Court made the following

ORDER: The revision petitioner is the plaintiff in O.S.No.95 of 1992 in the Court of District Munsif of Kodaikanal. He filed the suit for permanent injunction restraining the respondent/ defendant from interfering with his possession of the suit property which is a House and vacant site on the northern side of old Survey No.99/R2-C3 in Lake Road, Kodaikanal Town. He claimed in the plaint that he has purchased this property under a sale deed dated 27.4.1992 from the power agent of the owner Yasumithiran. According to him, the suit was laid since the defendant sought to disturb his possession. Plaintiff also obtained an *ex parte* injunction in I.A.No.153 of 1992. Thereafter, the defendant came forward with I.A.No.167 of 1992 for the purpose of appointment of an Advocate-Commissioner to inspect the suit property, measure the same with the help of qualified Taluk Surveyor and to find out whether the building is situated in Survey No.99/B-2-C3 alone or in both Survey Nos.99/B2-C3 and 99/B2-C and to note the physical features and file his report with plan. Since the learned District Munsif has allowed the application and ordered appointment of a Commissioner, the plaintiff has come forward with this revision petition.

2. One of the grounds on which the revision petitioner challenges the order of the court below is that the trial court has not passed a speaking order. A perusal of the impugned order discloses that there is no discussion regarding the respective contentions of the parties and why it is necessary that a Commissioner has to be appointed. However, the order of appointment of a Commissioner cannot be quashed on that sole ground, when we are able to see from the materials on record that the facts herein warrant such as appointment.

3. We find from the description in the plaint that the property in dispute is the northern side 5 cents in Old Survey No.99/B2-C3 in lake Road, Kodaikanal Town. The four boundaries of the said S.No.99/B2-C3 are also mentioned in the plaint. Though

no written statement has so far been filed, the affidavit filed by the defendant in support of the application for appointment of a commissioner reads that the suit vacant site originally balanced to one Dr.B.S.Chellappa. One Balakrishnan claiming as power agent of B.S.Chellappa entered into a sale agreement with the defendant on 15.2.1985. Subsequently, his son Yasumithiran, who got the property by settlement from his vendor acknowledged the above sale agreement and allowed the defendant to put up a construction in the vacant site. The said Yasumithiran undertook to complete the sale subsequently. Believing the said representation of Balakrishnan, defendant has put up a pucca building at a cost of Rs.6,50,000 in this site. After completing the construction, the defendant came to know that portion of the building measuring 6' x 47' has actually been built in the neighbour's land in R.S.No.99/B2-C. So she has purchased the adjoining land from its owner under a registered sale deed dated 27.12.1991. Thus, the defendant is in possession and enjoyment of the entire suit property as well as the encroached portion in R.S.No.99/B2-C. Since the revision petitioner tried to interfere with her possession, she was constrained to file O.S.No.91 of 1992 on the file of District Munsif, Kodaikanal and an injunction application in I.A.No.144 of 1992. The present suit has been laid immediately after that injunction application. The specific case of the present respondent is that her building is situated both in Survey No.99/B2-C3 and Survey No.99/B2-C.

4. Learned counsel for the revision petitioner first submits that the defendant has not even filed her written statement in the suit and the appointment of a Commissioner at this stage is premature. There is no merit in the above contention. The case of the present revision petitioner is already stated in the earlier suit O.S.No.91 of 1992 and so it is not as if we are not in a position to know what is the defence of the present defendant in this case. O.26, Rule 9. C.P.C. enables the court to depute a commission for local investigation whenever it considers that it is necessary for the purpose of elucidating any matter in dispute or of ascertaining the market-value of any property or the amount of any mesne profits or damages or annual net profits. If we are to hold that only after filing of the written statements commissioner could go, it would not be possible for a defendant to immediately

bring to the notice of the court essential facts and materials in his favour by taking out a commission. For filing written statement defendant will have to consider every pros and cons involved in the suit and he will have to go through the documents relied on by the plaintiff or to be relied on by him. For that it would necessarily take time. When defendant receives summons of a case or comes to know of a suit instituted against him he can immediately rush to the court and ask for a commission to be deputed to make local inspection. If the Court is to wait till written statement is filed the defendant is likely to be deprived of the precious opportunity of bringing facts and materials to the notices of the court which are of great relevance for proper and just decision of the case. In certain cases urgent commission will be the need of the hour. Defendant's right to take an urgent commission cannot be defeated on the ground that he has not filed written statement. A single Judge of the Kerala High Court has held in *John v. Kamarunnisa*, A.I.R. 1989 Ker. 78, where local inspection under O.26, Rule 9, C.P.C. is requisite and proper for elucidating matters in dispute in the suit, the same cannot be denied on the ground that the defendant has not yet filed his written statement. The said provision places no such bar on the court exercising the power. And I am in respectful agreement with that view.

5. In the counter affidavit before the trial court the plaintiff has mainly dealt with the merit of the suit claim. His counter does not disclose how the appointment of a commissioner is unnecessary in this case and whether he would be prejudiced in any manner if a commissioner goes there and finds out in which exact survey number the disputed building is constructed. His positive averment in his counter is that the disputed structure is in Survey No.99/B2-C3 alone. He further states that both in this suit as well as in O.S.No.91 of 1992 the suit property and its measurement and boundaries are one and the same. And there is no dispute between the parties regarding these facts. He also states that if there is any dispute in the suit property regarding measurement, the defendant can very well file the application. In any event, the Commissioner should have been issued only in the earlier suit and not in the case. Evidently there is no substance in the contentions of the plaintiff. It cannot be gain said that local inspection and the measurements of the disputed property by the

Advocate Commissioner with the assistance of a qualified Surveyor would bring out the essential facts and materials necessary to resolve the controversy between the parties. And no oral evidence can substitute the data gathered during inspection by the Commissioner. While so, it is far-fetched to say that the trial court has erred in allowing the commission application.

6. In the result, there is no merit in the civil revision petition and the same is dismissed even in the admission stage.

B.S. ---- *Pettion dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Prscent: *AR.Lakshmanan, J.*

W.P.No.7211 of 1992 19th November, 1993.

Muthukaruppan and others ...*Petitioners*
v.

State of Tamil Nadu represented by its Commissioner and Secretary, Adi Dravidar and Tribal Welfare Department, Madras and another

...*Respondents.*

Land Acquisition Act (I of 1894), Sec.4(1) - Notification under - Published in Government Gazette on 18.3.1991 - Published earlier in the newspapers on 14.3.1991 itself - Acquisition proceedings, if vitiated.

It is seen that the respondents have not followed the power given to them under Sec.4(1) of the Land Acquisition Act strictly and the publication has to be made only in the serialim as given in the section itself. In this case, the paper notification has been made prior to the publication of the notification made in the official gazette. On this short ground, the acquisition proceedings, in the court's opinion, have got to be set aside. [Para. 5]

Cases referred to:-

M.Rajagopal v. The Government of Tamil Nadu, (1992)2 M.L.J. 404. [Paras. 3, 4]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the

High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent relating to the Notification under Sec.4(1) of the Land Acquisition Act in G.O.(3-D) 175, Adi Dravidar and Tribal Welfare Department, dated 11.2.1991 and declaration under Sec.6 issued in G.O.(3-D) No.288, Adi Dravidar and Tribal Welfare Department, dated 12.4.1992.

K.Govindarajan, for Petitioners.

V.P.Sengottuvelan, Government Advocate, for Respondents.

The Court made the following

ORDER: By consent of both parties, the main writ petition itself is taken up for final hearing.

2. I have heard Mr.K.Govindarajan for petitioners and Mr.V.P.Sengottuvelan for respondents. The writ petition has been filed by the petitioners to call for the records of the first respondent relating to the Notification under Sec.4(1) of the Land Acquisition Act in G.O.(3-D) 175, Adi Dravidar and Tribal Welfare Department, dated 11.2.1991 and Declaration under Sec.6 issued in G.O.(3-D) No.288, Adi Dravidar and Tribal Welfare Department, dated 12.4.1992.

3. According to Mr.K.Govindarajan, learned counsel for the petitioners, the respondents have not followed the procedures contemplated under Sec.4(1) of the Act and that admittedly, the Notification under Sec.4(1) was published in the Government Gazette dated 18.3.1991, but the Notification was published earlier in the newspapers on 14.3.1991 itself. It is further contended that the decision of the Government will come into effect only from the date of publication of the notification in the Gazette and hence the publication in the newspapers, is contrary to the procedures prescribed under the Act. Mr.K.Govindarajan would further submit that the procedures followed in this case cannot be sustained in view of the judgment of this court in W.P.No.9163, 12529 of 1990 etc., dated 29th April, 1992 in the case of *M.Rajagopal and others v. The Government of Tamil Nadu and another, (1992)2 M.L.J. 404.*

4. The respondents have also filed a counter-affidavit. It is seen from para.2 of page.2 of the counter-affidavit sworn to by the Special Tahsildar (Land Acquisition) Adi Dravidar and Tribal Welfare, Tiruppur, who is well acquainted with the facts of the case from the records that the notification under Sec.4(1) was published in the Tamil Nadu Government Gazette, on 18.3.1991

and in the two Tamil dailies, viz., 'Pirpagal' on 14.3.1991 and 'Malai Murasu' on 14.3.1991 and the substance of the Notification was published in the locality on 23.4.1991. As rightly held by my learned Brother K.S.Bakthavatsalam, J., in the judgment above referred, the procedure followed by the respondents in this case, cannot be sustained. It is useful to reproduce the relevant passage from the judgment of my learned Brother K.S.Bakthavatsalam, J., in *M.Rajagopal and others v. The Government of Tamil Nadu and another*, (1992) 2 M.L.J. 404, which runs thus:

"A reading of the judgment clearly shows that the publication under Sec.4(1) in the Gazette is a preliminary step. Though the modes of publication are prescribed in Sec.4(1), after the amending Act, 1984, the publication has to be made first only in the Gazette and then only the other publications are to follow. It is settled law that when a power is given to do a certain thing, that thing must be done in that way or not at all and the other order of performance are necessarily forbidden. These principles would apply when the question is considered with regard to notification in a newspaper earlier than the publication is made in the gazette. The power given under Sec.4(1) has to be followed strictly by the State and the publication has to be made only in the seriatim as given in the section itself. In this case, the paper notification has been made prior to the notification has been made prior to the publication of the notification made in the Official Gazette. The notification has been published in the gazette on 2.11.1988 whereas in the newspaper it was on 27.10.1988. On this score alone without going into the other contentions, the acquisition proceedings have got to be set aside."

5. Thus it is seen that the respondents have not followed the power given to them under Sec.4(1) of the said Act strictly and the publication has to be made only in the seriatim as given in the section itself. In this case, the paper notification has been made prior to the publication of the notification made in the Official Gazette. On this short ground, without going into the other contentions raised in the writ petition, the acquisition proceedings, in my opinion, have got to be set aside. Accordingly, as no other points were argued by both parties, this writ petition is allowed on the above short

ground. There will be, however, no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.1965 of 1988 27th September, 1993.

Nanammal and others

...Petitioners

v.

Perumal Achari

...Respondent.

(A) Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (XIII of 1980), Sec.12(1)(i) - Applicability - 'Debt payable to a widow' - If includes debt payable to a widow who is a legal representative of husband of the original creditor - Many other legal representatives besides widow claiming debt - Share of widow exempted.

The debt referred to in Sec.12(1)(i) of the Tamil Nadu Indebted Agriculturists (Temporary Relief) Act does not make any distinction between a debt due originally or a debt due to a widow by virtue of her claim as legal representative of her deceased husband. In the absence of any such distinction, the court does not propose to import any distinction. The object of the said exemption is obvious, namely to benefit the widow to whom the debt was due. Taking that aspect into account and in the face of not mentioning of any distinction aforesaid, it is clear that the debt due to the widow whether the debt was original or whether the debt was due to her as legal representative of her deceased husband to whom the debt was originally due, the exemption would come into play. Even in a case where there were many decree holders apart from the widow, the widow would be entitled to a certain share in the decree debt and to that extent it is exempted.. [Paras. 4 & 5]

(B) Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (XIII of 1980), Sec.3(d)(vi) at (vii), Explanation - Agriculturist-debtor - Means to pay - Proof - Certificate of Tahsildar regarding income - If can be relied upon.

The court would like to mention that the certificate of the tahsildar regarding the income ought not to have been looked into by the court below, since there is no provision in Act (XIII of 1980) enabling the tahsildar to issue a certificate regarding the income. Only regarding the value of the property, he is authorised to issue a certificate by virtue of Explanation to Clauses (VI) and (VII) of Sec.3(d) of the Act.

[Para. 6]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Aruppukottai, dated 31.8.1987 and made in E.P.No.37 of 1966 in O.S.No.262 of 1977.

Jayabalan, for Petitioners.

K.V.Subramanian, for Respondent.

The Court made the following

ORDER: This revision petition is directed against the order in E.P.No.37 of 1986 in O.S.No.262 of 1977, passed by the District Munsif, Aruppukottai. This revision petition is directed against the order in E.P.No.37 of 1986 in O.P.No.262 of 1977, passed by the District Munsif, Aruppukottai.

2. Short facts are: One Ramasamy Naicker had filed the suit against the respondent for money and had obtained a decree. Execution was laid by his legal representatives against the respondent for realisation of the decree amount by arrest. That was resisted by the respondent on the ground that he was entitled to the benefits of Act 13 of 1980. After enquiry, the learned District Munsif, had held that the respondent was entitled to the benefits of Act 13 of 1980 and dismissed the execution petition. Aggrieved by the said order, the legal representatives have come forward with this revision petition.

3. Mr.N.Jayabalan, learned counsel appearing for the revision petitioners would submit that the 1st Petitioner is a widow and so, the debt due to her was exempted from the operation of the Act 13 of 1980 by virtue of Sec.12(1)(i) of the said Act. He would further submit that on facts also, the respondent is not entitled to the benefits of the Act.

Per contra, Mr.K.V.Subramanian, learned counsel appearing for the respondent would submit that the original debt was in favour of Ramasamy Naicker, that only on his death, his legal representatives viz., the widow and children were impleaded as parties and that unless the original debt due to a widow, the exemption under Sec.12(1)(i) of the Act, cannot be claimed. He

would further submit that apart from the widow, there are other decree-holders and it was not as if the widow was solely entitled to the debt, and on this account, the exemption cannot be claimed. He would further submit that the execution was for arrest and irrespective of the operation of the Act 13 of 1980, unless means is proved, the execution proceedings is bound to fail.

4. I have carefully considered the submissions made by the rival counsels. The relevant portion of Sec.12(1)(i) of Act 13 of 1980 reads as follows:

"Sec.12: *Certain debts and liabilities to be affected--*

Nothing in this Act shall apply to the following categories of debts and liabilities of a debtor, namely:

(1) any debt or debts payable on the 1st day of January, 1980 to-

(i) a widow----

E.P. was filed in 1986. The debt referred to in that section does not make any distinction between a debt due originally or a debt due to the widow by virtue of her claim as legal representative of her deceased husband. In the absence of any such distinction, I do not propose to import any distinction. The object of the said exemption is obvious, namely, to benefit the widow to whom the debt was due. Taking that aspect into account and in the face of not mentioning of any distinction aforesaid, I am clear that the debt due to the widow whether the debt was original or whether the debt was due to her as legal representative of her deceased husband, to whom the debt was originally due, the exemption would come into play.

5. The further submission of the learned counsel for the respondent is that there were many decree-holders apart from the widow and hence this exemption would not apply. Even in that case, the widow would be entitled to a certain share in the decree debt and to that extent, it is exempted. The order of the court below, not considering this aspect and exempting that portion of the debt due to the widow, cannot be sustained.

6. Regarding the claim that the respondent has got no means to pay, the court below had not adverted its attention to that aspect of the case, but had adverted its attention only on the question as to whether the respondent was entitled to the benefits of Act 13 of 1980 and on that finding only, the court below dismissed the petition. If the respondent was not entitled to claim the benefits of Act

13 of 1980, either because the debt due to the widow is exempted from the operation of the Act, or because of the evidence available in the court below, in either cases, unless it was shown that the respondent has no means to pay the decree debt, the execution petition cannot be dismissed. Further, I would like to mention that the certificate of the tahsildar regarding the income, ought not to have been looked into by the court below, since there is no provision in Act 13 of 1980 enabling the tahsildar to issue a certificate regarding the income. Only regarding the value of the property, he is authorised to issue a certificate by virtue of explanation to clauses (vi) and (vii) of Sec.3(d) of the Act.

7. In view of the above, for finding out the share of the widow and excluding it from the operation of Act 13 of 1980 and for finding out whether the respondent was entitled to the benefits of Act 13 of 1980 with regard to his remaining portion of the decree debt and for finding out whether the respondent has got means to pay the decree debt, the matter is remitted back to the court below. Accordingly, the civil revision petition is allowed and the order of the court below is set aside and the matter is remitted back to the court below for the purposes indicated above and for disposal according to law. The court below shall restore E.P.No.37 of 1986 and after enquiry on the above aspects, dispose it of according to the law.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No.1902 of 1993 7th October, 1993.

G.Rajendran ...*Petitioner*
v.
P.C.Ramalingam and another ...*Respondents.*

(A) Civil Procedure Code (V of 1908), O.21 - Suit for partition - Final decree passed - Execution petition for delivery of possession of suit property - Effective

delivery not made - Remedy of decree holder - It can file fresh execution petition or should file fresh suit. Both A.I.R. 1974 Mad. 325 and the present case are cases where there were no effective delivery of possession on the earlier occasion and it would be highly unjust to drive the decree-holder to a separate suit for possession when he has succeeded in this Court which was initiated as early as 1976.

[Para. 8]

(B) Civil Procedure Code (V of 1908), Sec.115 - Revision order making substantial justice - If can be interfered with.

This Court will not be justified in interfering with the impugned order under Sec.115, Civil Procedure Code when substantial justice has been done by the said order. [Para. 8]

Cases referred to:

Kunhanan v. Mammu Beary, A.I.R. 1961 S.C. 137. [Paras. 2, 4, 5, 6]

Ramaganesan v. Rajah Ayyar, (1963) 2 M.L.J. 162: A.I.R. 1964 Mad. 53: 76 L.W. 414: I.L.R. (1963) Mad. 911 (F.B.). [Paras. 2, 8]

K.Ramalingam v. K.N.K.Reddi, A.I.R. 1974 Mad. 325: (1974) 1 M.L.J. 142: 87 L.W. 63. [Para 4, 5, 6, 7].

Chennichi alias Periakkal v. Srinivasan Chettiar, (1970) 1 M.L.J. 234. [Paras. 4, 8]

Balambika v. Elizabeth, 1990 T.L.N.J. 116. [Para. 4]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Polur, Tiruvannamalai Sambavarayar District, dated 5.7.1993 and passed E.P.No.60 of 1993 in O.S.No.576 of 1983.

T.R.Rajagopalan, Senior Counsel for *R.G.Narendhiran*, for Petitioner.

G.Subramaniam, Senior Counsel for *A.S.Venkatachalamurthy, T.Muruga Manuckam*, for Respondent.

The Court made the following

ORDER: The 1st defendant-judgment-debtor has filed this civil revision petition against the order in E.P.No.60 of 1993, allowing the said execution petition filed by the decree-holder-respondent for issue of warrant for delivery of possession of the suit property, pursuant to the partition final decree passed on 29.4.1992 in O.S.No.576 of 1983.

2. The only contention of the learned counsel for the petitioner is that the execution petition itself is not maintainable in view of the following facts: On 25.6.1992 itself the decree-holder filed Ex.B-1

memo in the suit, praying for recording full satisfaction of the decree on the footing that the decree-holder had taken possession as per the final decree, outside court. Further pursuant to the said memo, on 30.6.1992 the court also recorded full satisfaction accordingly. Therefore, according to the said counsel for petitioner, the present E.P.No.60 of 1993 filed on 1.2.1993 is not maintainable. The learned counsel also relies on the decisions in *Kunhanan v. Mammu Beary*, A.I.R. 1961 S.C. 137 and *Ramaganesan v. Rajah Ayyar*, (1963) 2 M.L.J. 162; A.I.R. 1964 Mad. 53; 76 L.W. 414; I.L.R. (1963) Mad. 911 (F.B.).

3. I also find that the petitioner filed O.E.A.No.379 of 1992 on 23.12.1992 to set aside the abovesaid order dated 30.6.1992, but that the said execution application was not pressed and hence it was dismissed on 28.1.1993. Further, few days prior to 23.12.1992, that is on 15.12.1992, the petitioner filed O.S.No.521 of 1992 for permanent injunction against possession interference with reference to the property in question and also filed I.A.No.775 of 1992 for temporary injunction along with the said suit on the footing that he continues to be in possession of the said property. In I.A.No.775 of 1992, the respondent-decree-holder contended in his counter-affidavit dated 12.1.1993 that he has already taken possession and that hence, the abovesaid memo dated 25.6.1992 was filed. The said interlocutory application was, therefore, dismissed on 22.3.1993 as shown by Ex.B-3.

4. According to the learned counsel for the petitioner, the above E.P.No.60 of 1993 has been filed on 1.2.1993 without disclosing the abovesaid order dated 28.1.1993 in the abovesaid O.E.A.No.379 of 1992 or the pendency of the abovesaid I.A.No.775 of 1992 and the Court below, though has dismissed I.A.No.775 of 1992 on 22.3.1993, holding that the decree-holder had already taken possession pursuant to the abovesaid memo, strangely allowed the execution petition by order dated 5.7.1993, holding that the order dated 30.6.1992 recording full satisfaction as per the abovesaid memo is illegal. The said counsel argues that even though the decree-holder did not contend that the order dated 30.6.1992 was illegal, the court below has allowed the execution petition on the ground that it is illegal, relying on the mere pendency of O.E.A.No.216 of 1992 filed by the decree-holder for stay of the final decree proceedings (though no stay as such was given in O.E.A.No.216 of 1992)

and the pendency of O.S.No.521 of 1992.

5. On the other hand, the learned counsel for the respondent-decree-holder argues thus:

The conduct of the judgment-debtor himself in having filed O.E.A.No.375 of 1992 and O.S.No.521 of 1992 and I.A.No.775 of 1992 therein shows that delivery was actually not effected earlier, though the abovesaid memo of the decree-holder and the consequent order of the court below dated 30.6.1992 and the stand taken later also by the decree-holder that delivery was taken, show that delivery was actually effected. He further argues that the decree-holder should not be driven to another suit for possession despite the fact that he fought up to the Supreme Court in the present suit, which came to be filed as early as 1976. He also relies on *K.Ramalingam v. K.N.K.Reddi*, A.I.R. 1974 Mad. 325; (1974) 1 M.L.J. 142; 87 L.W. 63, which also considered and explained *Kunhanan v. Mammu Beary*, A.I.R. 1961 S.C. 137 as well as *Ramaganesan v. Rajah Ayyar*, (1963) 2 M.L.J. 162; A.I.R. 1964 Mad. 53; 76 L.W. 414; I.L.R. (1963) Mad. 911 (F.B.). He also submits that in the above circumstances there is no case for interference under Sec.115, C.P.C., particularly in the light of *Chennichi alias Periakkal v. Srinivasan Chettiar*, (1970) 1 M.L.J. 234. and *Balambika v. Elizabeth*, 1990 T.L.N.J. 116.

6. I have considered the rival submissions. There is great force in the argument of the learned counsel for the respondent-decree-holder. The conduct of the judgment-debtor in having filed O.E.A.No.379 of 1992 and O.S.No.521 of 1992 and also I.A.No.775 of 1992 shows that delivery was not actually effected earlier as per the memo of the decree-holder or the subsequent stand taken by him. In *K.Ramalingam v. K.N.K.Reddi*, A.I.R. 1974 Mad. 325; (1974) 1 M.L.J. 142; 87 L.W. 63, this Court summed up the position clearly after considering many earlier decisions, including *Kunhanan v. Mammu Beary*, A.I.R. 1961 S.C. 137 and *Ramaganesan v. Rajah Ayyar*, (1963) 2 M.L.J. 162; A.I.R. 1964 Mad. 53; 76 L.W. 414; I.L.R. (1963) Mad. 911 (F.B.). In paragraph 17 of its judgment, it concluded thus:

"Thus it is clear from the aforesaid decision that whatever may be the conflict between some decisions regarding filing on execution petition for a second time after the decree for possession has been satisfied, one thing is certain that if on the previous occasion there was no

legal, complete or effective delivery, a second execution petition was not a bar. As far as the present case is concerned, the judgment-debtors (appellants) themselves accept the fact that there was no actual physical delivery given to the decree-holder. They have come forward with a specific case that the alleged handing over of actual possession is not true and that as a matter of fact they are in possession of the property. The only persons who could object to a second execution petition if filed, on the basis that the decree has already been satisfied, themselves state that there was no legal complete or effective delivery of the property. In these circumstances, there is absolutely no substance in the argument that a subsequent execution petition will be objected to as a bar as if it will be a second execution petition filed after the decree has been satisfied."

7. Even in *Kunhanan v. Mammu Beary*, A.I.R. 1961 S.C. 137, it was observed thus:

"How under O.21, Rule 35, a person in possession and bound by the decree has to be removed only if necessary, that it to say, if necessary to give the decree-holder the possession he is entitled to and asks for. It would not be necessary to remove the person in possession if the decree-holder does not want such removal. It is open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that then he cannot later any that he has not been given that possession to which he was entitled under the law. This is what happened in this case."

So, the said Supreme Court case is distinguishable from the facts of the present case, as explained above. Likewise in *K.Ramalingam v. K.N.K.Reddi*, A.I.R. 1974 Mad. 325: (1974)1 M.L.J. 142: 87 L.W. 63, also the facts were different from the Supreme Court case and that is why the said A.I.R.1974 Mad. 325 also observed, after referring to the said Supreme Court decision, thus:

"From the above stated Supreme Court decision it is clear that if the decree-holder is satisfied with alleged delivery of possession, whether physical or symbolical, he cannot on a subsequent date ask for actual possession by filing a second execution petition; subsequent execution petition can be entertained only in cases where there was no legal, complete and

effective delivery of possession on the earlier occasion."

8. So, both *K.Ramalingam v. K.N.K.Reddi*, A.I.R. 1974 Mad. 325: (1974)1 M.L.J. 142: 87 L.W. 63 and the present case are cases where there were no effective delivery of possession on the earlier occasion and it would be highly unjust to drive the decree-holder to a separate suit for possession when he has succeeded in this suit, which was initiated as early as 1976.

9. Even in *Ramaganesan v. Rajah Ayyar*, (1963)2 M.L.J. 162: A.I.R. 1964 Mad. 53: 76 L.W. 414: I.L.R. (1963) Mad. 911 (F.B.), it was held on facts thus:

"From the principle laid down in these cases it would follow that symbolical delivery of possession effected on 29.7.1957 in the instant case would have no legal effect."

In the said case, this Court on to observe further thus:

"But in a case where possession has been lawfully given in any one of the three kinds specified above, it would not be competent for the decree-holder or purchaser to apply again for delivery (actual or constructive) unless there was no legal, complete or effective delivery on the earlier occasion."

So, there is no difficulty for me in concurring with the impugned order in the Execution petition. Further, in view of *Chenichi alias Periakkal v. Srinivasan Chettiar*, (1970)1 M.L.J. 234 and *Balambika v. Elizabeth*, 1990 T.L.N.J. 116 also, I will not be justified in interfering with the impugned order under Sec.115, C.P.C. When substantial justice has been done by the said order.

10. The civil revision petition is therefore, dismissed. No costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Janarthanam, J.*

C.R.P.Nos.2747 and 2748 of 1993 and
C.M.P.No.12869 of 1993 29th September, 1993.

K.Ponnambalam ...*Petitioner*
v.

Subdra Devi ...*Respondent.*
Civil Procedure Code (V of 1908), O.1, Rule 10(2)
- *Necessary or proper party* - *Respondent entering*
into agreement to purchase vacant land - *Filing suit*
for specific performance - *Original owner being set*
ex parte, decree passed - *Sale deed executed by court*
- *Respondent filing execution petition for delivery of*
possession - *Purchaser of suit land by means of a*
sale deed of later date - *If a necessary or proper party*
to execution proceedings - *Maxims* - *Nemo dat qua*
non habet.

On the *ex parte* decree coming to be passed on 2.5.1985 and on behalf of the original title-holder 'N', the court executing a sale deed in favour of the respondent on 22.12.1987 whatever right, title or interest he had in the suit vacant site, the same had been irretrievably lost inasmuch as he has not chosen to agitate the matter any further and in such a situation, the petitioner who was stated to have purchased the same vacant site by means of a sale deed dated 15.2.1989 at a later point of time cannot have any title to the vacant site better than that of his vendor 'N', the original title holder, going by the maxim *nemo dat qua non habet*. That being so, he cannot be stated to be a necessary or a proper party to be impleaded for effective adjudication of the matter involved in the execution proceedings levied by the respondent. [Para. 6] Petitions under Sec.115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court (X Assistant Judge), Madras dated 14.7.1993 and made E.A.No.5532 of 1992 in E.P.No.145 of 1989 in O.S.No.687 of 1984 respectively etc.

S.Sundaresan, for Petitioner.

The Court made the following

ORDER: Vacant site measuring 60 feet east-west and 20 feet north-south, totalling to 1200 square feet, with a thatched hut comprised in Old R.S.No.248/2A/2 and new R.S.No.248/242 in Rathinam Nagar - Old Plot No.17-A (New Plot No.17) originally belonged to One Nagarajan. He

it is said, agreed to sell the same to one Subadra Devi (respondent herein) for Rs.15,000 He was stated to have received an advance of Rs.10,000 and agreed to receive the balance of sale consideration on the date of execution of the sale deed. An agreement of sale was, in fact, entered into between them on 20.7.1981, evidencing those aspects. It seems, despite issuance of a notice by the respondent demanding execution of the sale deed expressing her readiness and willingness to perform her part of the contract, the original owner Nagarajan did not comply with the demand so made. Consequently, she filed the suit in O.S.No.687 of 1984 on the file of the XII Assistant Judge, City Civil Court, Madras. The said Nagarajan remained *ex parte* and consequently an *ex parte* decree came to be passed on 2.5.1985.

2. Consequently, the respondent was stated to have got the sale deed executed through court in her favour on 22.12.1987. The respondent filed E.P.No.145 of 1989 on the file of the X Assistant Judge, City Civil Court, Madras for delivery of vacant possession of the vacant site and delivery of the same, it is said, had been ordered. When she went to take possession along with the bailiff, there was some obstruction and consequently, she moved the executing court for removal of the same.

3. At this stage, One K.Ponnambalam (revision petitioner), claiming to have purchased the suit vacant site from the judgment-debtor original owner Nagarajan on 15.2.1989 filed E.A.No.5537 of 1992 in the said execution proceedings under O.1, Rule 10(2), C.P.C., praying for his being impleaded as a necessary party thereto.

4. He also filed E.A.No.5532 of 1992 under O.21, Rule 29, C.P.C., praying for stay of all further execution proceedings pending disposal of the suit in O.S.No.7829 of 1992 on the file of the VI Assistant Judge, City Civil Court, Madras, filed by him for setting aside the decree passed in O.S.No.687 of 1984, and consequent sale deed executed through court on 22.12.1987 and for permanent injunction.

5. Both the said applications were dismissed giving rise to the present actions.

6. Even at the outset, I may state that there are absolutely no merits for the entertainment of these civil revision petitions. Admittedly, as adverted to earlier, on the *ex parte* decree coming to be passed on 2.5.1985 and on behalf of the original

title-holder Nagarajan, the court executing a sale deed in favour of the respondent on 22.12.1987, whatever right, title or interest, he had in the suit vacant site, the same had been irretrievably lost, inasmuch as he has not chosen to agitate the matter any further and in such a situation, the petitioner, who was stated to have purchased the same vacant site by means of a sale deed dated 15.2.1989 at a later point of time cannot have any title to the vacant site better than that of his vendor Nagarajan-the original title-holder, going by the maxim *nemo dat qua non habet*. That being so, he cannot be stated to be a necessary or a proper party to be impleaded for effective adjudication of the matter involved in the execution proceedings levied by the respondent. Under such circumstances, the dismissal of both the execution applications by the court below cannot be stated to be not sustainable in law. Further, there is no irregularity or illegality in the impugned orders passed.

7. Both these civil revision petitions, as such, deserve, to be dismissed, even at the admission stage and they are accordingly dismissed. Consequently, C.M.P.No.12869 of 1993 is also dismissed.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: Kanakaraj, J.

W.P.No.7363 of 1986 22nd November, 1993.

M.Munusamy Gounder ...*Petitioner*
v.

Commissioner for Land Administration, Madras and others ...*Respondents.*

Revenue Standing Order, O.45(4) - Bought-in-lands of the Government - Assignment of - Questions pertaining to - It can be decided by civil courts.

The Revenue Standing Order 45 deals with the question of treatment of bought-in-lands, the manner in which trespass on such bought-in-lands should be dealt with and the manner in which such

bought-in-lands should be disposed of. In particular in Sub-sec.(4) of Revenue Standing Order 45, it is stated that in the matter of assignment of bought-in-lands the original owners or their undisputed heirs should be preferred to outsiders subject to certain conditions. Since the power is given to the authority under the Revenue Standing Orders on the question of assignment and on the question of the proper person who should get the assignment, the court is of the opinion that a civil court cannot decide that issue regarding assignment. The past history shows that title to the said lands can be claimed only on the basis of the assignment. Certainly, the civil court cannot grant an assignment. [Para. 3]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Commissioner for Revenue Administration, Madras, the 1st respondent herein relating to No.O.M.23968/86, dated 29.4.1986 against the order of the District Revenue Officer, Cuddalore, dated 22.1.1986 and made in Ref.B5/83377/84, the 2nd respondent herein and quash the same as illegal and without jurisdiction.

R.G.Rajan, for Petitioner.

P.Chandrasekaran, Additional Government Pleader, for Respondent Nos.1 and 2.

N.P.Kumar, for Respondent No.3.

The Court made the following

ORDER: The facts are not basically disputed. The lands in question bearing R.S.No.10/4 (1.92 acres) and 10/5 (1.04 acres) at Kadagampatti village are admittedly bought-in-lands of the Government within the meaning of Revenue Standing Order 45. The lands were assigned in favour of the 3rd respondent and there was a long history of litigation between the petitioner and the 3rd respondent. The petitioner filed an appeal to the Sub-Collector, Tindivanam, against the order of assessment and the same was allowed on 2.2.1973. On revision by the third respondent, the District Revenue Officer remanded the case to the Sub-Collector on 31.7.1973. Thereafter, by an order dated 11.3.1974, the Revenue Divisional Officer set aside the order of the Deputy Tahsildar and directed fresh enquiry. That order of the Revenue Divisional Officer dated 11.3.1974 was confirmed upto the stage of the Commissioner of the Land

Revenue. In the meanwhile, the petitioner seems to have filed O.S.No.2 of 1972 for declaration of his possessory title and for a permanent injunction against the third respondent. That suit was dismissed and on appeal in A.S.No.657 of 1973 the matter was again remanded to the trial court. On remand, the suit was decreed in favour of the petitioner and the further appeal by the third respondent was dismissed. It is in this state of affairs the Sub-Collector directed the Tahsildar to transfer the land in the name of the petitioner by an order dated 1.3.1984. Accordingly, the Tahsildar, by an order dated 24.4.1984, granted patta to the petitioner. The third respondent challenged this order in revision before the District Revenue Officer. The District Revenue Officer has passed an order on 22.1.1986 directing fresh enquiry. The writ petition is directed against this order, though the Commissioner of Land Revenue has also confirmed this order of the District Revenue Officer in his proceedings dated 29.4.1986. The Commissioner has expressed the view that the dispute between the parties should be settled by a civil court.

2. The learned counsel for the third respondent also brings to my notice a suit filed by the third respondent for the very same relief of declaration for possessory title and for an injunction. That suit seems to have been decreed *ex parte* on 29.9.1986 and the attempt of the writ petitioner to have the *ex parte* decree set aside did not succeed. It is also stated that there is a third suit pending between the parties, which has not yet been disposed of.

3. It is under these circumstances Mr.R.G.Rajan, learned counsel for the petitioner argues that the order of the District Revenue Officer dated 22.1.1986 directing a fresh enquiry into the entire issue by giving opportunity to both parties is not seriously questioned. But, according to the writ petitioner, his preferential claim under Revenue Standing Order 45(4) could also be considered at the time of the fresh enquiry. Learned counsel for the 3rd respondent argues that his claim should be considered on the basis of the assignment made in his favour as early as in the year 1971. The only question that has to be decided is whether the revenue authorities should go into the matter or whether as directed by the Commissioner, in his proceedings dated 29.4.1986, the parties should await decision from the civil court. In resolving this dispute, I am taking into account the fact, that

before the civil court the Government is not a party. Since the subject lands are bought-in lands the proper authority under Revenue Standing Order 45. This is because the said Revenue Standing Order 45 deals with the question of treatment of bought-in lands, the manner in which trespass on such bought-in lands should be dealt with and the manner in which such bought-in lands should be disposed of. In particular in Sub-sec.(4) of Revenue Standing Order 45, it is stated that in the matter of assignment of bought-in lands the original owners or their undisputed heirs should be preferred to outsiders subject to certain conditions. Since the power is given to the authority under the Revenue Standing Orders on the question of assignment and on the question of proper person who should get the assignment, I am of the opinion that a civil court cannot decide that issue regarding assignment. The past history shows that title to the said lands can be claimed only on the basis of the assignment. Certainly the civil court cannot grant an assignment. In this view of the matter, I uphold the order of the District Revenue Officer dated 22.1.1986 subject to certain modifications which I propose to make. The order of the Commissioner in his proceedings dated 29.4.1986 directing the parties to abide by the decision of the civil court is hereby set aside. In making the fresh enquiry as per the order of the District Revenue Officer dated 22.1.1986, the Tahsildar is directed to consider the claim of the writ petitioner under Revenue Standing Order 45(4) as well as the claim of the third respondent on the basis of his earlier assignment. Both the parties shall be given notice of the fresh enquiry and after hearing them or their counsel, a decision shall be rendered. The writ petitions are ordered in the above terms. There will be no order as to costs.

B.S.

Petition allowed in terms.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Pratap Singh, J.

C.R.P.No.2157 of 1988 5th October, 1993.

Govinda Padayachi ...Petitioner
v.

Uthandi Padayachi ...Respondent.

Limitation Act (XXXVI of 1963), Secs.2(j) and 18 - Expression 'Prescribed period' - Definition of - Period required to be excluded under provisions of debt laws - It can be treated as prescribed period - Acknowledgement made during that period is sufficient for the purpose of Sec.18.

On a pronote dated 13.4.1975, an endorsement of payment of Rs.5 towards interest was made on 15.11.1979. The respondent filed a suit on the pronote in 1982 stating that defendant was an agriculturist protected by Debt Law. It was contended by the defendant that the date of payment i.e. 15.11.1979 falling outside the period of three years, could not save limitation and that the suit was barred by limitation. The trial court rejected the contention and decreed the suit. He filed an appeal and failed there also. Hence the revision. *Held:* In 1987 T.N.L.J. 212, it has been held that the expression 'prescribed period' is now defined to mean the 'period of limitation' prescribed by the Schedule and computed according to the sections in the Limitation Act. By the Limitation Act of 1963, a period which is required to be excluded under the provisions of some other Act, in computing the period of limitation, cannot be treated as a 'prescribed period' and an acknowledgement made during that period will not be sufficient for the purpose of Sec.18 of the Limitation Act, 1963. The court agreed with the view expressed therein. On the facts of the case 1987 T.N.L.J. 282, is alone applicable and beyond the period of limitation and hence it would not save the suit from the bar of limitation and on that ground the suit is liable to be dismissed. [Paras. 8 & 10]

Cases referred to:

Kalavagunta Narasinga Rao Garu v. Veupolapati Rangayya, (1942)2 M.L.J. 610: A.I.R. 1943 Mad. 133: 55 L.W. 808: 1942 M.W.N. 685: 205 I.C. 546. [Para. 5]

Ramachandra Iyer v. Vadivelu, 1987 T.N.L.J. 282.

[Paras. 8 & 10]

Subbaraya v. Eswaramoorthy, A.I.R. 1963 Mad. 202: 75 L.W. 727. [Paras. 8, 9]

Firm Kamta Prasad Gulzari Lal, A.I.R. 1975 All. 41. [Para. 8]

Sayana Gounder v. Veerappa Gounder, (1959)1 M.L.J. 312: A.I.R. 1959 Mad. 278: I.L.R. 1959 Mad. 711: 1959 M.W.N. 207: (1959)72 L.W. 140. [Para. 9]

Ramachandra Iyer v. Annamalai Chettiar, (1967)1 M.L.J. 437: A.I.R. 1968 Mad. 103. [Para. 9]

V.Narayanaswamy, for Petitioner.

S.Venkateswaran, for Respondent.

The Court made the following

ORDER: This civil revision petition is directed against the judgment in A.S.No.20 of 1987 on the file of Subordinate Judge, Cuddalore, confirming the judgment in O.S.No.1322 of 1982 on the file of District Munsif, Panrutti.

2. Short facts are: The respondent has filed the suit on the foot of a pronote against the revision petitioner. He resisted it on the ground that there was partial failure of consideration that there was partial discharge that the endorsement was not true that defendant is entitled to the benefits of Debt Relief Acts and that the suit claim was barred by time. After trial, the learned District Munsif had rejected all the objections raised by the defendant and decreed the suit. Aggrieved by the same, the defendant has filed appeal in A.S.No.20 of 1987 and having failed there, has come forward with this revision petition.

3. Mr.V.Narayanaswamy, the learned counsel appearing for the revision petitioner, would submit that the plaintiff relied upon the endorsement Ex.A-2, dated 15.11.1979 that the said endorsement was not accepted by the defendant and the courts below were wrong in accepting Ex.A-2. He would further submit that the endorsement in Ex.A-2 was payment of Rs.50 towards interest and that would not amount to an acknowledgement under Sec.18 of Limitation Act. He would further submit that the date of pronote was 13.4.1975, date of part payment and endorsement therefor was dated 15.11.1979 which falls outside the period of three years and as such Ex.A-2 cannot save limitation. He would further submit that though Ex.A-2 was during the period of moratorium, after the new Limitation Act came into force, only if acknowledgement was made within the period of three years, that can be taken into

account and any acknowledgement made beyond the period of three years would not save limitation. I have heard Mr.S.Venkateswaran, the learned counsel appearing for the respondent, on the above aspects.

4. I have carefully considered the submissions made by the rival counsels. I shall first advert to the genuineness of Ex.A-2. Regarding Ex.A-2. The stand taken in the written statement in para.6 reads as follows:

“The endorsement is not true. It was misrepresented by the plaintiff as that he was getting the defendant’s signature for the purpose of discharging the promissory note. This defendant is an innocent and illiterate except he knows to write his name and old age.”

There is no plea that there was no endorsement whatsoever and his signature alone was taken. The stand taken was that the endorsement is not true and if it is taken along with other portion of para.6, it would mean that the contents of endorsement are not true. While so, the submission of Mr.V.Narayanaswamy that P.W.2, the scribe has admitted that while he made the endorsement, the signature was already there and so it must be taken that mere signature was obtained and later endorsement was taken, cannot be accepted. Mr.Narayanaswamy pointed out that there is some space left in between the endorsement and signature of the defendant in Ex.A-2 and thus there is intrinsic evidence to show that the signature must have been obtained earlier and endorsement must have been prepared later. But in the absence of any such specific plea in the written statement, I am unable to accept this submission. The person who wrote the endorsement figured as P.W.2 and has testified it. The finding of the courts below do not appear to be incorrect.

5. I shall next pass on to the submission of Mr.Narayanaswamy that even assuming Ex.A-2 is correct, the endorsement in it was only for payment of Rs.5 towards interest and that would not amount to an acknowledgement. In this regard, he relied upon the ruling reported in *Kalavagunta Narasinga Rao Garu v. Veupolapati Rangayya*, (1942) 2 M.L.J. 610: A.I.R. 1943 Mad. 133: 55 L.W. 808: 1942 M.W.N. 685: 205 I.C. 546. In that case, the suit was laid on the foot of a promissory note with two endorsements. The endorsements merely state that so much amount was paid. It was held that those endorsements did not save limitation

under Sec.20 of the Limitation Act. Inasmuch as it merely amounts to statement of fact that so much amount was paid. In this case, the learned counsel for the respondent would say that it would satisfy Sec.19 of the Limitation Act. As per Sec.19, Sub-sec.(1) where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt a fresh period of limitation shall be computed from the time when the payment was made. In this case, there was an endorsement for payment of debt. So it would fall within the purview of Sec.19(1) of Limitation Act and hence I am unable to accept this submission of Mr.Narayanaswamy.

6. I shall next pass on to the submission of Mr.Narayanaswamy that Ex.A-1 was dated 13.4.1975, Ex.A-2 endorsement was dated 15.11.1979 and it falls outside the period of three years and assuming it is true and assuming it falls within the purview of Sec.19(1) of Limitation Act, unless it was within the period of three years, it has to be ignored and it cannot be taken as saving limitation. To consider this submission, Sec.19 needs extraction. It reads as follows:

“19. *Effect of payment on account of debt or of interest on legacy:* Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made; Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.” *[emphasis supplied]*.

7. In Sec.2(j) of the Limitation Act, “prescribed period” is defined and it reads as follows:

“period of limitation” means the period of limitation prescribed for any suit, appeal or application by the schedule, and “prescribed period” means the period of limitation computed in accordance with the provisions of this Act.”

8. In *Ramachandra Iyer v. Vadivelu*, 1987 T.N.L.J. 282, Justice Kader had occasion to consider the impact of the new Limitation Act with reference to “prescribed period”. The effect of making an

acknowledgement during the period of moratorium, in which the learned Judge has held that this is a new provision introduced by the Act of 1963. The Old Act contained no such definition of the expression "prescribed period". It was held under the old Act that even in cases where the plaintiff was entitled to the exclusion of a time under the provisions of some other Act, the period would be a "period prescribed" within the meaning of Sec.19 of that Act and saved limitation. Then the learned Judge had referred to the rulings rendered in *Subbaraya v. Eswaramoorthy*, A.I.R. 1963 Mad. 202: 75 L.W. 727 and *Firm Kamta Prasad Gulzari Lal*, A.I.R. 1975 All. 41 and had held that these decisions can no longer be considered good law under the new Act. The expression "prescribed period" is now defined to mean the 'period of limitation' prescribed by the schedule and computed according to the sections in the Act. By the Limitation Act of 1963, a period which is required to be excluded under the provisions of some other Act, in computing the period of limitation, cannot be treated as a "prescribed period" and an acknowledgment made during that period will not be sufficient for the purpose of Sec.18 of the Limitation Act of 1963. With respect, I agree with the view expressed by the learned Judge.

9. The lower appellate court had relied upon the ruling *Subbaraya v. Eswaramoorthy*, A.I.R. 1963 Mad. 202: 75 L.W. 727 referred to supra. But that ruling was rendered under the old Limitation Act. In *Sayana Gounder v. Veerappa Gounder*, (1959) 1 M.L.J. 312: A.I.R. 1959 Mad. 278: I.L.R. 1959 Mad. 711: 1959 M.W.N. 207: (1959) 72 L.W. 140, this Court had held that Madras Indebted Agriculturists (Temporary Relief) Ordinance (V of 1953) which had come into force before the expiry of the period of limitation for the suit, followed by Acts V of 1954 and Act I of 1956 prohibited the filing of a suit till 1st July, 1955 and the endorsement made on 23rd June, 1955 validly saved the limitation for the suit. That ruling was rendered under Limitation Act (IX of 1908). In *Subbaraya v. Eswaramoorthy*, A.I.R. 1963 Mad. 202: 75 L.W. 727, a Division Bench of this Court had considered the distinction between Sec.14 and 19 of Limitation Act, 1908. In *Ramachandra Iyer v. Annamalai Chettiar*, (1967) 1 M.L.J. 437: A.I.R. 1968 Mad. 103, a Division Bench of this court had occasion to consider the acknowledgment during the extended period of limitation under Sec.13 of the

Limitation Act (IX of 1908). There rulings were rendered under the old Limitation Act, where there is no definition of expression "prescribed period". Under the new Limitation Act, "Prescribed period" is defined in Sec.2(j) of Limitation Act.

10. On the fact of this case, *Ramachandra Iyer v. Vadivelu*, 1987 T.N.L.J. 282, referred to supra, is alone applicable. While beyond the period of limitation and hence it would not save the suit from the bar of limitation and on that ground, the suit is liable to be dismissed. The courts below have not considered this aspect of the case and hence they have come to an erroneous conclusion and decreed the suit. That cannot stand in view of what I have stated and they are liable to be set aside. The civil revision petition is allowed, setting aside the judgments in A.S.No.20 of 1987 and O.S.No.1322 of 1982 and consequently O.S.No.1322 of 1982 on the file of District Munsif, Panruti shall stand dismissed, without costs. No costs in this C.R.P.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.No.956 of 1993 15th November, 1993.

Dr.Subramanian Swamy ...Appellant
v.

J.Jayalalitha and others ...Respondents.

(A) Constitution of India (1950), Arts.191, 192 and 226 - Representation of the Peoples Act (XLIII of 1951), Sec.9-A - Whether member of legislature has become subject to disqualification - Question pending before Election Commission - High Court, exercising jurisdiction under Art.226 whether can go into the question and decide.

The Constitution specifically provides for challenging the validity of the election to either House of Parliament or to either house of the legislature of a State by way of an election petition and

Art.329 of the Constitution specifically bars interference by courts in election matters notwithstanding anything contained in the Constitution to go into the question as to the validity of an election to either House of Parliament or to either House of the Legislature of a State except by an election petition presented to such authority and in such manner as may be provided by or under any law made by the appropriate legislature. Of course, Art.329 of the Constitution does not cover the question arising under Art.192 of the Constitution inasmuch as Art.192 deals with the situation which arises after the election and relates to a member of a House of the legislature of a State having become subject to any of the disqualifications mentioned in clause (1) of Art.191 of the Constitution. Nevertheless, when the Constitution specifically provides that such a question shall be referred for the decision of the Governor and the decision of the Governor shall have to be in accordance with the opinion rendered by the Election Commission, it must be the decision of the Governor and Governor alone, based on the opinion rendered by the Election Commission. Though the jurisdiction under Art.226 of the Constitution is wide and it can be exercised not only for the enforcement of any of the rights conferred by Part III of the Constitution but also for other purpose, it cannot be exercised so as to overcome the exclusive jurisdiction conferred on a specific constitutional authority to decide a particular question by a specific provision made in the Constitution even though the decision of such an authority is ultimately subject to judicial review under Art.226 of the Constitution. In the court's view, the constitutional discipline as contained in the various provisions of the Constitution has to be respected while exercising the jurisdiction under Art.226 of the Constitution. It cannot be exercised to defeat the object and intendment of another provision contained in the Constitution, namely, Art.192 of the Constitution. The exercise of power of judicial review over the opinion of the Election Commission rendered under Art.192 of the Constitution is quite different from the exercise of the very same jurisdiction by passing the special jurisdiction created and the procedure laid down under Art.192 of the Constitution. It would be transgressing the scheme of Art.192 and thereby acting in violation of the provisions of the Constitution which is not permissible. Therefore, the court is of

the view that the question as to whether the writ petitioner has become subject to any of the disqualifications mentioned in clause (1) of Art.191 of the Constitution read with Sec.9-A of the Representation of the Peoples Act should not have been gone into by the learned single judge when the same question is pending before the election commission under Art.192(2) of the Constitution. [Paras. 17 & 22]

(B) Doctrine of necessity - Applicability of - If applicable in case of multi-member Tribunal' - Chief Election Commissioner and other Election Commissioner (Conditions of Service) Act (XI of 1991), Secs.9 and 10 (Inserted by Ordinance XXXII of 1993) - Doctrine, if attracted.

The doctrine of necessity is applicable even though a Judge or tribunal is disqualified on the ground of bias if there is no other Judge or tribunal available to decide. The doctrine of necessity, as the name itself suggests is evolved out of sheer necessity to prevent failure of justice by enabling the Judge, even though he is disqualified on the ground of bias, to adjudicate. Thus it is applied in order to ensure that course of justice is not impeded and that a party who is entitled to have his case adjudicated does not go without the case being adjudicated. Therefore, it has to be applied when there is no way out to ensure that justice must not only be done but must also appear to be done. If there is a possibility to have alternative or another Judge to adjudicate, it should be adopted. Thus when there is alternative tribunal or Judge, the doctrine of necessity does not apply. It is also established that in the case of multi-member tribunal, the doctrine of necessity cannot be applied if the remaining members of the tribunal can adjudicate. After the hearing of this case was completed and the judgment was reserved, Ordinance XXXII of 1993 came to be promulgated by the President of India amending the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991 making the election commission a multi-member body. In the matter of discharging of judicial functions, in the light of the experience gained, it would be appropriate and practicable and functional if it is entrusted to one of the members or the Chief Election Commissioner with a provision for entrusting the same to any other member in the event of the member who is entrusted with the judicial function becomes disqualified to discharge the judicial functions.

Similarly, in case, the Chief Election Commissioner is entrusted with the judicial functions and he becomes disqualified as has happened in the instant case, a provision shall have to be made to entrust the same to another member. Thus, it is not possible to hold that as a result of Ordinance XXXII of 1993, the applicability of the doctrine of necessity is not, in any way, affected and no decision on the basis of majority without the Chief Election Commissioner can be arrived at. It is also not possible to accept the situation that even if the Chief Election Commissioner is excluded, the other two members, if they differ, there will be a stalemate. Therefore, the court holds that in view of the appointment of two Election Commissioners and in the light of the provisions contained in Secs.9 and 10 of the Chief Election Commissioner and other Election Commissioners (Conditions of Service and Transactions of Business) Act, 1991 as inserted by Ordinance XXXII of 1993, the doctrine of necessity cannot be applied to the case on hand. [Paras. 51, 52 & 57]

(C) Words and Phrases - Quorum - Meaning of.

In general, quorum means a majority of the view of the whole body. [Para. 55]

Cases referred to:

C.S.Rowjee v. State of Andhra Pradesh, A.I.R. 1964 S.C. 962: (1964) 2 A.L.J. 48. [Para. 14]

Brundasan v. Election Commission, A.I.R. 1965 S.C. 1892: (1965) 3 S.C.R. 53. [Para. 18]

Election Commission of India v. N.G.Ranga, A.I.R. 1978 S.C. 1609: (1979) 1 S.C.R. 210: (1978) 4 S.C.C. 181. [Para. 19]

East India Commercial Company v. Collector of Customs, A.I.R. 1962 S.C. 1893: (1963) 1 S.C.A. 622. [Para. 20]

B.Mishra v. R.Dixit, A.I.R. 1972 S.C. 2466: 1973 Cr.L.J. 19: 1973 S.C.D. 1. [Para. 20]

Manak Lal v. Dr.Prem Chand, A.I.R. 1957 S.C. 425: 1957 M.L.J. (Cr.) 254: 1957 S.C.A. 719: 1957 S.C.R. 575. [Paras. 23, 29]

Ranjit Thakur v. Union of India, A.I.R. 1987 S.C. 2386. [Paras. 23, 29]

Shri Rattan Lal Sharma v. Managing Committee, Dr.Hari Ram, (1993) 3 J.T. 487. [Para. 23]

Metropolitan Properties v. Lanon, (1968) 3 All E.R. 304: (1969) 1 Q.B. 577. [Para. 29]

Allinson v. General Council of Medical Education and Registration, (1894) 1 Q.B. 750. [Para. 29]

Public Utilities Commission of the District of Columbia v. Pollak, (1951) 343 U.S. 451. [Para. 29]

Shri Rattan Lal Sharma v. Managing Committee, Dr.Hari Ram (Co-Education) Higher Secondary School, (1993) 3 J.T.487. [Para. 29]

R. v. Sunderland Justices, (1924) 1 K.B. 357 (373). [Para. 29]

R. v. Sussex Justices, (1924) 1 K.B. 256 (259). [Para. 29]

S.S.Dhanoa v. Union of India, A.I.R. 1991 S.C. 1745. [Para. 44]

Lord Chancellor in Dimes v. Grand Function Canal, (1852) 3 H.L.C. 759. [Para. 50]

Miller v. Aldridge, 39 A.L.R. 1470. [Para. 50]

M/s.J.Mohapatra and Company v. State of Orissa, A.I.R. 1984 S.C. 1572: (1984) 4 S.C.C. 103. [Para. 50]

S.S.Dhanoa v. Union of India, A.I.R. 1991 S.C. 1745. [Para. 53]

R.Viswanathan v. Abdul Wajid, A.I.R. 1963 S.C. 1: (1963) 3 S.C.R. 22. [Para. 53]

Ashok Kumar Yadav v. State of Haryana, (1985) 4 S.C.C. 417. [Para. 56]

A.P.H.L.Conference, Shillong v. W.A.Sangma, A.I.R. 1977 S.C. 2155: (1977) 4 S.C.C. 161. [Para. 56]

Appeal under clause 15 of the Letters Patent against the order of Bakthavatsalam, J. dated 2.7.1993 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.Nos.6094 and 6095 of 1993 presented under Art.226 of the Constitution of India to issue writs of (1) prohibition prohibiting the first respondent from in any manner dealing with, hearing adjudicating upon or disposing the memorandum dated 2.10.1992 filed by the second respondent herein and forwarded by the Governor of Tamil Nadu to the first respondent (in W.P.No.6094 of 1993) and (2) declaration declaring that the petitioner has not incurred the alleged disqualification under Art.191(1)(e) of the Constitution of India read with Sec.9-A of the Representation of Peoples Act, 1951 as alleged by the second respondent in the memorandum dated 2.10.1992 (in W.P.No.6095 of 1993), respectively.

Subramanian Swamy, for Appellant (Party-in-Person)

K.K.Venugopal, Senior Counsel assisted by *K.V.Viswanathan*, *T.N.Manikateswaran* and *B.Ramesh*, for Respondent No.1.

G.Ramaswamy, Senior Counsel for *G.Rajagopalan*, for Respondent Nos.2 and 3.

The Judgment of the Court was delivered by *K.A.Swami, C.J.*: This appeal is preferred against

the order dated 2.7.1993 passed by the learned single judge in W.P.Nos.6094 and 6095 of 1993.

2. The appellant is the second respondent in the writ petitions. The first respondent is the petitioner in both the writ petitions. The second respondent herein is the first respondent in the writ petitions. The Election Commission of India has been impleaded in the writ appeal pursuant to the orders dated 7.10.1993 and 20.10.1993, at the instance of the first respondent passed in C.M.P.No.13873 of 1993.

3. The first respondent herein has also filed another petition, C.M.P.No.13874 of 1993 for directing the second respondent (Mr.T.N.Seshan, Chief Election Commissioner) to rescue himself when the question of the alleged disqualification of the first respondent is taken up for adjudication by the Election Commission. The Election Commission, through its Secretary, has also filed the counter-affidavit on its behalf. Mr.T.N.Seshan has also filed the counter-affidavit to the C.M.P.No.13874 of 1993, which is also heard along with the writ appeal.

4. Before filing the writ appeal in question, the appellant had approached the Supreme Court as against the order of the learned single judge in question in S.L.P. (Civil) No.10189-90 of 1993. The Supreme Court directed the appellant to lodge an appeal before the Division Bench of this Court within two weeks from 20.8.1993 and in that event, that appeal shall not be dismissed on the ground of limitation alone and the same be disposed of as expeditiously as possible, not later than six weeks from the lodgement of the appeal. Accordingly, the appeal came up before us for admission and also for condonation of delay in filing on 1.9.1993. We condoned the delay, admitted the appeal and directed it to be posted for final hearing on 28.9.1993 as both the sides agreed that, that date would be convenient to them. The hearing of the appeal was completed on 30.9.1993 and the judgment was reserved. However, on the very next day, Ordinance No.32 of 1993 came to be promulgated by the President of India, amending the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991. As the Ordinance had a bearing on the question of doctrine of necessity raised in the case, we thought it necessary to hear both the sides as to the effect of Ordinance No.32 of 1993 on the question of doctrine of necessity. In addition to

this, the first respondent also filed, as pointed out above, two petitions, viz., C.M.P.Nos.13873 and 13874 of 1993. Accordingly, the appeal was posted on 7.10.1993. Notice was issued to the Election Commission. Both sides agreed to address further arguments on 20.10.1993. Before that date, the Election Commission was also served. It put in appearance through a counsel and filed its counter-affidavit. It was impleaded as 3rd respondent on 20.10.1993. Further arguments were addressed by both sides on 20.10.1993.

5. In this judgment, the parties would be referred to with reference to the position they enjoyed in the writ petitions. Accordingly, the appellant herein would be referred to as the second respondent; the first respondent herein would be referred to as the writ petitioner; the second respondent herein as the first respondent and the Election Commission as the third respondent.

6. Necessary facts have been set out in greater detail by the learned single judge in his order dated 2.7.1993 against which the present appeal is preferred. However, we state them in short. The writ petitioner was elected to the Legislative Assembly of Tamil Nadu in the general elections held in June, 1991. Thereafter, she has also been elected as the leader of the A.I.A.D.M.K. party which has secured majority in the Assembly and as such she has been functioning as the Chief Minister of the State. Before she was elected to the Legislative Assembly, she had formed a partnership firm, known as "Jaya Publications" with one Tmt.V.Sashikala and it was also registered on 5.2.1990 with the Registrar of Firms at S.No.152/90.

7. The second respondent filed a petition dated 2.10.1992 before the Governor of Tamil Nadu under Art.192 of the Constitution of India to declare that the writ petitioner has become subject to a disqualification mentioned in clause (e)(1) of Art.191 of the Constitution and as such her seat in the Legislative Assembly has become vacant as the partnership firm "Jaya Publications" of which she is a partner had entered into a contract with the State Government and that contract subsisted. This petition was not immediately forwarded by the Governor to the Chief Election Commissioner for opinion under Art.192(2) of the Constitution. The second respondent filed W.P.(Civil) No.942 of 1992 against the Governor of Tamil Nadu and the writ petitioner for issuing a direction to the

Governor to forward the petition filed under Art.192 of the Constitution to the Election Commission. During the pendency of that petition, the Governor of Tamil Nadu, on 27.3.1993, forwarded the petition to the Election Commission. The present writ petitions came to be filed on 30.3.1993 seeking a writ of *prohibition* restraining the first respondent from in any manner dealing with, hearing, adjudicating upon, or disposing of the memorandum dated 2.10.1992 filed by the second respondent under Art.192 of the Constitution and forwarded to him by the Governor of Tamil Nadu. In W.P.No.6095 of 1993, she prayed for a declaration that she has not incurred the alleged disqualification under Art.191(1)(e) of the Constitution, read with Sec.9-A of the Representation of the Peoples Act, 1951 (for short, R.P.Act) as alleged by the second respondent in his petition dated 2.10.1992.

8. A writ of prohibition in W.P.No.6094 of 1993 is sought on the ground that the writ petitioner entertains a reasonable apprehension that the first respondent (Mr.T.N.Seshan) is biased in favour of respondent No.2 and as such, there is every likelihood of the decision of the first respondent being affected by bias. The facts and circumstances stated for entertaining reasonable apprehension that the first respondent is biased and she would not get a fair and unbiased decision from him would be referred to while dealing with the question of bias pleaded by her.

9. In W.P.No.6095 of 1993, a declaration that she has not incurred the disqualification as alleged by the second respondent, is sought on the ground that there existed no contract and also that the provisions were not attracted inasmuch as it could not be said that there was a contract between the firm, "Jaya Publications" and the State Government.

10. Learned single judge has, on consideration of the evidence on record and also the principles laid down in the various precedents cited before him, held that in the facts and circumstances of the case, the apprehension of bias of the first respondent is reasonable and as such, the learned single judge has further held that the first respondent may not be in a position to hear and decide the case impartially. Accordingly, the learned single judge has accepted the case of the writ petitioner that she will not get a fair and impartial decision from the first respondent.

11. On the application of doctrine of necessity, the learned single judge has held that though the principles of natural justice have to give way if the doctrine of necessity warrants, but it is not necessary to apply the doctrine of necessity in all circumstances, that it is possible to appoint Additional Election Commissioner under Art.324 of the Constitution, therefore, alternate forum is available, hence, the doctrine of necessity need not be applied.

12. Thereafter, the learned single judge has gone into the merits of the case as to whether the writ petitioner can be held to have become subject to a disqualification mentioned in Art.191(1) of the Constitution and has decided the same in favour of the writ petitioner. Here itself we may point out that this question squarely lies within the jurisdiction of the Governor who has to refer the question for opinion to the Election Commission and the Governor has to act according to the opinion of the Election Commission. This aspect of the case will be considered at the relevant stage. Consequently, the learned single judge has allowed W.P.No.6094 of 1993. Though W.P.No.6095 of 1993 has been dismissed, but a finding has been recorded that the writ petitioner has not become subject to the disqualification mentioned in Art.191(1) of the Constitution. Thus, in effect, the declaration sought in W.P.No.6095 of 1993 that the writ petitioner has not incurred disqualification has been granted. Consequently, the effect of the order is that W.P.No.6095 of 1993 also stands allowed, however it has been dismissed.

13. In the light of the contentions urged on both sides, the following points arise for consideration:

1. Whether the learned single judge is justified in going into the question as to whether the writ petitioner has become subject to the disqualification in terms of Art.191(1) of the Constitution, read with Sec.9-A of the R.P.Act.
2. Whether, in the facts and circumstances of the case, it can be held that the apprehension of bias entertained by the writ petitioner that she is not likely to get a fair and unbiased decision at the hands of the Chief Election Commissioner, Mr.T.N.Seshan, on the petition dated 2.10.1992 filed by the second respondent, is reasonable.
3. Whether the doctrine of necessity is attracted in the light of the insertion of Chapter III containing Secs.9 and 10 in the Chief

Election Commissioner and other Election Commissioners (Conditions of Service and Transaction of Business) Act, 1991.

4. What order?

14. *Point No.1:* After arriving at a conclusion that the apprehension of bias entertained by the writ petitioner that she is not likely to get a fair and just decision at the hands of the Chief Election Commissioner, Mr.T.N.Seshan is reasonable and as such, a writ in the nature of prohibition shall issue to him to refrain from deciding the case, the learned single judge has gone into the merits of the petition presented by the second respondent before the Governor under Art.192 of the Constitution, alleging that the writ petitioner has become subject to disqualification, as such it be declared that her seat has become vacant, and has decided that the contract did not subsist on the date the petition was filed, that the society with which "Jaya Publications" had entered into a contract was registered under the Societies Registration Act, as such the contract with such society was not a contract with the Government and hence, the provisions of Art.191(1)(e) of the Constitution and the provisions contained in Sec.9-A of the R.P.Act were not attracted. Learned single judge has proceeded to decide this question on the basis of the averments made in the petition dated 2.10.1992 filed by the second respondent before the Governor and also on the undisputed facts as to the period of contract. Learned single judge has ultimately held thus:

".....A conjoint reading of Arts.191 and 192 of the Constitution of India along with Sec.9-A of the Act 43 of 1951, strengthens my view that the first respondent Election Commission has no jurisdiction to go into the question. Factually, there is no question at all to be gone into. If any notice is issued to the petitioner under Art.192 of the Constitution of India to the petitioner, it will be *ab initio void*. It will be an empty formality if the Election Commission is allowed to enquire into the memorandum submitted by the second respondent herein dated 2.10.1992. As I have already stated, the memorandum submitted by the second respondent is very vague and also bereft of particulars. Though the second respondent has set in motion the law to disqualify the petitioner, he has not come forward before this Court by filing a counter-affidavit denying the

allegations made categorically by the petitioner in the affidavit filed in support of the writ petitions. Insofar as the second respondent has not chosen to file a counter-affidavit before this Court on the factual position, though sufficient opportunity has been given, in my view, the allegations made by the petitioner shall stand uncontroverted. It has been held so in *C.S.Rowjee v. State of Andhra Pradesh, A.I.R. 1964 S.C. 962: (1964) 2 An.L.T. 48*. I do not agree with the submission made by the second respondent that he has elected not to file a counter-affidavit before this Court as he has got the protection under Sec.146 of the Act 43 of 1951 and as he is only a pro forma party in the writ petitions. Reliance made by Dr.Subramanian Swamy, who appeared as party in person, with regard to Sec.146 of the Act 43 of 1951 has no relevance at all. As I have already stated, even if the allegations made in the memorandum submitted by Dr.Subramanian Swamy, the second respondent herein, are factually correct, no question of disqualification arises in view of the provisions under Arts.190(3) and 192(1) of the Constitution of India read with Sec.9-A of the Act 43 of 1951, with regard to the first two agreements cited *supra*. With regard to the third contract, it is not at all a subsisting contract, assuming that it is a contract with the appropriate Government, when in law it is not so. Looking at any angle, I am of the view, that on the facts and circumstances of the case and at the backdrop of the cases mentioned hereinabove, a writ of prohibition has got to issue.

An argument was made at the Bar that the petitioner should be asked to face the Election Commission and come up before this Court if an adverse opinion is given by Election Commission and also if an adverse order is passed by the Election Commission on the memorandum submitted by the second respondent. I do not think it necessary on the facts and circumstances of this case, to direct the petitioner to face the Election Commission and then come up before this Court for judicial review. As I am fully satisfied that this is a fit case, in which a writ of prohibition is to issue it is not necessary that the petitioner, who is the Chief Minister of a State and who has been voted to power with large majority, should be asked to

face the Election Commission on such flimsy grounds at the instance of the second respondent."

15. It is submitted by learned Senior Counsel Mr.G.Ramaswamy and Dr.Subramanian Swamy that Art.192 of the Constitution specifically provides that if any question arises as to whether a member of either House of a Legislature has become subject to any of the disqualifications mentioned in clause (1) of Art.191 of the Constitution, the question shall be referred for the decision of the Governor and his decision shall be final; that before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion; therefore, it is not open to the High Court, in exercise of its jurisdiction under Art.226 of the Constitution, to embark upon, and decide, the question arising under Art.192 of the Constitution.

16. On the contrary, it is contended by Mr.K.K.Venugopal, learned Senior Counsel appearing for the writ petitioner, that the Election Commission, while rendering its opinion, as referred to it by the Governor under Art.192 of the Constitution, acts as a quasi-judicial tribunal; such a tribunal and its decision are amenable to the jurisdiction of this Court under Art.226 of the Constitution; therefore, it is open to this Court, in the exercise of its jurisdiction under Art.226 of the Constitution, to decide as to whether the petition filed under Art.192 of the Constitution and referred to the Election Commission would at all involve a question as to whether a member of the State Legislature has become subject to any of the disqualifications mentioned in clause (1) of Art.191 of the Constitution, read with Sec.9-A of the R.P.Act; if such a question arises, then only the Election Commission will have jurisdiction to render opinion; therefore, on the undisputed facts and in the light of the decision of this Court in *M.S.Devasagayam v. K.A.Krishnasami and others, E.P. No.1 of 1978 dated 31.1.1979*, such a question did not arise; therefore, the Election Commission was trying to clutch at the jurisdiction; hence the learned single judge of this Court was justified in going into the question and deciding the same.

17. Though the contentions, as put forth by Mr.K.K.Venugopal, learned Senior Counsel, on the first blush appears to be very plausible and attractive, but on a careful consideration of the

same, we find it difficult to accept the same. It is relevant to notice that the Governor shall have to act according to the opinion of the Election Commission. In other words, the Governor has to render his decision according to the opinion of the Election Commission and such decision is final. There is no doubt that the opinion of the Election Commission, is subject to judicial review by the High Court under Art.226 of the Constitution. But that does not mean that the High Court, in exercise of its jurisdiction under Art.226 of the Constitution, can embark upon deciding the question by itself even before the Election Commission has rendered its opinion. It may be noticed that the Constitution specifically provides for challenging the validity of an election to either Houses of Parliament or to either house of the Legislature of a State by way of an election petition and Art.329 of the Constitution specifically bars interference by courts in election matters notwithstanding anything contained in the Constitution to go into the question as to the validity of an election to either Houses of Parliament or to either house of the Legislature of a State, except by an election petition presented to such authority and in such manner as may be provided by or under any law made by the appropriate Legislature. Of course, Art.329 of the Constitution does not cover the question arising under Art.192 of the Constitution inasmuch as Art.192 deals with the situation which arises after the election and relates to a member of a House of the Legislature of a State having become subject to any of the disqualifications mentioned in clause (1) of Art.191 of the Constitution. Nevertheless, when the Constitution specifically provides that such a question shall be referred for the decision of the Governor and the decision of the Governor shall have to be in accordance with the opinion rendered by the Election Commission, it must be the decision of the Governor, and Governor alone, based on the opinion rendered by the Election Commission. Though the jurisdiction under Art.226 of the Constitution is wide and it can be exercised not only for the enforcement of any of the rights conferred by Part III of the Constitution, but also for any other purpose, it cannot be exercised so as to overcome the exclusive jurisdiction conferred on a specific constitutional authority to decide a particular question, by a specific provision made in the Constitution, even though the decision of

such an authority is ultimately subject to judicial review under Art.226 of the Constitution. In our view, the constitutional discipline, as contained in the various provisions of the Constitution, has to be respected while exercising the jurisdiction under Art.226 of the Constitution. It cannot be exercised so as to defeat the object and intendment of another provision contained in the Constitution namely Art.192 of the Constitution.

18. In *Brundaban v. Election Commission*, A.I.R. 1965 S.C. 1892: (1965)3 S.C.R. 53, Art.192 of the Constitution came up for consideration. The Constitution Bench of the Supreme Court held thus:

"We are not impressed by these arguments. It is significant that the first clause of Art.192 (1) does not permit of any limitations such as Mr.Setalvad suggests. What the said clause requires is that a question should arise; how it arises, by whom it is raised, in what circumstances it is raised, are not relevant for the purpose of the application of this clause. All that is relevant is that a question of the type mentioned by the clause should arise; and so, the limitation which Mr.Setalvad seeks to introduce in the construction of the first part of Art.192(1) is plainly inconsistent with the words used in the said clause.

Then as to the argument based on the words 'the question shall be referred for the decision of the Governor', these words do not import the assumption that any other authority has to receive the complaint and after a prima facie and initial investigation about the complaint, send it on or refer it to the Governor for his decision. These words merely emphasise that any question of the type contemplated by clause (1) of Art.192 shall be decided by the Governor and Governor alone; no other authority can decide it, nor can the decision of the said question as such fall within the jurisdiction of the courts. That is the significance of the words 'shall be referred for the decision of the Governor'. If the intention was that the question must be raised first in the Legislative Assembly and after a prima facie examination by the Speaker it should be referred by him to the Governor, Art.192(1) would have been worded in an entirely different manner. We do not think there is any justification for reading such serious limitations in Art.192(1) merely by implication.

.....

The scheme of Art.192(1) and (2) is absolutely clear. The decision on the question raised under Art.192(1) has no doubt to be pronounced by the Governor, but that decision has to be in accordance with the opinion of the Election Commission. The object of this provision clearly is to leave it to the Election Commission to decide the matter, though the decision as such would formally be pronounced in the name of the Governor. When the Governor pronounces his decision under Art.192(1), he is not required to consult his Council of Ministers; he is not even required to consider and decide the matter himself; he has merely to forward the question to the Election Commission for its opinion, and as soon as the opinion is received, 'he shall act according to such opinion'. In regard to complaints made against the election of members to the Legislative Assembly, the jurisdiction to decide such complaints is left with the Election Tribunal under the relevant provisions of the Act. That means that all allegations made challenging the validity of the election of any member, have to be tried by the Election Tribunals constituted by the Election Commission. Similarly, all complaints in respect of disqualifications subsequently incurred by members who have been validly elected, have, in substance, to be tried by the Election Commission, though the decision in form has to be pronounced by the Governor. If this scheme of Art.192(1) and (2) is borne in mind, there would be no difficulty in rejecting Mr.Setalvad's contention that the enquiry must be held by the Governor. It is the opinion of the Election Commission which is in substance decisive and it is legitimate to assume that when the complaint is received by the Governor, and he forwards it to the Election Commission, the Election Commission should proceed to try the complaint before it gives its opinion. Therefore, we are satisfied that respondent No.1 acted within its jurisdiction when it served a notice on the appellant calling upon him to file his statement and produce his evidence in support thereof." [Italics supplied]

The above underlined portions of the decision in *Brundaban's case*, A.I.R. 1965 S.C. 1892: (1965)3 S.C.R. 53, make it clear that the decision on the question shall have to be that of the Governor and Governor alone, but that decision shall have to be

in accordance with the opinion of the Election Commission. Thus, in substance, it is the opinion of Election Commission that is decisive.

19. Again, in *Election Commission of India v. N.G.Ranga*, A.I.R. 1978 S.C. 1609: (1979) 1 S.C.R. 210: (1978) 4 S.C.C. 181, a question arose as to exercise of power by the President under Art.103(2) of the Constitution, which relates to the decision on questions as to disqualification of members of either house of Parliament. Arts. 103 and 192 came to be substituted by the Constitution (Forty-fourth Amendment) Act, 1978 for what was substituted by the Constitution (Forty-second Amendment) Act, 1976. The first one deals with the question arising as to whether a member of either house of Parliament has become subject to any of the disqualifications and the second one relates to the question arising as to whether the member of a Legislature of a State has become subject to any of the disqualifications mentioned in Arts.101 and 191 of the Constitution respectively. Both are similarly worded. On considering the provisions contained in Art.103 of the Constitution, it was held by the Constitution Bench of the Supreme Court in the aforesaid *N.G.Ranga's case*, A.I.R. 1978 S.C. 1609: (1979) 1 S.C.R. 210: (1978) 4 S.C.C. 181, that the President was bound to obtain the opinion of the Election Commission before taking a decision on the question. Not only that, the President was bound to act according to the opinion given by the Election Commission, that the amended Article expressly conferred power on the Commission to make such enquiry as it thinks fit, therefore, the Commission was charged with the obligation to tender its opinion to the President. Thus, it is clear that exclusive jurisdiction is conferred upon the Election Commission to render its opinion on the question referred to it under Art.192 of the Constitution. Not only this, the Governor is also bound by that opinion. Therefore, he has to pronounce his decision according to the opinion given by the Election Commission. Thus, in the light of the aforesaid decisions of the Supreme Court, the question cannot at all be considered to be *res integra*. However, the learned single judge has distinguished the aforesaid two decisions on the ground that in those decisions, the question as to whether the jurisdiction under Art.226 of the Constitution can be exercised and a decision on the question arising as to whether a member of a house of Legislature of a State has

become subject to any of the disqualifications mentioned in Art.191(1) can be rendered by a High Court, even without allowing the Election Commission to render its opinion, as required by Art.192(2) of the Constitution and the Governor to give his decision in accordance with such opinion of the Election Commission, has not been considered. We are of the considered opinion that the view taken by the learned single judge in this regard cannot be accepted as it does not accord with the scheme of Art.192(1) and (2) of the Constitution and is quite contrary to the aforesaid decisions of the Supreme Court.

20. Mr.K.K.Venugopal, learned Senior Counsel appearing for the writ petitioner, however, placed reliance on the two decisions of the Supreme Court in *East India Commercial Company v. Collector of Customs*, A.I.R. 1962 S.C. 1893: (1963) 1 S.C.A. 622 and *B.Mishra v. R.Dixit*, A.I.R. 1972 S.C. 2466: 1973 Crl.L.J. 19: 1973 S.C.D. 1 and contended that as the decision of the Election Commission is subject to judicial review by this Court under Art.226 of the Constitution, the Election Commission is bound to follow the decision of this Court in *M.S.Devasagayam v. K.A.Krishnasami and others*, E.P.No.1 of 1978, dated 31.1.1979, in which it has been held that a society registered under the Societies Registration Act would not be a limb of the Government and that a contract with such society would not be a contract with the Government, there would be no justification to allow the Election Commission to go into the question which does not really arise in the light of the aforesaid decision in E.P.No.1 of 1978. *East India Commercial Company's case*, A.I.R. 1962 S.C. 1893: (1963) 1 S.C.A. 622, it was held that a writ of *prohibition* against the inferior tribunal forbidding it from continuing the proceedings therein on the ground that the proceeding was without or in excess of jurisdiction, or contrary to the laws of the land could be issued. On considering the contents of the notice issued by the Collector of Customs, he was prohibited from proceeding with the same. It is necessary to point out that firstly, the Collector of Customs cannot be compared with a constitutional functionary, viz., the Election Commission; secondly, the action that was proposed to be taken by the Collector of Customs was under an enactment which cannot be equated to the provisions of the Constitution; thirdly, it was found that even on the assumption

that the allegations made in the notice were true, the Tribunal had no jurisdiction to proceed with the enquiry under Sec.167(8) of the Sea Customs Act. Such a situation does not arise in the instant case. It has to be decided by the Election Commission as to whether there was any subsisting contract between the firm known as "Jaya Publications" of which the writ petitioner was a partner, and the Government and if so, whether the writ petitioner had become subject to any of the disqualifications mentioned in clause (1) of Art.191 of the Constitution. On the contrary, the learned single judge has gone into these questions and decided them. This is not at all permissible in law. As pointed out earlier, it has been specifically held by the Supreme Court in the aforesaid two decisions rendered in *Brundaban's case*, A.I.R. 1965 S.C. 1892; (1965)3 S.C.R. 53 and *N.G.Ranga's case*, A.I.R. 1978 S.C. 1609; (1979)1 S.C.R. 210; (1978)4 S.C.C. 181, that,

"any question of the type contemplated by clause (1) of Art.192 shall be decided by the Governor and Governor alone; no other authority can decide it, nor can the decision of the said question as such fall within the jurisdiction of the Courts. That is the significance of the words 'shall be referred for the decision of the Governor'."

21. *B.Mishra's case*, A.I.R. 1972 S.C. 2466; 1973 Cr.L.J. 19; 1973 S.C.D. 1 referred to above related to a case where a Judicial Officer was deliberately avoiding to follow the decision given by the High Court by giving wrong and illegitimate reasons. Therefore, it was held that the conduct of the Judicial Officer was clearly *mala fide* and amounted to disobedience and disregard of court by acting in opposition to the authority, justice and dignity thereof and thereby bringing the administration of law into disrepute. This decision was relied upon in support of the contention that the Election Commission is bound by the decision of this Court in *M.S.Devasagayam v. K.A.Krishnasami and others*, E.P.No.1 of 1978, dated 31.1.1979 and not following the same would result in committing contempt of court; therefore, permitting the Election Commission to render its opinion in a case like this would be only an empty formality and as such, the learned single judge is justified in going into the merits of the case and deciding the same. All that we can say is that this contention can be urged before the Election Commission and not

before this Court in order to bypass the provisions of Art.192 of the Constitution.

22. We may point out here the anomaly that may arise in the event this Court were to choose to exercise the jurisdiction under Art.226 of the Constitution bypassing the provisions contained in Art.192 of the Constitution and decide the question as to whether a member of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Art.191 of the Constitution. Suppose if this Court were to come to the conclusion that a member of a house of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Art.191 of the Constitution, that decision by itself will not result in the seat of such member in the house becoming vacant under Art.190(3) of the Constitution. It is only the decision of the Governor on that question that will attract Art.190(3) of the Constitution. Further, what is binding upon the Governor is the opinion of the Election Commission. Of course, the opinion of the Election Commission, may be subject to judicial review. But the exercise of power of judicial review over the opinion of the Election Commission rendered under Art.192 of the Constitution is quite different from the exercise of the very same jurisdiction bypassing the special jurisdiction created and the procedure laid down under Art.192 of the Constitution. It would be transgressing the scheme of Art.192 and thereby acting in violation of the provisions of the Constitution which is not permissible. Therefore, we are of the view that the question as to whether the writ petitioner has become subject to any of the disqualifications mentioned in clause (1) of Art.191 of the Constitution read with Sec.9-A of the Representation of the People Act should not have been gone into by the learned single judge when the same question is pending before the Election Commission under Art.192(2) of the Constitution. Point No.1 is accordingly answered in the negative.

23. *Point No.2*: Learned single judge has recorded a finding on this point in favour of the writ petitioner. In arriving at the conclusion that the writ petitioner has substantiated her case based on bias and likelihood of bias, the tests laid down in *Manak Lal v. Dr.Prem Chand*, A.I.R. 1957 S.C. 425; 1957 M.L.J. (Cr.) 254; 1957 S.C.A. 719; 1957 S.C.R. 575, *Ranjit Thakur v. Union of India*, A.I.R. 1987 S.C. 2386 and *Shri Rattan Lal Sharma v. Managing*

Committee, Dr.Hari Ram, (1993)3 J.T. 487 are applied by learned Judge and he has held thus:

"So on a careful scrutiny of cases and the copies of records produced before me and taking into consideration the principles laid down in the cases mentioned hereinabove and on the facts and circumstances of the cases on hand, I am fully satisfied that the point raised by Mr.K.K.Venugopal, the learned senior counsel appearing for the petitioner, with regard to the question of bias, likelihood of bias and the reasonable apprehension of bias, has to be accepted. At the same time, I have to point out that on the basis of the counter-affidavit filed by the first respondent herein, it cannot be said that he will hear the case impartially. Though it is accepted by both the parties that the first respondent is a man of integrity and is also a constitutional functionary, holding a responsible post, if the principles laid down in the cases mentioned hereinabove, are to be applied to the facts of the cases on hand, I have no other option except to accept the case of the petitioner that she will not get a fair hearing or a decision from the first respondent herein. The peculiar facts of the case can be seen. Dr.Subramanian Swamy, the second respondent herein, against the petitioner herein, has given a memorandum to the Governor of Tamil Nadu. According to him, there is some delay in forwarding the said memorandum to the first respondent herein. As such, the second respondent herein approached the Supreme Court by way of a writ petition in W.P.(Civil) No.942 of 1992. Dr.Roxna S.Swamy, the wife of the second respondent herein is the advocate for the first respondent herein, in a civil suit filed by the first respondent against a news agency praying for a huge amount of Rs.one crore, as defamation. The first respondent/ Election Commission is to hear the memorandum submitted by the second respondent herein. Dr.Roxna S.Swamy, a practising advocate, assisted her husband in the conduct of the writ petition against the Governor of Tamil Nadu. Now the said memorandum submitted by the second respondent herein has been forwarded to the first respondent herein. The petitioner alleges that if the first respondent is allowed to continue the hearing, it will be against the principles of natural justice. On the principles

laid down by various courts, which have been extracted above, I do not think that it can be said that the contention of the learned senior counsel appearing for the petitioner is untenable. So on the peculiar facts and circumstances of this case, I have to hold that it will be meaningless to allow the first respondent to enquire into the memorandum submitted by the second respondent which had been forwarded by the Governor of Tamil Nadu, for a decision which will be a nullity and *coram non judice*, as it will affect the principles of natural justice.

Mr.K.K.Venugopal, the learned senior counsel also points out that Mr.T.N.Seshan, the first respondent herein, was a student of Dr.Subramanian Swamy, when Dr.Subramanian Swamy, was Professor of Economics in Harvard University and it has been accepted by Dr.Subramanian Swamy during the course of arguments. The reasonable apprehension in the minds of the petitioner that the first respondent will be biased against her cannot be brushed aside lightly because of the close and intimate friendship between the first and second respondents herein and the unity and identity of interests between the counsel of the first respondent, who is the wife of the second respondent and the second respondent who has given the memorandum against the petitioner. Though it is stated that Mr.T.N.Seshan, the first respondent herein will be impartial, I am of the view, as held by Lord Denning, if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit: It is a fact that the first respondent herein, has engaged Dr.Roxna S.Swamy, the wife of the second respondent only as his counsel in a civil suit with high stakes, in my view, it makes no difference. No reasonable man would draw any distinction between the second respondent and his wife, on seeing that she was living with the second respondent and assisting him in his case before the Supreme Court with regard to this very same subject matter, wherein a writ of *mandamus* was filed by the second respondent against the Governor of Tamil Nadu, when there was some delay in forwarding his memorandum to the Election Commission. It can be easily said that when deciding a petition filed

by the husband of his advocate with regard to disqualification, the interest of the husband of the counsel will have an impact on Mr.T.N.Seshan's mind, the first respondent, unconsciously. This may affect the decision which may be arrived at by the first respondent. This is what is called 'real likelihood of bias'. To state in the words of Lord Denning:

'...So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr.Lennon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias....'

In this case, the wife will be interested in a cause taken by her husband and when she is the counsel for the first respondent Mr.T.N.Seshan, the submission of Mr.K.K.Venugopal, the learned senior counsel for the petitioner that the decision to be arrived at by Mr.T.N.Seshan, the first respondent herein will be against the principles of natural justice has got to be accepted. So on the facts and circumstances of this case, I am fully satisfied that the contention raised by the learned senior counsel for the petitioner, on the question of bias, likelihood of bias, a real likelihood of bias is well taken, especially in the absence of counter-affidavit, on facts, by the second respondent herein."

Ultimately, in paragraph 36 of the order, the learned single judge has concluded thus:

"It is true that even if the contentions raised by the Election Commission/the first respondent herein in paragraph 6 of the counter-affidavit are accepted that the Election Commissioner had discharged his duties with competence, sense of responsibility and a high degree of excellence and that he enjoyed the reputation of an outstanding official and known for discretion, objectivity, circumspection and responsibility, yet if the principles of natural justice as laid down in the abovementioned cases are applied, I am of the view, that though the first respondent claims to hold a very high office, still the principles of 'bias' and 'real likelihood of bias' will apply to him also from hearing the case or from proceeding with the enquiry on the memorandum submitted by the second respondent herein. In my view, however, the person may be highly placed, when he is subjected to the test, applying the principles of

natural justice, the consideration about the outstanding authority or responsibility of the first respondent herein cannot come in the way. The fact alleged by the petitioner is not disputed in paragraph 5 of the counter-affidavit filed by the first respondent. It has been admitted by the first respondent that Dr.Roxna S.Swamy, the wife of the second respondent herein is the counsel for him in a civil suit filed before the High Court, New Delhi against a news agency. It is also seen that Dr.Roxna S.Swamy, the wife of the second respondent was assisting her husband in conducting a writ petition before the Supreme Court of India against the Governor of Tamil Nadu. It is also seen that the first respondent is the family friend of the second respondent. Just because the questions of 'bias' and 'likelihood of bias' are raised by the petitioner herein, it does not mean that the petitioner does deliberately attempt to defame and bring down the stature of the first respondent as the constitutional functionary. In my view, the petitioner is entitled to voice out her grievances before this Court, to substantiate her case based on 'bias' and likelihood of bias'. A passage in 'Administrative Law - H.W.R.Wade, Sixth Edition - can be usefully referred to. At page 489 it has been held as follows.

'....Among other obvious cases of prejudice are personal friendship or hostility and family relationship....'

So if the facts of the case before this Court are looked upon in the backdrop of cases decided by various decisions in various courts, mentioned hereinabove, I do not think I can accept the arguments of Mr.G.Ramaswamy, the learned senior counsel appearing for the first respondent/ Election Commission, that the question of 'bias' is raised only to protract the proceedings. Equally so, I am not satisfied with the argument that the question of bias is raised only to stultify the constitutional functionaries. Also I am not convinced with the arguments of Dr.Subramanian Swamy that the question of bias raised in this case is a shallow bubble and far-fetched."

As a part of this paragraph, the learned single judge has also referred to a passage in 'Administrative Law - H.W.R.Wade, Sixth Edition, at page 484 in support of the view taken by him. We do not

consider it necessary to reproduce the same.

24. It is contended before us by Dr.Subramanian Swamy and learned counsel for respondents 1 and 3 that the case of bias, or likelihood of bias by the first respondent cannot be held to have been made out by the writ petitioner merely because Dr.Roxna S.Swamy, the wife of Dr.Subramanian Swamy, is the advocate of the first respondent in the suit filed by him against United News of India, New Delhi, in the High Court of Delhi; and also because of the fact that the Election Commission has sent a communication to the Secretary to the Governor of Tamil Nadu, dated 4.12.1992, along with the representation submitted by Dr.Subramanian Swamy to the first respondent. It is also contended that the learned single judge, after having held that the first respondent is a man of integrity and is also a constitutional functionary, holding a responsible post, is not justified in accepting the case of the writ petitioner. That the first respondent was a student of the second respondent and he is a family friend of the second respondent cannot also be considered to be circumstances so as to hold that the first respondent would be, or is likely to be biased in favour of the second respondent.

25. On the contrary, it is contended on behalf of the writ petitioner by her learned senior counsel, Mr.K.K.Venugopal, that in the light of the averments contained in paragraphs 6, 7, 8 and 9 of the writ petition and the communication dated 4.11.1992 sent by the Election Commission to the Secretary to the Governor of Tamil Nadu pursuant to the letter dated 2.11.1992 of the second respondent, addressed to the first respondent, discloses the special anxiety shown by the first respondent to have seizin over the case and decide the same; that the Election Commission, while performing its functions under Art.192 of the Constitution and rendering an opinion on the question referred to it, acts as a quasi judicial authority, that the special anxiety shown by him to have seizin over the matter only shows the bias of the first respondent in favour of the second respondent. Therefore, it is contended that the learned single judge is justified in holding that the writ petitioner has made out a case of bias.

It is also contended that the suit filed by the first respondent is very crucial to him inasmuch as he has invested a huge sum and his prestige is involved; that its success depends upon the

successful prosecution of the case by Dr.Roxna S.Swamy; that as there is unity and identity of interest between Dr.Roxna S.Swamy and her husband, Dr.Subramanian Swamy, the first respondent will not be able to give unbiased opinion; that even otherwise, these circumstances are sufficient to give rise to reasonable apprehension in the mind of the writ petitioner or for that matter, any reasonable person, that the first respondent is not likely to give fair and just decision.

26. It is always a question of fact to be decided in each case as to whether the bias attributed to a judge or members constituting a tribunal or quasi judicial authority is made out. It has to be decided on the facts and circumstances of each case. While deciding the question of bias, it has to be borne in mind that whether there is reasonable ground made out for assuming the possibility of bias and whether it is likely to produce, in the minds of the litigant or the public at large, the reasonable doubt about the fairness of the administration of justice.

27. Under Sec.146(1) of the Representation of the Peoples Act, 1951, the Election Commission enjoys the power to require any person, subject to any privilege, which may be claimed by that person, under any law for the time being in force, to furnish information on such points or matters, as in the opinion of the Commission may be useful for, or relevant to, the subject matter of the enquiry.

28. Thus, the Election Commission, for the purpose of enquiry, enjoys the powers which a civil court has, while trying a suit. The opinion it renders on the question referred to it by the Governor under Art.192(2) of the Constitution affects the right of the party concerned to continue as member of the Legislature of a State. Therefore, the Election Commission is required to hold an enquiry with notice to the person concerned and formulate its opinion on the basis of the oral and documentary evidence placed before it during the course of the enquiry. As such, the Election Commission acts as a quasi judicial authority or a tribunal. Therefore, it is required to act free from bias and render its opinion judicially in conformity with law justice and fair play. Nothing has to be done by it, which creates even a slight suspicion that there has been an improper interference in the course of justice or which erodes the confidence.

29. It applies not only to the justices, but to all

tribunals and bodies, which are given jurisdiction to determine, judicially the rights of parties. See *Manak Lal v. Dr. Prem Chand*, A.I.R. 1957 S.C. 425; 1957 M.L.J. (CrL) 254; 1957 S.C.A. 719; 1957 S.C.R. 575.

In *Metropolitan Properties v. Lanon*, (1968)3 All E.R. 304; (1969)1 Q.B. 577, it has been observed:

"The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand."

It has also been further observed:

"There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking "The Judge was biased".' [Italics supplied]

In *Ranjit Thakur v. Union of India*, A.I.R. 1987 S.C. 2386, as to the test of real likelihood of bias, it has been observed:

"The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely....."

"It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial coram non iudice"

It has also been further observed:

"As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "am I biased?" but to look at the mind of the party before him." [Italics supplied]

In *Ranjit Thakur v. Union of India*, A.I.R. 1987 S.C. 2386, the observations made by Lord Esher in

Allinson v. General Council of Medical Education and Registration, (1894)1 Q.B. 750 at 758, by Lord Denning, M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*, (1969)1 Q.B. 577 at 599 and Frankfurter, J. in *Public Utilities Commission of the District of Columbia v. Pollak*, (1951) 343 U.S. 451 at 466 have also been quoted with approval, which are as follows:

"The question is not, whether in fact he was or was not biased. The court cannot inquire into that..... In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration any person who is to take part in it should not be in such a position that he might be suspected of being biased." (Lord Esher in *Allinson's case*.)

"...in considering whether there was a real likelihood of bias, the court does not look at the mind of the Justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be nevertheless if right minded persons would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit...." (Lord Denning, M.R. in *Metropolitan Properties Co. (F.G.C.)'s case*, (1969)1 Q.B. 577 at 599. [Italics supplied])

"The judicial process demands that a judge moves within the framework of relevant legal rules and the court covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole Judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But, it is also true that reason cannot control the subconscious influence of feelings of which it is

unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating. Judges rescue themselves. They do not sit in judgment..."

(...Frankfurter, J. in *Public Utilities Commission of the District of Columbia case*, (1951) 343 U.S. 451.)

In *Shri Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School and others*, (1993) 3 J.T. 487 (495-496), while dealing with the administrative law and rules of natural justice, it has been observed thus:

"One of the cardinal principles of natural justice is '*nemo debet esse iudex in propria causa*' (No man shall be a judge in his own cause)"

It has been further observed, after referring to the decisions in *R. v. Sunderland Justices*, (1924) 1 K.B. 357 (373) and *R. v. Sussex Justices*, (1924) 1 K.B. 256 (259) and *Manak Lal v. Dr. Prem Chand*, A.I.R. 1957 S.C. 425; 1957 M.L.J. (Crl.) 254; 1957 S.C.A. 719; 1957 S.C.R. 575 and also *Halsbury's Laws of England* (4th Edn.), Vol. 2, para. 551, thus:

"The test is not whether in fact, a bias, has affected the judgment, the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done must also appear to be done." [Emphasis supplied]

It is also relevant to notice the statement of law as to the test of likelihood of bias stated in "*Review of Administrative Action*" by Mark Aronson and Nicola Franklin, a publication by The Law Book Company Ltd., in 1987, at page 195, wherein under the caption "*Personal Factors*", it has been stated thus:

"Kinship, friendship, personal involvement or prejudice can produce disqualifying bias, depending upon the intensity of the suspicion of bias reasonably aroused..."

Kinship, direct friendship, or friendship with the family of a party or witness can disqualify. Such links between bench and bar table can also disqualify."

30. Bearing in mind these tests or norms as laid down by the various authoritative pronouncements referred to above, we proceed to determine

as to whether on the basis of the facts and circumstances placed on record, it can be held that the apprehension of bias entertained by the writ petitioner that she is not likely to get a fair and just decision at the hands of the first respondent, Mr. T. N. Seshan, Chief Election Commissioner, on the petition dated 2.10.1992, filed by the second respondent, is reasonable.

31. The case of the writ petitioner is that the first respondent has filed a suit for defamation in the High Court of Delhi being Civil Suit No. 3286 of 1992 in August, 1992 against the United News of India, New Delhi, claiming a sum of Rs. 1 crore as damages for the defamation alleged in the suit. In that suit, the first respondent, who is the plaintiff, is represented by Dr. Roxna S. Swamy, Advocate, who is the wife of Dr. Subramanian Swamy, the second respondent. It is further alleged that Dr. Roxna S. Swamy assisted her husband Dr. Subramanian Swamy and instructed him in conducting his case before the Supreme Court, being W.P. (Civil) No. 942 of 1992, which was filed against the writ petitioner and the Governor of Tamil Nadu, for issuing a direction to the Governor of Tamil Nadu to forward the petition presented by Dr. Subramanian Swamy, under Art. 192 of the Constitution to the Election Commission for opinion. It is further alleged that the first respondent has paid a court fee of Rs. one lakh on the plaint filed in C.S. No. 3286 of 1992, that his success in the suit depends upon the performance of his counsel Dr. Roxna S. Swamy, that the first respondent having invested his savings over the years as a Government servant and later as the Chief Election Commissioner of India, the stakes in the suit as far as he is concerned, both monetarily as well as by way of protecting his reputation, are very high and that, therefore, he is wholly indebted to his counsel Dr. Roxna S. Swamy, whether she is appearing for him on professional basis, on payment of fees, or otherwise on account of any family friendship with the counsel and her husband for the efficient and successful conduct of the case. It is also further alleged that whatever it may be, the first respondent is fully aware of the unity and identity of interests between Dr. Roxna S. Swamy, who is his counsel in his Rs. One crore case and her husband Dr. Subramanian Swamy who is hotly pursuing his charge of disqualification against the writ petitioner. Therefore, it is alleged that the first respondent would find it embarrassing and

difficult to decide freely and impartially the case of disqualification put forward by Dr. Subramanian Swamy against the writ petitioner, which is in substance and effect would be a decision and opinion against his counsel Dr. Roxna S. Swamy.

32. In paragraph 8 of the petition, it is also further averred that independent of what is averred in paragraphs 6 and 7, the writ petitioner would never have confidence that the first respondent would be able to dissociate his lawyer-client relationship with Dr. Roxna S. Swamy in the Rs. 1 crore suit from the adjudication of the question referred to by the Governor for opinion on the petition of Dr. Subramanian Swamy, filed under Art. 192 of the Constitution.

33. It is also further alleged that the decision of the first respondent would have a far-reaching consequence and repercussions not only on the writ petitioner as a member of the Legislative Assembly or as the Chief Minister of the State of Tamil Nadu but the very political future of the State of Tamil Nadu.

34. We would like to make it clear at this stage itself that the aforesaid averment is eschewed from our consideration because what is relevant for our purpose is not the consequences or the position held by the writ petitioner, but to see whether the apprehension of bias entertained by the writ petitioner that she is not likely to get a fair and just decision at the hands of the first respondent is reasonable and whether in the facts and circumstances of the case, reasonable people might think that the first respondent is or was biased.

35. The writ petitioner has also further averred that she is entitled to have a judge totally independent and impartial inasmuch as the Governor of the State is bound by the opinion of the first respondent. It has also been averred in paragraph 9 of the petition that the second respondent appears to have been obtaining special help and assistance from the Election Commission of India in presenting and prosecuting the case in Civil Writ Petition No. 942 of 1992 filed before the Supreme Court. In support of this averment, paragraph 7 of the Civil Writ Petition No. 942 of 1992 is extracted, which is as follows:

"Para. 7: The petitioner has also separately applied both to the President of India and the Chief Election Commissioner praying that the respondent No. 1 be directed to obey the mandate of Art. 192(2) of the Constitution of India.

Appended hereto as Annexure 'C' colly are the aforesaid representations of the petitioner to the President of India and the Chief Election Commissioner. The petitioner understands that both these high constitutional functionaries have contacted the respondent No. 1 to inform him of the correct legal position. Nevertheless the respondent No. 1 continues adamant and has failed to obey the constitutional mandate".

It has also been further averred that the aforesaid averments made in paragraph 7 of the Civil Writ Petition No. 942 of 1992 were further expanded by the second respondent by filing a list of dates appended to the writ petition in which it is stated as follows:

"November, 1992:

Both the President of India and the Election Commission communicate to respondent No. 1 the requirements of the Constitution in regard to Art. 192(2). This includes two circulars dated 20.3.1957 and 24.6.1983 whereby the Election Commission had directed the Secretaries to the Governors of all States that in future the Commission's opinion on such references should be sought as soon as practicable after they are received by the Governor and that no such reference should be withheld pending any inquiry or the obtaining of any legal opinion before its communication to the Commission."

On the basis of the aforesaid extracts, it is further averred that it is obvious that without the assistance of the Election Commission of India, the second respondent could not have known the fact that the Election Commission of India had been in confidential communication with the Governor of the State of Tamil Nadu to persuade the Governor to make a reference of his memorandum to the Election Commission of India.

It is further alleged in paragraph 9 that taking the circumstances individually or collectively, the first respondent is disqualified from dealing with the reference made to him on the memorandum filed by the second respondent before the Governor as the principles of "bias" or "likelihood of bias" or "real apprehension of bias" would be attracted to the case.

36. In the counter-affidavit filed by the first respondent, it is admitted that he has filed Civil Suit No. 3286 of 1992 for damages against the United News of India in the High Court of Delhi of a sum of Rs. 1 crore; that Dr. Roxna S. Swamy, wife of the

second respondent is his counsel. However, it is asserted that the allegation that on account of the above fact he is likely to be biased while deciding the question placed in the petition submitted by the second respondent is totally without any basis; that the allegation of bias or likelihood of bias has been deliberately made with a view to bring down the stature of the constitutional office held by the first respondent; that he has enjoyed the reputation of an outstanding official and is known for discretion, objectivity circumspection and responsibility; that the allegation of bias or likelihood of bias raised against him is totally without any legal or factual basis and that it is just and necessary to expunge the same by condemning the writ petitioner; that in W.P.No.1862 of 1993 filed by the AIADMK, represented by its Head-quarters Secretary, Thiru C.R.Aranganayagam, for which party the writ petitioner is the General Secretary, allegations of bias were raised against him stating that he is a family friend of the second respondent (Dr.Subramanian Swamy) and therefore, he has taken a decision against the AIADMK party, that in the writ petition it is alleged that the first respondent has filed a separate affidavit refuting the allegations made therein; that the allegation of bias have been raised against the first respondent not because the second respondent's wife happens to be his counsel in the suit filed in the High Court of Delhi, but it is a deliberate attempt to defame the first respondent; that the allegation made in paragraph 9 of the affidavit of the writ petitioner that the second respondent appears to have been obtaining special help and assistance from the Election Commission of India in presenting and prosecuting the case in Writ Petition (Civil) No.1942 of 1993 in the Supreme Court of India is absolutely without any basis and the same is specifically denied; that the allegation that the second respondent could not have known the fact that the Election Commission of India had been in confidential communication with the Governor of Tamil Nadu without the help of the Election Commission of India and the allegation that the second respondent was given assistance in getting this information are also specifically denied. The first respondent has further averred that the filing of the counter-affidavit by him before this Court in the writ petition should not be misconstrued as his anxiety to hear the matter, that he is filing this counter-affidavit as it is his duty to bring to the

notice of the court certain constitutional obligations cast upon him to decide certain issues. Further allegations in the counter-affidavit are in respect of doctrine of necessity. Therefore, the same are not referred to while dealing with Point No.2. In addition to this, the first respondent has stated that he is prepared to be bound by any order that may be passed by this Court and that he would assure and reiterate before this Court that in the event of any memorandum relating to disqualification of the writ petitioner being/going to be placed before him for his opinion, he will decide the same without fear of, or favour to, any party and without any bias.

37. The second respondent has filed written submissions. It is his stand that he has not filed a counter-affidavit because the averments made in the writ petition are against the first respondent and that it is a matter between the first respondent and the writ petitioner and therefore, he has not filed a counter-affidavit and has chosen to file only the written submissions. It is contended by him in the written submissions that the conduct of the writ petitioner clearly goes to show that she is not prepared to face the enquiry before the Election Commission of India and somehow wants to thwart the petition presented by him to the Governor of Tamil Nadu which has now been forwarded to the Election Commission of India. He has further stated that it is malicious to state that the Chief Election Commissioner passed on confidential papers or any papers to him; that the averment made in paragraph 6 of the affidavit filed in support of the writ petition that there is unity and identity of interest between him and his wife, Dr.Roxna S.Swamy in prosecuting the charge of disqualification averred against the writ petitioner is absolutely irrelevant; that the fact that Dr.Roxna S.Swamy is the counsel on record for Mr.T.N.Seshan has got no relevance for the disqualification incurred by the writ petitioner under Arts.191 and 192 of the Constitution; that Dr.Roxna S.Swamy has got a duty under the Advocates' Act to represent her client; that the writ petitions are filed on flimsy grounds to avoid the statutory enquiry before the Election Commission; that the fact that Dr.Roxna S.Swamy happens to be the counsel in a suit for defamation filed by the second respondent as an individual cannot interfere with the second respondent's right to have his petition for disqualification being enquired into by the Election

Commission of India, that the first respondent would be dealing with the case as Election Commission of India and not in his individual capacity; that bias or likelihood of bias cannot be attributed to the first respondent in the eye of law; that the allegations made in paragraphs 7 and 8 of the affidavit filed by the writ petitioner are without any legal basis whatsoever; that the allegations made in paragraph 9 of the affidavit of the writ petitioner that the second respondent was obtaining special help and assistance from the Election Commission of India for preparing and prosecuting his case in W.P.No.942 of 1992 in the Supreme Court of India is not correct and it is misleading; that he denies that he has got any assistance from the Election Commission of India for obtaining the communications referred to in paragraph 9 of the affidavit and that those allegations are far from truth to the knowledge of the writ petitioner.

38. The Secretary of the Election Commission of India has filed a counter-affidavit on behalf of the Election Commission of India. He has stated that the allegation made in paragraph 9 of the affidavit of the writ petitioner that the second respondent (Dr.Subramanian Swamy) appears to have been obtaining special help and assistance from the Election Commission of India in presenting and prosecuting the case in W.P. (Civil) No.942 of 1992 in the Supreme Court is totally incorrect. He has also specifically denied the same. He has also denied the allegation made in paragraph 9 of the affidavit of the writ petitioner that without the assistance of the Election Commission of India, the second respondent (Dr.Subramanian Swamy) could not have known the fact that the Election Commission of India had been in confidential communication with the Governor of the State of Tamil Nadu to persuade the Governor to make a reference of his memo to the Election Commission of India. In addition to this, he has further stated that the second respondent addressed a letter dated 2.11.1992 to the Election Commission of India, enclosing his memo dated 2.10.1992, that the said letter along with its enclosure, as received by the Election Commission of India, was forwarded to the Governor of Tamil Nadu by the Commission's letter dated 4.11.1992 along with two general circulars issued in the past with a request to the Governor of Tamil Nadu to deal with the same in accordance with law; that except the communication dated 4.11.1992, no other

communication was sent by the Election Commission of India to the Governor of Tamil Nadu in respect of the matter in question.

39. Thus, on a close examination of the averments made in the affidavit of the writ petitioner, the counter-affidavit of the first respondent (Thiru T.N.Seshan) and also of the Secretary to the Election Commission of India filed in the writ appeal, the averments made by the second respondent in his written submissions, the letter dated 2.11.1992 of the second respondent addressed to the first respondent and the letter of the Election Commission of India dated 4.11.1992 addressed to the Secretary to Governor of Tamil Nadu, the following facts and circumstances emerge.

(a) The first respondent on paying a heavy court-fee of Rs.1 lakh, has filed Civil Suit No.3286 of 1992 in the High Court of Delhi against the United News of India, claiming a sum of Rs.1 crore as damages for defamation alleged in the suit. It is a very crucial case for the first respondent. Not only because he has paid a huge court fee of Rs.1 lakh which sum, from any standard, is a big sum for a civil servant like the first respondent, though he is now the Chief Election Commissioner, but it is a suit filed for damages on the ground that the United News of India has defamed him. Therefore, the very image and reputation of the first respondent are at stake apart from the monetary aspect of it.

(b) The first respondent has filed such a suit through Dr.Roxna S.Swamy, Advocate, who is none other than the wife of the second respondent, Dr.Subramanian Swamy. The suit was filed in the month of August, 1992. Dr.Subramanian Swamy and his wife have been together appearing in the case filed by Dr.Subramanian Swamy against the writ petitioner and the present proceedings initiated by the writ petitioner. Dr.Roxna S.Swamy assisted the second respondent in W.P. (Civil) No.942 of 1992 filed by him in the Supreme Court against the present writ petitioner and the Governor of Tamil Nadu, seeking a *mandamus* to the Governor to forward the petition dated 2.10.1992 filed by him to disqualify the writ petitioner from being a Member of the State Legislature. Therefore, it cannot be said that Dr.Roxna S.Swamy is unconnected with, or has no knowledge of, the proceedings that are going on between the second respondent and the writ petitioner before the Supreme Court and before this Court.

(c) It would be unrealistic to think or consider that Dr. Roxna S. Swamy, when she has been assisting her husband, the second respondent, in prosecuting the proceeding against the writ petitioner before the Supreme Court and before this Court, would not be interested and unaware of the proceedings in question and the importance and value of the same to her husband, Dr. Subramanian Swamy. Therefore, the case of the writ petitioner that there is unity and identity of interest between the second respondent and his wife cannot be rejected.

(d) The first respondent is a family friend of the second respondent and he was also a student of the second respondent when the second respondent was a Professor of Economics in Harvard University. This fact was accepted by the second respondent, as observed by the learned single judge, during the course of the arguments.

(e) In addition to these circumstances, it is also established in this case that the second respondent did avail the assistance of the first respondent for expeditious forwarding of his petition dated 2.10.1992 to the Election Commission by the Governor of Tamil Nadu. Apart from the averments made in paragraph 9 of the affidavit of the writ petitioner, in the writ appeal, learned counsel for the first respondent, along with a memo produced xerox copies of the letter dated 2.11.1992 of the second respondent addresses to the first respondent and the letter dated 4.11.1992 by the Secretary to the Election Commission to the Secretary to the Governor of Tamil Nadu. The second respondent has not addressed the letter to the Election Commission or to the Chief Election Commissioner, but has addressed it to Thiru T.N. Seshan, though he has described him as the Chief Election Commissioner. The letter does not appear to have been submitted purely as an official correspondence inasmuch as it addressed Thiru T.N. Seshan as "Dear C.E.C.". Along with the letter, he has enclosed a copy of the memorandum dated 2.10.1992 handed over by him in advance to the Governor of Tamil Nadu on 27.9.1992. In the second paragraph, it is stated that the memorandum raises the question of disqualification under Art. 191(e) of the Constitution, of the writ petitioner as an M.L.A., having been elected in 1991. It is also further averred in the letter that though the Governor is required under the Constitution to forward the same to the Election Commission

without any further delay, but more than a month has already passed without any response from the Governor, despite the verdict of the Supreme Court on the mandatory requirement of Art. 192 and the Election Commission's letter to the Governor of Tamil Nadu (Ref. No. 113/1/AP/Governor/91-JS). Ultimately, he has sought the intervention of the Chief Election Commissioner to set matters on legally proper course. A copy of this letter of the second respondent, along with its enclosure, was forwarded to the Secretary to the Governor of Tamil Nadu with the letter dated 4.11.1992. The said letter apart from forwarding a copy of the letter dated 2.11.1992 of the second respondent had drawn the attention of the Secretary to the Governor to the Commission's Circular No. 113/1/AP/Governor/91-JS-1, dated 10.3.1992 and also enclosed a copy of the same. The letter further requested the Secretary to the Governor to take suitable action in accordance with law. Lastly, it stated that the receipt of the letter be acknowledged by return Fax/Telex.

40. The facts and circumstances stated above as (a), (b), (c) and (d) would establish that there is more than an ordinary relationship between the first respondent on the one hand and the second respondent and his wife on the other. The relationship of lawyer and client, apart from being contractual, is a relationship rooted in confidence. No party entrusts the case to a counsel unless he has confidence in the counsel. Therefore, the relationship between the client and the counsel is not an ordinary relationship. It can even be stated that it is a fiduciary one. Counsel would normally be in a dominating position. On the facts and circumstances of the case, it cannot be said that Dr. Roxna S. Swamy will not at all be interested in the proceedings being prosecuted by her husband, Dr. Subramanian Swamy, against the writ petitioner. In such circumstances, it would be unrealistic and ignoring the normal human conduct and would be opposed to common sense, to hold that the interest of Dr. Roxna S. Swamy and Dr. Subramanian Swamy in the proceedings would not operate in the mind of the first respondent while giving his opinion on the petition dated 2.10.1992 presented by Dr. Subramanian Swamy, the husband of Dr. Roxna S. Swamy, to disqualify the writ petitioner. It is not the assertion, and confidence, of the first respondent that he would give his opinion without any fear of, or favour to,

any person, and without bias in favour of the second respondent, and even assuming that he would do so, that is relevant for keeping beyond reasonable doubt about the fairness of administration of justice. But what is relevant is as to how, in the facts and circumstances of the case, the writ petitioner feels. Is it not, in the facts and circumstances of the case, reasonable for the writ petitioner to assume the possibility of bias or likelihood of bias of the first respondent in favour of the second respondent? We have no doubt that the facts and circumstances of the case do create a reasonable apprehension in the mind of the writ petitioner and it would also be sufficient to produce in the mind not only of the writ petitioner but also of the public at large a reasonable doubt about the fairness of the administration of justice and a suspicion that there is a likelihood of bias by the first respondent in favour of the second respondent.

This is further fortified by another circumstance, viz., persuading the Governor of Tamil Nadu to forward the petition dated 2.10.1992 filed by the second respondent to the Chief Election Commissioner. The letter dated 2.11.1992 of the second respondent addresses the first respondent as "Dear C.E.C.", disclosing familiarity. Immediately it has been sent to the Secretary to the Governor of Tamil Nadu to take suitable action in accordance with law and to acknowledge the receipt of the letter by return Fax/Telex. This circumstance shows the unusual anxiety shown by the first respondent to have seisin of the matter. We have, in the earlier portion of this judgment, pointed out that the Chief Election Commissioner, while rendering opinion on the question referred by the Governor under Art.192 of the Constitution, acts as a quasi-judicial authority or a tribunal. Therefore, he has to act judicially as he decides the right of a party before him. It is unbecoming of any judge, tribunal or an authority empowered to discharge judicial functions to chase a case and to have it before him for decision.

41. The conduct of the first respondent in trying to have the petition forwarded to him immediately, undoubtedly exhibits his extraordinary interest in the matter which cannot at all be considered to be consistent with the Judicial Code of Conduct. Naturally, such a conduct tends to create an apprehension, which cannot be termed as unreasonable, or wild guess, or baseless in the mind of

the writ petitioner, that the first respondent is or is likely to be biased in favour of the second respondent or at any rate he will not be or not likely to be, free from bias, thereby he will not, or is not likely to, be able to decide without fear or favour. 42. No doubt, the respondents 1 and 2 have denied that the first respondent is biased in favour of the 2nd respondent. The basic facts and circumstances as pointed out above are not denied. Therefore, it is only a matter of drawing inevitable or unavoidable, inferences from those facts and circumstances. In cases like this, it is always a matter of inference from the proved facts and circumstances. In such cases, direct evidence is not always available, though it may be possible in some cases.

43. We have, with reference to a decision in *Manak Lal's case*, A.I.R. 1957 S.C. 425: 1957 M.L.J. (Crl.) 254: 1957 S.C.A. 719: 1957 S.C.R. 575, pointed out that the question as to whether, a judge, tribunal or an authority to act judicially is likely to be biased or there is a possibility of bias, is always a question of fact to be decided on the facts and circumstances of each case. Therefore, applying the tests laid down in the various authoritative pronouncements, referred to above, we have no doubt in holding that in the facts and circumstances of the case, apprehension of bias entertained by the writ petitioner that she is not likely to get a fair and just decision at the hands of the Chief Election Commissioner, Mr. T.N. Seshan, on the petition dated 2.10.1992 filed by the second respondent is reasonable and it is well founded. Accordingly, we agree with the learned single judge on this point and answer Point No.2 in the affirmative.

44. *Point No.3*: It is the case of the respondents 1 to 3 that the scheme of Art.192 and the provisions contained in Art.324 of the Constitution would make it clear that it is the Chief Election Commissioner, who is to give an opinion under Art.192(2) of the Constitution which binds the Governor as he has to pronounce his decision in accordance with the opinion of the Election Commissioner. There is no other authority which is vested with the jurisdiction or is competent to give opinion on the question referred by the Governor for opinion under Art.192(1) of the Constitution. The Election Commission, while rendering its opinion under Art.192(2) of the Constitution, acts as a judicial tribunal, therefore, necessarily the first respondent has to give opinion on the question referred

by the Governor under Art.192(1) of the Constitution. Merely because the writ petitioner has chosen to attribute bias to the first respondent, who is the constitutional authority and there is no other authority to decide the question referred under Art.192(1) of the Constitution, the first respondent cannot be refrained from giving his opinion. To do so would amount to failure of justice, which cannot be allowed to take place; that in order to meet such a situation, the doctrine of necessity has been evolved and applied in India; that even appointment of two additional Election Commissioners has not changed the situation because the Election Commission cannot function and discharge its duties, administrative and judicial, without the first respondent, who is the Chief Election Commissioner. Therefore, it is contended that the Ordinance 32 of 1993 has not made any difference, nor it has affected the applicability of the doctrine of necessity to the case, inasmuch as, in the light of a decision of the Supreme Court in *S.S.Dhanoa v. Union of India*, A.I.R. 1991 S.C. 1745, the Election Commission cannot function without the Chief Election Commissioner- the first respondent in the instant case.

45. On the contrary, it is contended on behalf of the writ petitioner that once it is found that the apprehension of bias attributed to the first respondent, is reasonable, he becomes disqualified to hear and decide the question referred to him by the Governor on the petition dated 2.10.1992, filed by the second respondent, that his decision becomes *coram non judice*, as such, the doctrine of necessity itself is inconsistent with the principle of *coram non judice*. The doctrine of necessity cannot be applied in India because of the wide powers of judicial review under Art.226 of the Constitution. It is contended that instead of compelling the writ petitioner, in case whose apprehension of bias attributed to the first respondent is accepted, to go through the proceedings before the first respondent and have the decision subsequently quashed on the ground of *coram non judice* which will be an exercise in futility, it is better not to have a biased judge and to allow a disqualification to continue. It would be highly unjust and opposed to rule of law and principles of natural justice to subject a person to a biased judge. Therefore, it is submitted, in view of the vast power of judicial review available under

Art.226 of the Constitution, that the question as to whether the doctrine of necessity should at all be applied in India is required to be reviewed. In the present situation, however, there is no need to apply the doctrine of necessity to the case on hand in view of the Ordinance 32 of 1993, issued by the President and appointment of two more Election Commissioners, who can perform the same functions as are to be performed by the first respondent.

46. Both the sides have also placed reliance on certain decisions, which will be considered in due course.

47. Learned single judge, on the question of doctrine of necessity, on considering the decisions cited before him and on considering the provisions contained in Art.324(2) of the Constitution, has held:

"...that though the principle of natural justice has to give way, if doctrine of necessity warrants, it is not necessary to apply the doctrine of necessity in all circumstances.

Considering the peculiar facts and circumstances of the case and the peculiar situation in which the petitioner is placed, I am of the view, that relief can be given by the Government of India under Art.324 of the Constitution of India as it provides for an appointment of additional Election Commissioner, to solve the question posed before this Court under Art.226 of the Constitution of India, Since Art.324 of the Constitution of India provides for an appointment of additional Election Commissioner, *an alternate forum* I am of the view that doctrine of necessity need not be applied to this case. This Court is fully convinced with the contentions raised by the learned senior counsel for the petitioner, with regard to the question of bias, the real likelihood of bias and that the first respondent/ Election Commission should not be allowed to proceed with the memorandum given by the second respondent and given an opinion and that if it is given it will be a nullify. So this Court is of the view that a writ of *prohibition* can issue against the first respondent not to proceed with the enquiry on the memorandum submitted by Dr.Subramanian Swamy, the second respondent herein, dated 2.10.1992."

48. It must be noticed that there are certain things which the law permits to be done as a matter of

necessity. All those such things are not quite in consonance with the principles of judicial propriety. The doctrine of necessity is one such which arises when the judge has exclusive jurisdiction to try the case. It is applied to ensure that the course of justice is not impeded. Sometimes it becomes necessary to subdue some principles of judicial propriety. To put it in other words, the doctrine of necessity overrides the requirement of judicial propriety. No doubt, it is an anomaly in law. The doctrine of necessity arises in the case of bias, when there is no other judge who has jurisdiction to decide the case. Murphy ad Prit Chett in "Courts, judges and Politics", published by Randum House, 1961 III Edition at pages 185 and 186, while dealing with the rule of necessity, judicial ethics and disqualification have stated that the rule of necessity which has been traced back in English Common Law to 1430 is that a judge is not disqualified to try a case because of his personal interest in the matter at issue, *if there is no other judge available to hear and decide the case*.

In Volume 48-A Corpus Juris Secundum at paragraph 100, it is stated that the Rule for disqualification of judges must yield to demands of necessity and will not prevail if disqualification will prevent resort to the only tribunal to which relief may be obtained. It has been specifically stated that particularly such disqualification would result in denial of a litigant's constitutional right to have a question properly presented to such Court and adjudicated. It is also stated that if disqualification operates so as to bar justice to the parties and if no other Tribunal is available the disqualified judge or judges may, by necessity proceed to judgment.

49. The Supreme Court of United States in *Walter Evans v. J. Rogers Core*, has stated:

"Stated in its broadest aspect, the contention involves the power of tax the compensation of Federal judges in general, -- and also the salary of the President, as to which the Constitution (Art.2, 1, C1, 6) contains a similar limitation. Because of the individual relation of the members of this Court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to

invoke our (248)³ decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which, under the law, he could go."

50. Mark Aronson and Nicola Franklin, in "Review of Administrative Action", published by the Law Book Company Ltd., in 1987, dealing with the doctrine of necessity, have stated that "It has long been recognised that the bias rule is subject to the doctrine of "necessity". The appeal to the House of Lords against the judgment of the Lord Chancellor in *Dimes v. Grand Function Canal*, (1852)3 H.L.C. 759, was upheld on the ground of that judge's pecuniary interest." It has also been further stated that "a decision maker may not always invoke "necessity" to defeat an objection on the ground of bias, even where no other body is qualified to act in lieu of that person or body. If the ground of disqualification was, for example, voluntarily or unnecessarily assumed by the decision-maker, the Court must choose between the twin evils of allowing an unnecessarily biased person to act, or preventing action altogether." *R. v. Optical Board-Ex parte Qurban*, (1933) S.A.S.R. 1, has been quoted wherein the members of the Board took active role in the investigation leading to the charge and they were held disqualified even though this left the board without a quorum. It was held that they should have got someone else to do the investigation. "The Full Court in South Australia refused to allow the "necessity" principle to prevail over the bias it perceived in having a magistrate and prosecuting counsel belonging to the same department and sharing the Crown Solicitor as their department head. It was said that the informant could brief someone else, or a justice of the peace could hear the case. *It was also noted that there was no impasse, as the Government could repeal the recent proclamation which has brought the magistrates and prosecuting counsel too close to each other. The judges got their way; the magistrates were removed to another department.*"

In *Miller v. Aldridge*, 39 A.L.R. 1479, on the question of limitations of Rule (of necessity), it is stated that "the rule permitting action by a disqualified judge when no other is competent to act, being an exception, enforced by necessity, to a rule resting on sound public policy, *its application in any case can be justified only by strict and imperious necessity; a disqualified judge not being entitled to*

act, if it is possible to secure another judge to sit in his place”.

At paragraph 66 of Volume I of “American Jurisprudence”, Second Edition, it is stated that “there is an exception, based upon necessity, to the rule of disqualification of an administrative officer. Disqualification will not be permitted to destroy the only tribunal with power in the premises.”

It is also further stated that “*if there is anyone else who can act in the place of the disqualified person or persons, or if a board or commission may act in the absence of the disqualified person or persons, the doctrine of necessity does not apply.*”

Similarly, Geoffrey A. Flick, in his book “Natural Justice”, Second Edition, published by Butterworths, dealing with the rule of necessity, has stated that “the rule is firmly established in both English and Commonwealth jurisdictions and in American jurisdictions and is to the effect that disqualification of an adjudicator or will not be permitted to destroy the only Tribunal with power to act.”

It is also further stated that “*clearly the rule is inapplicable where the statute provides an alternative forum to the biased tribunal or where the statute contemplates that a majority of the agency can reach a decision.*”

In *Miller v. Aldridge*, 39 A.L.R. 1470, it is held that all the authorities have generally agreed that, of course, the rule of disqualification is the paramount policy and is only to yield when the necessity is so great and overwhelming, that there may not be an entire failure of justice. The Courts have treated the question as presenting a comparison of wrongs, or a choice of two evils. The opposition to the doctrine of necessity insists that it were better the question be delayed until the commission be remediated by legislative enactment.

Our Apex Court in *M/s. J. Mohapatra and Company v. State of Orissa*, A.I.R. 1984 S.C. 1572; (1984) 3 S.C.C. 103, has held that “*The doctrine of necessity applies not only to judicial matters, but also to quasi-judicial and administrative matters. The High Court, however, wrongly applied this doctrine to the author-members of the assessment sub-committee. It is true, the members of this sub-committee were appointed by a Government resolution and some of them were appointed by virtue of the official position they were holding, such as, the Secretary, Education Department of the Government of Orissa and the Director, Higher Education, etc.,*

There was, however, nothing to prevent those whose books were submitted for selection from pointing out this fact to the State Government so that it could amend its Resolution by appointing a substitute or substitutes as the case may be. There was equally nothing to prevent such non-official author-members from resigning from the committee on the ground of their interest in the matter.”

51. Thus, it can be deduced from the aforesaid decisions that the doctrine of necessity is applicable even though a judge or tribunal is disqualified on the ground of bias, if there is no other judge or Tribunal available to decide. The doctrine of necessity, as the name itself suggests is evolved out of sheer necessity to prevent failure of justice by enabling the judge, even though he is disqualified on the ground of bias, to adjudicate. Thus, it is applied in order to ensure that course of justice is not impeded and that a party who is entitled to have his case adjudicated does not go without the case being adjudicated. Therefore, it has to be applied when there is no way out to ensure that justice must not only be done but must also appear to be done. If there is a possibility to have alternative or another judge to adjudicate it should be adopted. Thus, where there is alternative tribunal or a judge, the doctrine of necessity does not apply. It is of importance to notice that in *Mohapatra's case*, (1984) 4 S.C.C. 103; A.I.R. 1984 S.C. 1572, the Supreme Court declined to apply the doctrine of necessity on the ground that it was possible for the Government to amend its resolution by appointing a substitute or substitutes and it was equally possible for such of those members who had interest in the subject matter to resign from the committee. It is also established that in the case of multi-member tribunal, the doctrine of necessity cannot be applied, if the remaining members of the tribunal can adjudicate.

52. As already pointed out, after the hearing of this case was completed and the judgment was reserved, Ordinance 32 of 1993 came to be promulgated by the President of India, amending the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991, making the Election Commission a multi-member body. In the light of this Ordinance, we have also heard both the sides once again. Thus, as the matter stands, the Election Commission is not a single member commission. It consists of three members including the first respondent who is the

Chief Election Commissioner.

53. It is contended by Mr. G. Ramaswamy, learned Senior Counsel appearing for the first respondent, that the Chief Election Commissioner being an integral part of the Election Commission, without him the Election Commission cannot function or discharge any of its duties and the applicability of doctrine of necessity is not affected by reason of Ordinance 32 of 1993. The same is the contention of Dr. Subramanian Swamy. They have heavily relied upon the decisions in *S.S. Dhanoa v. Union of India*, A.I.R. 1991 S.C. 1745 and *R. Viswanathan v. Abdul Wajid*, A.I.R. 1963 S.C. 1: (1963) 3 S.C.R. 22. As far as the decision in *Viswanathan's case*, is concerned, no sustenance can be drawn as the Election Commission has now become a multi-member commission. Further, the observation that Mr. Medappa and Mr. Balakrishnaiah consistent with the dignity of the Court should not have sat in the Full Bench, goes in favour of the writ petitioner.

53.1. In *Dhanoa's case*, A.I.R. 1991 S.C. 1745, the rescinding of the notification, creating two posts of Election Commissioners and also the rescinding of the notification by which Mr. Dhanoa and Mr. S.G. Gill were made as Election Commissioners, were challenged. Considering Art. 324 of the Constitution, the Supreme Court quoted with approval the speech made by Dr. Ambedkar:

"We, of course, do not propose to give the same status to the other members of the Commission. We have left the matter to the President as to the circumstances under which he would deem fit...."

It is also further observed by the Supreme Court, "What is therefore, evident from the discussion of the framers of the Constitution, is firstly, they did not want to give the same status to the Election Commissioners as of the Chief Election Commissioner and secondly they wanted the Chief Election Commissioner to be in overall control of the business of the Commission. The nearest analogy of another constitutional institution that comes to our mind in this connection is that of the Council of Ministers under Arts. 74 and 163 of the Constitution. The Prime Minister and the Chief Minister, as the case may be, are at the head of the Council of Ministers and they together with the other Ministers constitute the council. They are, however, not bound by the views

of the other Ministers and may even override them."

It is also relevant to notice the observations made with regard to the rule of transacting business in a multi-member body and also the advisability of having multi-member body, in paragraphs 15 and 21 of the judgment in the aforesaid case:-

"15. It is further an acknowledged rule of transacting business in a multi-member body that when there is no express provision to the contrary, the business has to be carried on unanimously. The rule to the contrary such as the decision by majority, has to be laid down specifically by spelling out the kind of majority--whether simple, special, of all the members or of the members present and voting etc. In a case such as that of the Election Commission which is not merely an advisory body but an executive one, it is difficult to carry on its affairs by insisting on unanimous decisions in all matters. Hence, a realistic approach demands that either the procedure for transacting business is spelt out by a statute or a rule either prior to or simultaneously with the appointment of the Election Commissioners or that no appointment of Election Commissioners is made in the absence of such procedure. In the present case, admittedly, no such procedure has been laid down."

"21. There is no doubt that two heads are better than one, and particularly when an institution like the Election Commission is entrusted with vital functions, and is armed with exclusive uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however, all-wise he may be. It ill-conforms the tenets of the democratic rule. It is true that the independence of an institution depends upon the persons who man it and not on their number. A single individual may sometimes prove capable of withstanding all the pulls and pressures, which many may not. However, when vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness. The fact, however, remains that where more individuals than one, man an institution, their roles have to be clearly defined, if the functioning of the institution is not to come to

anaught.”

54. It appears to us that keeping in view the observations made by the Supreme Court in paragraphs 15 and 21 in *Dhanoa's case*, the Ordinance 32 of 1993 has been issued to amend the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act 11 of 1991. The Ordinance amends the title of the Act by substituting for the words “and for matters”, by the words “and to provide for the procedure for transaction of business by the Election Commission and for matters”. Thus, the object of the Ordinance is to provide for the procedure for transaction of business of the Election Commission and also to make the Election Commission a multi-member Commission. The Ordinance inserts Chapter III containing Secs.9 and 10 in Act 11 of 1991. These sections are as follows:

“9. The business of the Election Commission shall be transacted in accordance with the provisions of this Act.”

“10. (1) The Election Commission may, by unanimous decision, regulate the procedure for transaction of its business as also allocation of its business amongst the Chief Election Commissioner and other Election Commissioners.

(2) Save as provided in Sub-sec.(1), all business of the Election Commission shall, as far as possible, be transacted unanimously.

(3) Subject to the provisions of Sub-sec.(2), if the Chief Election Commissioner and other Election Commissioners differ in opinion on any matter, such matter shall be decided according to the opinion of the majority.”

A reading of these provisions in the background of the object with which they are inserted, makes it clear that the business of the Election Commission which consists of three members including the Chief Election Commissioner, shall have to be transacted in accordance with the provisions of Act 11 of 1991. The Election Commission shall have to ‘unanimously’ decide regarding the regulation of the procedure for transaction of its business and also the allocation of its business amongst the Chief Election Commissioner and other two Election Commissioners. The business of the Election Commission shall have to be, as far as possible, transacted unanimously and if, in the event the Chief Election Commissioner and other Election Commissioners differ in opinion on any

matter, such matter shall have to be decided according to the opinion of the majority. Though Sub-sec.(1) of Sec.10, as inserted by the Ordinance, uses the word “may” as the power under Sec.10 is coupled with duty, therefore, it is necessary for the Commission to evolve a procedure and allot its business amongst the Chief Election Commissioner and other two Election Commissioners. If it does not do so, it will be failing in discharging its legal obligation which the Election Commission cannot afford to do. Therefore, it is incumbent upon the Election Commission in the light of the provisions contained in Sec.10, inserted by Ordinance 32 of 1993 in Act 11 of 1991 coupled with its onerous duties and functions to immediately decide unanimously to regulate the procedure of transaction of its business and also allocation of its business amongst the Chief Election Commissioner and two other Commissioners. While doing so, as the Election Commission has now faced with the problem of bias attributed to the Chief Election Commissioner in the matter of rendering opinion under Art.192(2) of the Constitution and such a situation can even arise in future, it becomes necessary for the Election Commission to specifically make a provision in the regulations or rules to meet such a situation. It is common knowledge that in a multi-member commission, matters relating to judicial as well as administrative, decision can be taken on the basis of the majority view. Therefore, the Commission has to fix a coram.

55. In general, quorum means a majority of the view of the whole body. The meaning of “quorum”, as is given in Black's Law Dictionary, is as follows:

“A majority of the entire body; e.g., a quorum of a state Supreme Court. The number of members who must be present in a deliberative body before business may be transacted. In both houses of Congress a quorum consists of a majority of those chosen and sworn.

Such a number of the members of a body as is competent to transact business in the absence of the other members. The idea of quorum is that, when that required number of persons goes into a session as a body, such as directors of a Corporation, the votes of a majority thereof are sufficient for binding action. Benintendi v. Kenton Hotel, 294 N.Y.112, 60 N.E. 2d 829, 831. When a committee, board of directors, meeting of

share-holders, legislature or other body of persons cannot act unless a certain number at least of them are present, that number is called a 'quorum'. In the absence of any law or rule fixing the quorum, it consists of a majority of those entitled to act."

56. Therefore, the Election Commission, while framing the rules or regulations or passing resolutions relating to the procedure for transaction of its business, shall have to provide for the quorum. The functions of an Election Commission can be transacted by one member or two members together, or all the three together, as may be resolved by the Commission. In *Ashok Kumar Yadav v. State of Haryana*, (1985)4 S.C.C. 417 at paragraph 18, it has been observed:

"When two or more members of a Public Service Commission are holding a *viva voce* examination, they are functioning not as individuals but as the Public Service Commission. Of course, we must make it clear that when a close relative of a member of a Public Service Commission is appearing for interview, such member must withdraw from participation in the interview of that candidate and must not take part in any discussion in regard to the merits of that candidate and even the marks or credits given to that candidate should not be disclosed to him."

As the Election Commission is created under the Constitution and is invested under the law with not only administrative powers but also with certain judicial powers by the State, however fractional it may be, to exclusively resolve disputes *inter alia* between rival parties with regard to certain matters. See: *A.P.H.L. Conference, Shillong v. W.A. Sangma*, A.I.R. 1977 S.C. 2155: (1977)4 S.C.C. 161, it becomes necessary for it to regulate the procedure for transaction of its business and also to allocate its business amongst the Chief Election Commissioner and other Election Commissioners. The judicial functions and powers of the Election Commission can be entrusted, as may be resolved by the Election Commission, to one member or two members together and the Chief Election Commissioner or all the three together. As already pointed out, in the event of all the three together exercising the powers and discharging the functions especially in the matter of judicial functions, it would have to be by majority unless the judicial function is entrusted to one of them, which is also permissible for the Election

Commission to do so.

57. In the matter of discharging of judicial functions, in the light of the experience gained, it would be appropriate and practicable and functional if it is entrusted to one of the members or the Chief Election Commissioner with a provision for entrusting the same to any other member in the event the member who is entrusted with the judicial function becomes disqualified to discharge the judicial functions. Similarly, in case, the Chief Election Commissioner is entrusted with the judicial functions and he becomes disqualified, as has happened in the instant case, a provision shall have to be made to entrust the same to another member. Sec.10 of Act 11 of 1991, as inserted by Ordinance 32 of 1993, enables the Election Commission to provide for all these aspects by framing the regulations or rules or passing the resolutions, as it deems necessary. Thus, it is not possible to hold, as contended by Mr.G.Ramaswamy, learned senior counsel for the first respondent, that as a result of Ordinance 32 of 1993, the applicability of the doctrine of necessity is not in any way affected and no decision on the basis of majority without the Chief Election Commissioner can be arrived at. It is also not possible to accept the situation, as contended by the learned counsel, that even if the Chief Election Commissioner is excluded, the other two members, if they differ, there will be a stalemate. It has already been pointed out by us that in the matter of performing of judicial functions, it is just and appropriate and practicable to entrust it to any one of the members or the Chief Election Commissioner individually, with a provision for re-entrustment or transfer of such function to any other member or the Chief Election Commissioner as the case may be in the event such Election Commissioner or Chief Election Commissioner becomes disqualified, to hear and decide the same. We accordingly answer point No.3 as follows: In view of the appointment of two Election Commissioners and in the light of the provisions contained in Secs.9 and 10 of the Chief Election Commissioner and other Election Commissioners (Conditions of Service and Transaction of Business) Act, 1991, as inserted by Ordinance 32 of 1993, the doctrine of necessity cannot be applied to the case on hand.

58. As already pointed out, the writ petitioner has filed C.M.P.No.13874 of 1993 to direct the first respondent Mr.T.N.Seshan) to recuse himself when

the question of the alleged disqualification of the writ petitioner is taken up for adjudication. The first respondent has also filed the counter affidavit to it. In the light of the findings recorded on points No.2 and 3, it has to be held that Mr.T.N.Seshan, the Chief Election Commissioner is disqualified to hear the petition dated 2.10.1992 filed by the second respondent before the Governor of Tamil Nadu and forwarded to the first respondent. As such, he has to be directed to recuse himself and participating in the proceedings pertaining to the writ petitioner by the Election Commission.

59. *Point No.4:* For the reasons stated above, the writ appeal is allowed in part; (a) the writ of prohibition, prohibiting the Election Commission from going into the petition dated 2.10.1992 filed by the second respondent and rendering its opinion as per Art.192(2) of the Constitution is set aside. (b) W.P.No.6095 of 1993 is dismissed as not maintainable as the question whether the writ petitioner has become subject to the disqualification under Art.191 read with Sec.9-A of the Representation of the Peoples Act, 1951, has to be gone into by the Election Commission as per Art.192(2) of the Constitution. All the contentions of the writ petitioner and the respondents in this regard are left open. (c) The order of the learned single judge is accordingly modified and W.P.No.6094 of 1993 is allowed in the following terms: A writ of *prohibition* is issued to the first respondent (Mr.T.N.Seshan) from in any manner dealing with, hearing, adjudicating upon or disposing of the memorandum dated 2.10.1992 filed by the second respondent (Dr.Subramanian Swamy) and forwarded by the Governor of Tamil Nadu to the first respondent. We make it clear that it is open to the Election Commission, while regulating the procedure for transaction of its business or allocation of its business to allot it to any one of the other two members or to both, as it deems necessary and proper. In the facts and circumstances of the case, there will be no order as to costs.

B.S.

Appeal allowed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and S.M.Ali Mohammed, JJ.*

O.S.A.No.67 of 1992

17th August, 1993.

Mohamed Hussain Sulaiman of Great Eastern Engineering Company ...*Appellant*
v.

State Bank of India, Overseas Branch, Madras and others ...*Respondents.*

Civil Procedure Code (V of 1908), 0.39, R.6 and Sec.151 - Sale by way of interlocutory orders of property subject matter of suit - When can be ordered - Inherent power of court not available.

The provision in the Code of Civil Procedure for sale by way of interlocutory orders of any property which is the subject matter of the suit or attached before judgment is permissible only when they are subject of speedy and natural decay and otherwise, when for any just and sufficient cause, the court finds it desirable to have sold at once. The power given to the court under O.39, Rule 6 of the Code of Civil Procedure alone is available before adjudication and decree that may be executed in accordance with the provisions under O.21 of the Code of Civil Procedure. A Bench of this Court in the case of *Ranjani v. The Indian Bank*, O.S.A.No.64 of 1993 dated 5.8.1993 and another in the case of *PL.CT.SP. Subramanian Chettiar v. Meenakshi Achi*, (1992)1 L.W. 423, has clearly spelled out the only situation in which pending the suit, the court can order interim sale is one as contemplated under Rule 6 of O.39 of the Code of Civil Procedure. The inherent power of the court under Sec.151 of the Code is not available at all. [Para. 5]

Cases referred to:

PL.CT.SP. Subramaniam Chettiar v. Meenakshi Achi, (1992)2 L.W. 423. [Para. 5]

Muthuswami Gounder v. A.P.Kaithamalai Gounder, 1976 T.L.N.J. 191. [Para. 5]

R.Ramamurthi v. Rajeswara Rao, A.I.R. 1973 S.C. 643; (1973)2 S.C.C. 721. [Para. 5]

Appeal under Clause 15 of the Letters Patent against the O.36, Rule 11 of Original Side Rules of Maruthamuthu, J., dated 16.4.1991 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No.5398 of 1990 in C.S.No.351 of 1987, etc.

N.Balasubramaniam, for Appellant.

R.Sreekrishnan, for Respondent No.1.

The Judgment of the Court was delivered by

Mishra, J.: The instant appeal is yet another in the series of cases in this Court, at the instance of the creditors in particular, in which before any adjudication of the money claim in the suit and accordingly, any decree, defendant's properties are sold through the intervention of the court, the sale proceeds are allowed to be appropriated by the plaintiff and as we shall presently see in the instant suit, the third party-purchasers are neither delivered any property, nor are they given the refund of the money so realised from them as the consideration of the auction purchase. The plaintiff/1st respondent has filed the suit, C.S.No.351 of 1987 for recovery of Rs.16,82,882.60 from respondents 2 to 4 and in default of payment for sale of B Schedule property in the plaint for realisation of the suit claim. Pending suit, however, the plaintiff/1st respondent filed Application No.2084 of 1987 for appointment of an Advocate as Commissioner to take inventory of the stocks and other goods in Schedule B property mentioned in the plaint and take possession and another Application No.2083 of 1987 for interim injunction restraining the defendants from disposing or otherwise alienating the goods available in the premises of the 1st defendant, *i.e.*, to say, the 2nd respondent herein. On 13.7.1989, the court passed an order directing the plaintiff/1st respondent to nominate one of its officers to take inventory of the stocks in the property described in B Schedule to the plaint and it was understood that the plaintiff and defendants would come out with the offers or purchaser if any so that the said stock might be sold to the highest offerer. On 25.8.1989, the plaintiff brought in 4 sealed covers containing offers for different amounts, which included the offer of the appellant herein, *i.e.*, to say, Great Eastern Engineering Company, Madras. The appellant's offer was the highest; yet, it seems, the court permitted the bid once again and finally, it seems, it was settled in favour of M/s.Raman & Co., The said Raman & Co., however, did not come forward and it seems, backed out. It fell this time upon the appellant to pay Rs.7,90,000 for B Schedule properties by depositing Rs.50,000 immediately in court and the balance of Rs.7,40,000 in instalments on various dates by getting extension of time from court for payment of the amount. After completing, however, of the payment of

Rs.7,90,000 the appellant herein demanded delivery of the goods. On 3.10.1989, one of the Officers of the plaintiff described as plaintiff's officer-in-charge (rehabilitation) issued a letter to the appellant permitting to take delivery of the goods available at No.71, Periana Maistry Street, Periamet, Madras-3. The said officer also sent a copy of that letter, it is said, to the 1st defendant/2nd respondent asking him to release stocks detailed in that letter to the appellant or its authorised representative/nominee as the appellant had paid the entire sum of Rs.7,90,000 as per the order of the court. According to the appellant, however, when it reached the destination as directed by the said Officer of the plaintiff, it was denied any delivery of the goods. It returned, thus, with an application in court alleging that the plaintiff and the defendants had abused the process of law, which amounted to contempt and committed various criminal offences. The appellant issued a lawyer's notice to defendants 1 to 3 (respondents 2 to 4) with a copy to the plaintiff/1st respondent alleging that the goods were not delivered to it as per the letter of the plaintiff, but, that notice was returned unserved, as the premises of the defendants 1 and 2 (respondents 3 and 4) was found locked. The appellant filed in the said suit Application No.5398 of 1990 seeking a direction to the plaintiff to deliver the auction materials together with Rs.1 lac as damages or alternatively to refund the sum of Rs.7,90,000 received from it with interest from 3.10.1989 and Rs.1 lac as damages. By another Application No.5399 of 1990, the appellant also sought punishment to respondents 2 to 4 for Contempt of Court in respect of the goods sold, but not delivered to it. The appellant made yet another Application No.5400 of 1990 seeking a direction for the prosecution of defendants 1 to 3, *i.e.*, to say, respondents 2 to 4 for having committed criminal offence for wrongfully selling away the goods to third parties and converting the proceeds against themselves.

2. The plaintiff as well as defendants opposed the abovesaid applications. The plaintiff/1st respondent, however, came forward with a case in its counter that on 3.10.1989, it addressed a letter to the defendants/ respondents asking them to deliver the leather stocks to the appellant as per the order of the court and that it was under the impression that the goods were taken delivery by the appellant accordingly, but that it was only on

18.4.1990, when the plaintiff/1st respondent received a notice from the counsel of the appellant that it came to know that the appellant had not taken delivery of the goods from the defendants. It maintained in its counter that it was not responsible for the non-delivery of the leather stocks by defendants 2 to 4 to the appellant, as it had duly acted as per the direction of the court.

3. The return of the 2nd respondent is, however, curious, for, according to it, the purchase money was arranged by the defendants themselves, that the appellant herein had no means to pay the purchase money and that two suits C.S.No.757 of 1990 and C.S.No.769 of 1990 have been instituted accordingly by it impleading the appellant as a party/ defendant for realisation of such advances made by it to the appellant. Although it does not appear to say that it delivered the goods as ordered by the court to the appellant, it has said that the appellant has duly acknowledged the delivery of the stocks by the defendants/ respondents 2 to 4 by delivery of the original letter dated 3.10.1989 issued by the plaintiff-1st respondent.

4. The trial court has, however, after taking notice of the case of the parties stated as follows:

“They must have agreed between themselves that the goods must be somehow purchased and retained by paying the sale price and that the goods, after payment of the sale price to the plaintiff must be shared between them. The second defendant must have had the fear that if the goods were sold and delivered to the applicant and if the applicant would in turn pass on the goods in favour of third parties, there would be loss to the first defendant-company and therefore, the second defendant as director of the first defendant-company must have come forward to arrange for the payment of rupees four lakhs to be paid to the applicant. If only the applicant had not received the sum of rupees four lakhs from the second defendant or the first defendant-company and had not paid the same to the plaintiff, the claim of the applicant herein would be straight forward and he might be deemed to be entitled to his claim at present. But, it is not so, as the applicant has conducted himself otherwise and he has not come with clean hands. If he has received a major part of the sale price from the first defendant or the second defendant themselves and paid the same to the plaintiff, it is

but natural that the defendants had thought of having right in respect of the goods that were sold in favour of the applicant. It is significant to note there that the applicant has not expressly stated in his affidavit that he received rupees four lakhs from the defendants 1 and 2 for payment to the plaintiff and for making up of Rs.7,90,000. This is an indication that the applicant is a person guilty of suppression of material facts.

The circumstances that a sum of rupees four lakhs was paid by the defendants 1 and 2 while the applicant had paid only Rs.3,90,000 shows that some dispute must have arisen between the defendants and the applicant over the disposal of the goods from the premises of the first defendant long after 3.10.1989 and that, therefore, the applicant did not come forward with a complaint that the goods were not delivered to him or immediately after 3.10.1989. The plaintiff has evidently issued and handed over the latter to the applicant on 3.10.1989 itself soon after the realisation of Rs.7,90,000. If the applicant's claim is straightforward he ought to have gone to the premises of the first defendant on 3.10.1989 itself or the following day and in any event, without delay and taken steps to take delivery of the goods. Here, it appears that nothing as such has been done by the applicant. As against the latter issued by the plaintiff permitting to take delivery of the goods on 3.10.1989, the applicant would come forward with a complaint that the goods were not delivered to him only on 13.4.1990, that is exactly 6 1/2 months after the said letter of the plaintiff. There is absolutely no reason why the applicant has not made any complaint of non-delivery of the goods by the defendants soon after 3.10.1989. The legal notice issued by the applicant's counsel on 18.4.1990 alone contains such an allegation of non-delivery of the goods. He has not made any complaint to the plaintiff, the proper authority to whom the complaint could and should be legitimately made, till 18.4.1990 about the non-delivery of the goods by the defendants.

The allegation of the applicant in his notice dated 18.4.1990 that the applicant made complaints on several occasions to the plaintiff, but that the plaintiff did not take action on the matter, is found to be false. The plaintiff's

counsel has duly repudiated this allegation in his letter dated 25.5.1990 by saying that the applicant made no such complaint. It is clear that the allegation that the applicant made complaints to the plaintiff on several occasions, but that the plaintiff took no action on the complaint, has been invented by the applicant as an explanation to cover up the delay of 6 1/2 months in sending the first notice dated 18.4.1990 to the defendants. Even then, the applicant's counsel did not address the notice to the plaintiff also as addressed to defendants. The applicant's counsel has just marked a copy of the notice dated 18.4.1990 to the plaintiff as if it was not important to the plaintiff. Probably, the applicant did not like to invite an immediate and suitable reply from the plaintiff and that, therefore, the notice was not addressed to the plaintiff also. Here, the plaintiff would say that after the passing of the letter dated 3.10.1989, the plaintiff was under the *bona fide* impression that the applicant had taken delivery of the goods as no complaint of non-delivery of the goods was made by the applicant soon after 3.10.1989 and as the leather goods in question being perishable might not have been kept undelivered to the applicant for so long.

So far as the defendants are concerned, their contention is that the goods were duly delivered to the applicant as soon as he handed over the letter dated 3.10.1989 of the plaintiff. The possession of this letter by the defendants after handing over of the same the applicant is relied on by the defendants as a document evidencing the delivery of the goods. Their plea is that if the goods were not delivered to the applicant, the letter issued by the plaintiff would not have passed into the hands of the defendants. Of course, there is no letter or voucher evidencing the actual delivery of the goods by the defendants from the premises of the first defendant to the applicant. But still, it is not possible to hold definitely that the goods were not delivered to the applicant. If the goods were not delivered to the applicant, the natural human conduct of a person like the applicant would be to report to the plaintiff or take up the matter to the court soon after 3.10.1989. But, it has not been done so by the applicant. He has kept quiet for about 6 1/2 months after the letter

issued by the plaintiff for taking delivery of the goods from the first defendant and he has chosen to complain of the non-delivery of the goods only thereafter. This sort of conduct on the part of the applicant is not consistent with the natural conduct of a person and probability.

So far as the plaintiff is concerned, it is not possible for this Court to direct the repayment of Rs.7,90,000, leave alone the interest and damages claimed by the applicant, for the reason that the plaintiff has duly acted according to the directions of this Court in its order dated 23.8.1989. The order directs that the plaintiff must issue a letter requesting the defendants to deliver the goods and that on receipt of the letter the defendants should deliver the goods to the purchaser (applicant). Here, the plaintiff has duly complied with this order and, if the applicant has not taken delivery of the goods as alleged by him, it must be attributed only to his underhand dealings and laches. He should not have received the money from the first defendant or the second defendant for payment to the plaintiff when it is the goods of these defendants that were sold and this had really complicated the matter and put the applicant in a helpless situation for which he alone is responsible. In the circumstances, we have only to say that the applicant and the defendants should sort out the claims and settle the same and not to look to the plaintiff for redressal. The applicant will not be entitled to seek any relief at the hands of this Court. Consequently, we have to refuse the relief of direction that the plaintiff should deliver the hypothecated materials with Rs.1,00,000 as damages, or refund the sale price of Rs.7,90,000 with interest and damages of Rs.1,00,000. It is not known how the applicant will be entitled to claim both interest and damages in this regard. For the reasons stated above, we have to hold that the applicant has not made out a case for punishing the defendants 1 to 3 for contempt of court's order or for directing criminal prosecution against them."

Besides the above, the trial court also has held that the appellant has no *locus standi* to make the above mentioned applications, as the order for the sale of the property described in Schedule B of the plaint was in favour of Great Eastern Engineering

Company and not the appellant individually. It has said.

"The said Great Eastern Engineering Company is said to be a partnership concern of which the applicant has described himself as a partner in Application No.4161 of 1989 and as Managing Partner in Application No.4662 of 1989. These two applications have been filed by the applicant seeking extension of time for payment of part of the sale price. Now, in the present applications, we see the applicant himself to figure as an individual to make the claim on behalf of Great Eastern Engineering Company. The cause title of the present applications is styled as "Mohamed Hussain Suleman of Great Eastern Engineering Company." He has not indicated in these applications that he is a partner or a managing partner of the said firm. Nor, has he mentioned that the said Great Eastern Engineering Company has become a proprietary concern of himself and that, therefore, he has come forward with the present applications. The description of himself as applicant in the applications gives rise to the question whether the applicant is entitled and is competent to file these applications. It has not been shown here that the said Great Eastern Engineering Company is a registered firm. Unless the firm is a registered one, it cannot sue the plaintiff and the defendants in the present applications. In fact, this is the very contention raised on behalf of the defendants. The defendants would plead in this context that the applicant has come forward with the present applications as a pre-exemption on coming to know somehow that the defendants were going to file suits against Great Eastern Engineering Company and the applicant for recovery of Rs.4,00,000 paid by defendants 1 and 2 to the applicant towards the sale price of the goods. Evidently, one suit, C.S.No.757 of 1990 has been filed by the first defendant for recovery of Rs.3,55,520 with interest and costs and the other suit C.S.No.769 of 1990 has been filed by the second defendant for recovery of Rs.1,19,250 with interest and costs. These suits against the applicant and the firm of Great Eastern Engineering Company are pending. In the circumstances, I have to uphold the technical plea of the defendants that the applications are not maintainable."

5. Before we started delivering the instant judgment, however, learned counsel for the plaintiff/1st respondent has brought to our notice that the suit has been decreed *ex parte*. The fact, however, remains uncontroverted that when the plaintiff filed the application for sale of Schedule B properties, the defendants were yet to file their written statement. The application, thus, for the sale of Schedule B properties was made at a time when issues were yet to be framed and it was not yet known, whether the defendants would accept the plaintiff's claim or not. The provision in the Code of Civil Procedure for sale by way of interlocutory orders of any property which is the subject-matter of the suit or attached before judgment, is permissible only when they are subject of speedy and natural decay and otherwise when for any just and sufficient cause, the court finds it desirable to have sold at once. The power given to the court under O.39, Rule 6 of the Code of Civil Procedure alone is available before adjudication and decree that may be executed in accordance with the provisions under O.21 of the Code of Civil Procedure. A Bench of this Court in the case of *Ranjani v. The Indian Bank*, O.S.A.No.64 of 1993, dated 5.8.1993 and another in the case of *PL CT.SP. Subramanian Chettiar v. Meenakshi Achi and seven others*, (1992)1 L.W. 423, has clearly spelled out, the only situation in which pending the suit, the court can order interim sale is one as contemplated under Rule 6 of O.39 of Code of Civil Procedure. The inherent power of the court under Sec.151 of the Code is not available at all. The court has stated the reasons for taking the said view and we can hardly find better words to express ourselves than the words in the judgment of this Court in *PL CT.SP. Subramanian Chettiar v. Meenakshi Achi and seven others*, (1992)1 L.W. 423:

"There are certain specific provisions in the code as respects the sale of movable and immovable properties. O.39, Rule 6 invests the power to the court to order interim sale of movable property and the said Rule reads as follows:

"The court may on the application of any party to a suit order the sale, by any person named in such order and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit or attached before judgment in such suit, which is subject to speedy and natural decay, or which

for any other just and sufficient cause it may be desirable to have sold at once."

There are also other provisions regarding the sale of movable property found traceable to O.21, Rules 74 to 81 and the details of those provisions need not at all be required to be elaborated here for the purpose of the instant case. The sale of immovable property, in execution of the decree is legally permissible and to this effect, there is a provision under O.21, Rule 82 which prescribes:

"Sales of immovable property in execution of decrees may be ordered by any court other than a Court of Small Causes."

O.21, Rules 83 to 96 prescribe the procedure to be followed in such sales. Barring these provisions, there is no other provision, except the provision, as adumbrated in Sec.151 of the Code dealing with the inherent powers of the court. Sec.151 does not confer a power in the court, but makes a statutory recognition of the inherent power of the court to do certain things *ex debito justitiae*. Such a power is not to be exercised casually and if at all exercised with circumspection and not to violate any rule of law or equity. There can be no justification in applying the powers of the inherent jurisdiction to introduce a new form of procedure for which no provision is made by law.

For the direction by the court, in the instant case, to the Commissioner to order sale of two items of the suit properties in final decree proceedings, for meeting the pressing demands of the estate in discharging the huge tax arrears, the aforesaid provisions of O.21, Rule 39 cannot at all be made applicable and further, no other provision is available, except the invoking of the inherent jurisdiction under Sec.151 which in our view, is also not applicable, as the inhering of such a power to the court would tantamount to introducing a new form of procedure, for which no provision is made in the Code and if at all, any provision is traceable, for such sale of property in partition action, reference may be made to Sec.2 of the Partition Act (IV of 1893) wherein it is legally permissible to effect such sale, in case a division of the property cannot reasonably or conveniently be made. The case on hand is not one falling within the purview of Sec.2 of the Partition Act.

In this context, useful reference may be made to the decision in *Muthuswami Gounder v. A.P.Kaithamalai Gounder*, 1976 T.L.N.J. 191. In that case, the lower court after taking into

consideration the Commissioner's report and the objections filed by the respondent, directed the Commissioner to sell the property among the sharers, after giving one month's notice to the counsel of both the parties and the successful bidder, among the sharers, shall be permitted to set off his share to the sale price and deposit the balance. Aggrieved by the said order, the defendant preferred a revision to this Court, which considered the question as to whether the court has inherent jurisdiction, apart from the Partition Act to pass an order as it thinks just and convenient. This Court after placing implicit reliance on the Division Bench decision of this Court in O.S.A.No.108 of 1966 which was affirmed by the apex of the Judicial Administration of the country in *R.Ramamurthi v. Rajeswara Rao*, A.I.R. 1973 S.C. 643: (1973)2 S.C.C. 721, said thus:

"It is clear from the discussion and the decision rendered in O.S.A.No.108 of 1966 that this Court will not have inherent powers, apart from the Partition Act, to pass orders in respect of a partition suit. I am in complete agreement with the arguments advanced by the petitioner's counsel to the effect that O.S.A.No. 108 of 1966 is the authority for the proposition that the court will not have any inherent powers, apart from the Partition Act in respect of partition suits. It is clear the court below has exercised jurisdiction not vested in it by law. The lower court ought to have decided the case as per the provisions of Sec.2 of the Partition Act and should not have ordered auction of the suit property in between the sharers."

Notwithstanding the above, the plaintiff/1st respondent herein filed a petition seeking appointment of a Commissioner for preparing the inventories and got an order that it itself would nominate one of its officers to take an inventory of the stocks in the property described in Schedule B to the plaint and thereafter would obtain offers from willing purchasers and place the offers so received by its Officer before the court and other applications aforementioned. The court, however, accorded its seal to the offers of the intending purchasers by first accepting the highest offer of M/s.Raman and Co., and when it did not come forward to purchase the goods, the next offer of the appellant was accepted and deposits by it came in instalments, the first deposit being Rs.50,000 and the balance, it is not in dispute, was fully

accounted for against which alone, the court ordered for delivery of the goods to it. The interesting part, however, of the case, is in the authority to deliver the goods to the purchaser, viz., the appellant herein. If the defendants were required to deliver the goods, why did the court ask the plaintiff to deliver the goods and how then the plaintiff issued a letter for the delivery of the goods as to the appellant herein.

6. It is not in dispute that the appellant herein has paid the price of the goods and that the said price has been settled by the court, realised through the orders of the court by the plaintiff/respondent and it is the plaintiff who has received the same. The plaintiff/respondent has, as the receipts show, received payments of the purchase money from the appellant herein on behalf of M/s. Great Eastern Engineering Company. It is available in the contents of the various communications that the plaintiff/respondent has arranged for the sale of stocks lying at No.71, Periana Maistry Street, Periamet, Madras and when they received the final payment on 3.10.1989, they wrote to the appellant as follows:

"C.S.No.351 of 1987:

M/s.Nihads Leathers (P) Ltd.

With reference to your letters dated 28.9.1989 and 29.9.1989 tendering cheques aggregating Rs.4,40,000 for credit of M/s.Nihads Leathers (P) Ltd., Account towards sale of stocks, we have to advise that we today realised the cheques. With realisation of these cheques, we have received from you totally Rs.7,90,000 (Rupees Seven lacs and ninety thousands only) as per court order towards payment of stocks of leather sold to you.

Please take delivery of the following quantity of leather stocks from M/s.Nihads Leathers (P) Ltd., 71, Periyanna Maistry Street, Periamet, Madras-3.

1.	Goat Gloving Leather	3295 pieces
2.	Glze Kid Blac	4238 "
3.	Goat sued Finished Leather	7691 "
4.	Buff Calf Leather	1774 "

	Total	16998 "

We thank you very much for your sincere co-operation extended to us in this matter.

Yours faithfully,

Officer-in-Charge (Rehabilitation)"

and gave along with that a letter of sale of stocks of leather per court order stating as follows:

"We have today instructed Shri Mohamed Hussain Sulaiman of Great Eastern Engineering Company to take delivery from you of the stocks of leather pieces sold through court order, as he has paid the entire sum of Rs.7,90,000 to the credit of your account.

Please extend the necessary co-operation in effecting the delivery to him or his authorised representative/ nominee.

Yours faithfully,

Officer-in-Charge (Rehabilitation)"

The appellant has maintained that the goods were not delivered to it and the plaintiff/respondent's letter of authority to take delivery of the goods remained a paper deal only, about which they repeatedly informed the plaintiff/respondent as well as the defendants. But we find in a letter issued by the learned Advocate for the plaintiff bank that the plaintiff/respondent received copies of letters issued to Nihads Leathers (P) Ltd., that is to say the 2nd respondent herein (the 1st defendant in the suit) and that from that alone the plaintiff/respondent came to know that the defendants had not delivered the possession of the stocks of goods purchased by the appellant for a sum of Rs.7,90,000. In this letter, obviously under the instructions of the officers of the plaintiff bank, learned Advocate for the plaintiff bank has stated as follows:

"The statement contained in paragraph 3 of your letter that "my client had also on several occasions complained to State Bank of India, but State Bank of India has not taken any action in the matter" is not true. Your clients did not at any time before, complain to the Bank about the non-delivery of the stocks. The Bank has until receipt of copy of your letter been under the *bona fide* belief that your clients have already taken delivery of possession of the stocks from Nihada Leather (P) Ltd.

The allegations made in paragraph 4 of your letter that Mr.Hajee K.Immadduddin and Mrs.Hameeda Banu acted "in collusion and conspiracy with the Bank Officials" is false and without any substance whatsoever. If Mr.Hajee K.Immadduddin and/or Mr.Hameeda Banu have removed the stocks, it is in contravention of the orders passed by the Honourable High

Court and they have to hold themselves responsible to you for the consequences flowing from such unauthorised removal and non-delivery to your clients."

The first twist thus in the whole game of the sale of the stocks of goods at the instance of the plaintiff/respondent came by way of a reply to one of the letters of the appellant by the learned Advocate of the plaintiff/respondent, in which it is said, if the defendants had removed the stocks it was in contravention of the orders passed by the court and they had held themselves responsible to the appellant for the consequences flowing from such unauthorised removal and non-delivery of the goods. The defendants came forward with their story in lawyer's reply to the lawyer's notice on behalf of the appellant on 21.5.1990 in these words:

"It is totally false that your client has made a payment of Rs.7,90,000 to State Bank of India and thereafter the 1st of my client was directed by the bank to release the stocks to your client. After the auction in court your client had made a payment of Rs.50,000 on 29.8.1989 and inspected and verified the stocks. He found them to be in order and gave a letter to that effect to my client. Though your client had offered to purchase the stocks for Rs.7,90,000 he did not have the means to pay the same. The 2nd of my client could understand that he could not make payment of the entire auction money from his own account. Your client requested the 2nd of my client to help him in the payment of the amounts, and represented that after the completion of the transaction he would be able to dispose of the stocks and pay my client the amounts advanced by him. On 12.9.1989 he had received as hand loan a sum of Rs.1,00,000 from Barkath Leather Exporters, 33, Hunters Road, Madras-7, which is a sole proprietor concern belonging to the 2nd of my client. At that stage he represented to the 2nd of my client that he was expecting funds from M/s.Shaw Wallace and Co. and that he would repay the loan shortly.

In the meantime, he filed an application for grant of further time and the Hon'ble High Court was pleased to extend the time by order dated 12.9.1989 on which date he had executed a letter and received the abovesaid sum of Rs.1,00,000 as handloan. Before 29.9.1989 the date upto which the court granted time he

could not deposit any further amount. He had again approached the 2nd of my client and requested him to help him further. My client having found that the transaction was halfway through and he having already given Rs.1,00,000 the 1st of my client had given him two cheques in their favour dated 23.9.1989 for Rs.1,00,000 each. These cheques were deposited to your client towards the auction price of Rs.7,90,000. The 1st of my client had further passed on a cheque for Rs.1,00,000 dated 27.9.1989 which was also deposited by your client towards the sale price. On 28.9.1989 your client filed another application stating that the deals he expected have not fructified and wanted further time to organise resources.

After deposit of the entire amount on 3.10.1989 he obtained a letter from State Bank of India wherein the Bank had advised my client to deliver the stocks to your client since the total amount was paid to the Bank. It was assured by your client at that time that he would sell the stocks and repay the 2nd of my client Rs.4,00,000. Your client had delivered the original letter of State Bank of India and taken delivery of the goods promising to pay the amounts taken from my client immediately after sale of the goods. Since the 2nd of my client did not receive the amount paid to your client he had started insisting on repayment of the same. Your client was evading payment of the amount. Now having come to know clearly that my client is contemplating to take civil and criminal action against your client he had issued the belated notice after more than 6 months without any whisper of such non-delivery earlier. The allegations in your notice that he had made complaints to State Bank of India is totally false. If your client should resort to state that such complaints were oral they could all be only imaginary. At any rate neither your client nor the bank had at any time prior to your notice under reply had even whispered of non-delivery. The averment in your notice of alleged contempt by my client is false, mischievous and made to intimidate my clients.

My clients hereby call upon your client to repay the sum of Rs.4,00,000 within 15 days of receipt hereof failing which they will be taking action against your client for recovery of the sum with interest at 21% per annum from the

dates of respective payments as also criminal complaint against your client for cheating”.

7. We have dilated in some detail to the first respondent of the plaintiff/ respondent to the case of the appellant as well as the first response of the defendants to the case of the appellant that as directed by the court it deposited the purchase money in instalments with the plaintiff/ respondent. The plaintiff/ respondent acknowledged such deposits and accordingly accepted that right of property in the goods stood transferred to the appellant and accordingly the appellant was entitled to take possession of the stocks sold to it. The plaintiff/ respondents' response was, well what if you have paid the price, if goods have not been delivered defendants alone are answerable. The defendants, on the other hand, have a strange case of a sort of a contract under which the defendants made available to the appellant money from time to time which money alone the appellant deposited towards the auction price of Rs.7,90,000 which money amounting to Rs.4,00,000 the appellant deposited towards the price of the stocks sold under the court's order and added that the appellant had delivered the original letter of the plaintiff/ respondent to the defendants and taken delivery of the goods.

8. The learned single Judge has, however, found no details are available as to how the balance of Rs.3,40,000 was paid by the applicant so as to complete the sale price of Rs.7,90,000 on 3.10.1989. Here the fact that both the 2nd defendant and the applicant had acted together and made payment of the sale price shows that there was some collusive arrangement between them. They must have agreed between themselves that the goods must be somehow purchased and retained by paying the sale price and that the goods after payment of the sale price to the plaintiff must be shared between them. The 2nd defendant must have had the fear that if the goods were sold and delivered to the application and if the applicant would in turn pass on the goods in favour of third parties, there would be loss to the 1st defendant company and therefore the 2nd defendant as Director of the 1st defendant company must have come forward to arrange for the payment of Rs.4,00,000 to be paid to the applicant.” We regret that a finding of such a vital consequence has been recorded based solely on conjectures. Could this be a concern of the court how the purchaser arranged for the

purchase money and how he dealt with others including the defendants outside of the court when the simple case before it was that on payment of Rs.7,90,000 the appellant became entitled to the goods? If there was any other claimant or any other claim stood independently and separately for which neither there could be any nor was any issue in the main suit how that could be an issue in the proceeding for the auction sale of the goods. What has always been guarded by the courts is that they must not fall prey to surmises and conjectures. They do draw inferences of facts, but that they do on the basis of the proved facts and of such facts only which are inferable from such proved facts. We have seen through the facts that all cautions which laws create for any sale, effected through courts, were thrown to the winds by the plaintiff/ respondent and the defendants and no care whatever was taken at any stage of the proceeding for the sale of the goods to adhere to the provisions under the Sale of Goods Act. If, after receiving the purchaser money, the plaintiff/ respondent has said the transfer of the goods to the appellant was to be effected by the defendants since they were the owners of the goods and they were in the custody of the goods, how could it then receive the purchase money and appropriate it when they knew that they could not effect the transfer. It is not possible to acknowledge that the plaintiff/ respondent was unaware of the legal position that it is the seller who has to receive the price of the goods and the buyer to take delivery of the goods. Sec.31 of the Sale of Goods Act says, it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale. Facts aforementioned leave no manner of doubt that for all purposes throughout the proceeding for the sale of goods, the plaintiff/ respondent represented itself as the seller of the goods. It is it who invited tenders. It is it who received payments and it is admitted, it has received in full the sale price of the goods.

9. Learned counsel for the plaintiff/ respondent has, however, pointed out that the court's order to sell the goods was passed in presence of the defendants and the arrangement accordingly for inviting tenders and payment of the price of goods was ordered by the court in presence of the defendants. Thus, all acts of the plaintiff/ respondent for the sale of the goods were on behalf of the

defendants only. They were required to obey the order of the court and accordingly deliver the goods to the appellant. Had this been, however, a case of the sale of the goods ordered by the court and the payment of Rs.7,90,000 as the price of the goods of the defendants was ordered to be appropriated on account of the defendants and the plaintiff/ respondent received such payment under the orders of the court as part satisfaction of their claim and/or subject to final decree perhaps there would have been some cause for the plaintiff/ respondent to say that it has played no such role in the sale of the goods which would make it liable for any action by the appellant. The difficulty, however, for the plaintiff/ respondent is that it just cannot appropriate the purchase money until it is so ordered by the court as a part of the decree and it is thus to be accepted as money realised from the defendants. There is nothing of this sort on the record. In fact, nothing of this sort could have been done at all.

10. We were, however, anxious in this proceeding to know if there was, as claimed by the defendants/ respondents any delivery of stocks to the appellant. The only case of the alleged delivery is the delivery of the letter of the plaintiff/ respondent by the appellant to one of the defendants, and their story that they paid to the appellant a sum of about Rs.4,00,000 for which money they have already filed two suits, viz., C.S.No.757 of 1990 and C.S.No.769 of 1990. In spite of our views as aforementioned, we do not propose to straightaway order forward of any damages to the appellant and/or any action upon the plaintiff/ respondent and/or defendants for committing either any criminal offences of wrongfully, selling away the goods third parties and appropriating the proceeds to themselves or for contempt, we have reasons in the instant case, however, to hold that a sum of Rs.7,90,000 belonging to the appellant is in the hands of the plaintiff/ respondent and the plaintiff/ respondent is liable to refund the same to the appellant herein with reasonable interest thereon forthwith. The other matters, however, have to be attended to in accordance with law. If we are not making any further orders, we are doing so for the reason that the trial court is yet to apply itself in the light of our observation and in the light of the law of the land. We are satisfied, however, that the impugned judgment dismissing the three applications cannot be sustained and the same is fit to be

set aside. The Application No.5398 of 1990 is allowed in part. The plaintiff/ respondent is directed to refund the sum of Rs.7,90,000 with interest thereon due from 3.10.1989 till date of payment. The reasonable interest, in our opinion, on the facts of the instant case will be the maximum that the plaintiff has been claiming during the said period from its debtors fixed at 18% compoundable with quarterly rests. This, however, shall be subject to the right of the appellant herein to claim damages for any loss or injury in a properly constituted suit. Application Nos.5399 and 5400 of 1990 are remitted to the trial court for disposal in accordance with law. It is, however, open to the plaintiff/ respondent to execute the decree in accordance with law. The appeal is accordingly allowed with costs. Hearing fee Rs.5,000.

B.S.

*Appeal allowed.**[Full Bench]***IN THE HIGH COURT OF JUDICATURE AT MADRAS.***[Special Original Jurisdiction]***Present: Srinivasan, Bakhavatsalam and Janarthanam, JJ.**W.P.No.20963 of 1993 and W.M.P.No.32830 of 1993
29th November, 1993.**M.Ranka***...Petitioner*

v.

The Hon'ble Chief Justice of Tamilnadu, High Court, Madras and others*...Respondents.*

Constitution of India (1950), Art.226 - Writ of mandamus - Party or counsel - If can choose his judge in any cause - Advocate, if can claim that matters in which he is appearing should not be posted before particular Judges of High Court.

It is not open to any party or counsel to choose his judge. The petitioner is an advocate practising in this Court and he cannot claim that the matters in which he is appearing shall not be posted before respondents 2 and 3 who are Judges of this Court.

[Para. 3]

Cases referred to:

Mayavaram Financial Corporation Ltd, Mayiladuthurai v. The Registrar of Chits, Pondicherry, (1991)2 L.W. 80. [Paras. 3, 4]

M.Ranga v. The Hon'ble Chief Justice of Tamil Nadu, (1991)2 L.W. 98. [Para. 4]

Zikar v. M.P.State Government, A.I.R. 1951 Nag. 11. [Para. 5]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing (A) The Hon'ble Chief Justice, respondent No.1 herein in turn to direct the Registry of the court to forthwith number the contempt petition under D.No.14283/92 W.P.SR.No.93969 of 1992, W.M.P.SR. No.1205 of 1993 in W.P.SR.No.93969 of 1992 and place the papers before the respondent No.1 herein, etc. *M.Ranka*, for Petitioner.

The Order of the Full Bench was made by *Srinivasan, J.*: This matter has been posted before the Full Bench obviously because the connected matters namely, a contempt petition and a writ petition filed by this petitioner were referred to this Full Bench. This writ petition was presented on 28.9.1993. The first respondent is the Chief Justice of this Court, respondents 2 to 4 are Judges of this Court, the 5th respondent is the Union of India, 6th respondent is the Indian Overseas Bank, and the 7th respondent is the Advocate-Commissioner R.Subburam. The prayers are as follows:

"(A) the Hon'ble the Chief Justice, respondent No.1 herein, in turn, to direct the Registry of this Hon'ble Court to forthwith number the contempt Petition under D.No.14283/92; W.P.SR.No.93969 of 1992, W.M.P. SR.No.1205/93 in W.P.SR.No.93969 of 1992 and place the papers before the respondent No.1 herein.

(B) the respondent No.1 herein to constitute an appropriate LARGER BENCH to expeditiously hear and decide the Contempt Petition, Writ and Writ Miscellaneous Petitions as referred in PRAYER (A);

(C) the respondent No.1 herein to constitute a FULL BENCH to finally hear W.P.No.1059 of 1982;

(D) the respondent No.1 herein NOT to post any matter in future, in which the petitioner happens to appear as a counsel for any party to a proceeding, either under the Civil, Criminal

or Writ Jurisdiction before respondent 2 or respondent No.3 herein either single or in a Division Bench;

(E) the respondent No.1 herein to constitute an appropriate Bench to finally hear and dispose of W.P.No.11167 of 1987;

(F) Respondent No.3, 4, 6 and 7 herein to jointly and severally to pay the interest on Rs.1,75,000 at 24% from 2.11.1991 to 25.12.1992;

(G) Respondent Nos.3,4,6 and 7 herein to pay adequate compensation to the auction purchaser for loss of profit sustained by him as a direct result of seizure and removal of the subject machine, on 25.2.1992 and 13.6.1992 respectively, by Respondent Nos.6 and 7 from the premises of the auction-purchaser;

(H) GRANTING SUCH further or other equitable relief or reliefs to the petitioner herein, including one of cost throughout, and thus RENDER JUSTICE."

2. The first prayer relates to the Contempt petition and the Writ Petition which have been disposed of by us to-day by separate Judgments. Hence, prayers (A) and (B) have become infructuous. Prayers (C) and (E) relate to writ petitions filed by the petitioner herein. They have already been listed before this Full Bench. One of them has been partly heard. Hence, those prayers have become infructuous.

3. With reference to prayer (D), we have no hesitation to hold that it is not sustainable. It is not open to any party or counsel to choose his Judge. The petitioner is an advocate practising in this court and he cannot claim that the matters in which he is appearing shall not be posted before respondents 2 and 3, who are Judges of this court. A Full Bench of this Court has considered a similar question in *Mayavaram Financial Corporation Ltd, Mayiladuthurai v. The Registrar of Chits, Pondicherry*, (1991)2 L.W. 80. On this aspect of the matter, the Full Bench said:

"Likewise, in a civil proceeding as well, no person can claim that his matter should be heard by a single Judge much less a particular Judge or a particular Division Bench of the Court. The business of the court will be determined by the Hon'ble the Chief Justice alone, who in his discretion may decide what judge is to sit alone and what Judges are to constitute different benches and allotted business of the court. The Letters Patent aforequoted

recognises this power of the Hon'ble the Chief Justice of the court and as held by the Supreme Court, even in the absence of a specific provision, this is an inherent power of the Hon'ble the Chief Justice."

We are entirely in agreement with the above statement of law.

4. The petitioner himself filed a similar writ petition in W.P.No.18704 of 1990 against the Chief Justice of this Court, two puisne Judges and the Additional Registrar (Judicial) of this Court. The main prayer was to issue a *mandamus* directing the Chief Justice not to post any of the matters in which the petitioner appears as a counsel or party in person before respondents 2 and 3 therein, either in a Bench or sitting single. That writ petition was dismissed by one of us (Bakthavatsalam, J.) on 20.12.1990. The Judgment is reported in *M.Ranka v. Honourable Chief Justice of Tamil Nadu High Court, Madras and others*, (1991) 2 L.W. 98. However, it was observed in that Judgment that it was open to the petitioner to approach the Chief Justice and make a request that his case may not be heard by a particular Bench. Reliance was placed on a judgment of Ramalingam, J. In W.P.SR No.60737 of 1990 dated 12.9.1990 in which the same view was expressed. The petitioner preferred an appeal in W.A.No.17 of 1991, which was heard by a Division Bench. The appeal was dismissed by the Division Bench by its Judgment dated 13th March 1991 which is reported in (1991) 2 L.W. 225. While upholding the Judgment of the single Judge that the writ petition was not maintainable, the Division Bench differed from the view expressed by the single Judge that it was open to the petitioner to request the Chief Justice not to post the matter before a particular Bench. In the judgment, the Division Bench quoted the passage extracted above from the judgment of the Full Bench in the *Mayavaram Financial Corporation case*, (1991) 2 L.W. 80. The Division Bench proceeded to hold that the Chief Justice has no jurisdiction to transfer a case which is already before a Bench or a learned Judge of the court. The relevant passage in the Judgment reads thus:

"With respect we disagree with the last observation of S.Ramalingam, J. that a party or a counsel may make a special mention before the Chief Justice so that the case pending before one Bench may be posted before another Bench. So far as other two

observations are concerned, we think it right to say that if for some reasons, the learned Judges assigned with a case or cases, find that they should not hear the case or the cases, they may direct the papers to be placed before the Chief Justice for posting such case or cases before some other Bench and in some extraordinary circumstances, the counsel appearing in a case may make a special request that a particular case or cases may not be heard by a particular Bench for reasons none other than the reasons that are spelt out in the principles that no one shall be a judge in his own cause (*Nemo debet casa judose propria cause*). So far as the first rule is concerned, if the Judge himself or the Judges themselves say that a particular case or cases assigned to him/ them say be taken out of his/ their list, there should be no difficulty. So far as the second rule is concerned in which it is said that a counsel may bring to the notice of the court that a particular case or cases may not be heard by a particular Bench or a Judge of the court means to say only that the counsel would bring a fact to the notice of the court and no more. He cannot be allowed to insist or ask this court not to hear a case. It will be again for the Judge or the Judges hearing the case to decide whether they should say that the cases be listed before another Judge or Bench or not. Judges of the court including the Chief Justice are equals and exercise the same judicial power except such powers that are specifically assigned to the Chief Justice. There is no reason to concede a power in the Chief Justice to transfer a case from one Bench to another Bench of the Court or from one Judge to another Judge of the Court. Act of allocating business or portfolio or assigning case or cases is different from the act of recalling the case from the file of a particular Judge or a Bench of the court and from transferring a case from the file of a particular Judge or a Bench of the court and from transferring a case from the file of a particular Judge or a Bench of the court, to another Judge or a Bench of the court because any decision about it would partake the character of a judicial order."

5. A Division Bench of the Nagpur High court has occasion to consider the same question in *Zikar v. M.P.State Government*, A.I.R. 1951 Nag. 11. It was

held that there is no power in the Chief Justice of a High Court under the Constitution or the Letters Patent or the Rules of the High Court or Sec.108(2), Government of India Act, 1915 to withdraw or transfer a case which a Divisional court is in seisin. It was also held that a litigant's right is only to invoke the jurisdiction of the High Court and not to have his case decided by any particular Judge or Judges and that the matter is entirely one of internal arrangement of the High Court with which the litigant has no concern. With respect we agree with the propositions laid down in the above cases and hold that it is not open to the party or a counsel to pray that his cases should not be posted before a particular Judge or Division Bench. The petitioner argued vehemently that the ruling of the Division Bench in *M.Ranka v. Hon'ble the Chief Justice of Tamil Nadu, (1991) 2 L.W. 225* is erroneous and *per incuriam*. According to him, it is not open to a Division Bench to overrule the views expressed by two single Judges sitting separately and it ought to have referred the matter to a larger Bench. There is no substance in the contentions and we are unable to accept the same.

6. With reference to prayers (F) and (G) the petitioner has no *locus standi*. If at all any person is to claim interest on the amount deposited by the auction purchaser as price for the machinery or compensation for loss of profit, it is only the auction purchaser Ramesh Kumar. The petitioner is not holding any Power of Attorney from Ramesh Kumar. Hence, he cannot maintain the prayers.

7. In the result, we have no hesitation to dismiss the writ petition. In view of the fact that the writ petition is directed also against Union of India and the Indian Overseas Bank it should be numbered and taken on file, though we are dismissing it *in limine*. The Registry is directed to number the petition and this will be the order in the said writ petition.

8. The prayer in the W.M.P. reads as follows:

"For the reasons stated in the accompanying affidavit the petitioner herein respectfully PRAYS that this Hon'ble Court may be pleased to issue suitable Direction to the Respondent No.1 herein not to assign any Judicial work to respondent No.3 herein till the Contempt petition, the writ miscellaneous petition and writ petition in terms of prayers A and B of the

main petition are heard and decided by an appropriate Bench in the interest of Justice, Equity and Good conscience. *And as in duty bound, the petitioner shall ever pray."*

As the prayer is only till the disposal of the contempt petition and the other petitions mentioned therein and as we have now disposed of the said petitions, the prayer has become infructuous. Hence, the W.M.P. is dismissed. The Registry is directed to number the said W.M.P. also and this will be the order thereon.

B.S. ----- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.No.864 of 1993 17th August, 1993.

V.S.Balakrishnan ...Appellant
v.

Pudukottai Municipality represented by its Commissioner, Pudukottai and another ...Respondents.

(A) *Deed - Construction - Licence or lease - Description of party to, described as licensee or lessee - If a determining factor.*

Mere description of party as a licensee or lessee is not the determining factor as to whether the transaction is a lease or licence. [Para. 5]

(B) *Deed - Construction - Held, that it should be read as a whole.*

It is one of the rules of interpretation or construction of a document that it must be read as a whole. [Para. 6]

Case referred to:

Qudrat Ullah v. Municipal Board, Bareilly, (1974) 1 S.C.C. 202; A.I.R. 1974 S.C. 396. [Para. 7]

Appeal under Clause 15 of the Letters Patent against the order of Srinivasan, J., dated 25.6.1993 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.1615 of 1990 presented under Art.226 of the Constitution of India to issue a writ of *certiorarified mandamus* calling for the records pertaining to the

notification issued by the respondent in Na.Ka.A.4/15423/89, dated 29.1.1990 and quash the same in so far as item 1 is concerned and direct the respondent to permit the petitioner to continue as a lessee of the weekly market in Pudukottai Municipality.

C.Selvaraju, for Appellant.

N.Baskaran, for Respondent No.1.

The Judgment of the Court was delivered by *K.A.Swami, C.J.*: This writ appeal is preferred against the order dated 25.6.1993 passed by the learned single Judge in W.P.No.1615 of 1990. As the writ petition has been dismissed, the petitioner has come up in appeal.

2. In the writ petitioner, the petitioner/ appellant sought for quashing of the notification dated 29.1.1990 in Na.Ka.A.4/15423/89 proposing to put up the right to collect fees in the weekly market for the period from 1.4.1989 to 31.3.1990 at the Pudukottai Municipality. The notification was challenged by the petitioner on the grounds that he is the lessee of the market in question as the same was leased to him under the indenture dated 5.4.1989 that though it was for the period between 1.4.1989 and 31.3.1990 it would not be open to the Municipality to evict the petitioner on the expiry of the period of lease without resorting to the procedure known to law. The Municipality opposed the writ petition and contended that the weekly market in question was not leased to the petitioner/ appellant and he was only a licensee of the right of collecting fees in the weekly market for the period from 1.4.1989 to 31.3.1990, that right came to an end on 31.3.1990. Therefore, the petitioner/ appellant was not entitled to continue to collect the fees from the weekly market beyond 31.3.1990. As such the Municipality was entitled to conduct an auction of the right to collect the fees from the weekly market for the period subsequent to 31.3.1990 and it was that right which was put up for auction in the notification dated 29.1.1990. In the writ petition, the petitioner had secured an interim order staying the proposed auction. Consequently, no auction was held and by this process the petitioner continues to collect the licence fees from those who conduct business in the market in question.

3. The learned single Judge has held that the indenture dated 5.4.1989 is a licence and not a lease; that even if it is held to be a lease it has come to an end on 31.3.1990 and as such the petitioner

has no right, title or interest in the market in question, as such he is not entitled to the relief sought for in the writ petition. Accordingly, the learned single Judge has dismissed the writ petition.

4. In the light of the contentions urged by learned counsel for the appellant, the points that arise for consideration in this appeal are as follows:

(i) Whether the indenture dated 5.4.1989 executed by the Municipality in favour of the appellant, can be held to be lease?

(ii) Whether the appellant is entitled to any of the reliefs sought for in the writ petition?

5. In order to decide as to whether the indenture dated 5.4.1989 is a lease or a licence, it is necessary to advert to the relevant portions of the very document itself. Throughout the document, the petitioner/ appellant has been described as a licensee only. We are aware of the fact that mere description of the party as a licensee or lessee is not the determining factor as to whether the transaction is a lease or a licence, but while doing so we are only stating the salient features of the indenture which describes the petitioner as a licensee only. The second feature of the document is that it has come into existence consequent to the public auction held on 15.2.1989. In that public auction, what was put up for auction was the right to collect the fees in the weekly market at Pudukottai Municipality during the period 1.4.1989 to 31.3.1990. The appellant/ petitioner offered the highest bid of Rs.7,00,150 for the period his bid was accepted and the deed was executed in his favour. In the very opening portion of the document it has been stated thus:

"Whereas the licensee's bid of Rs.7,00,150 per year in the public auction held on 15.2.1989 for the right of collecting the fees in the Weekly Market, Pudukottai during the period from 1.4.1989 to 31.3.1990 was accepted by Municipal Council in its resolution No.638, dated 28.2.1989 subject to the terms and conditions hereinafter contained and also specified in the auction notice."

Thus, it has been specifically stated that what was put up for auction was only the right of collecting the fees in the weekly market, Pudukottai during the period from 1.4.1989 to 31.3.1990 with the conditions that are stated in the indenture dated 5.4.1989. Therefore, it is clear that what was granted to the petitioner/ appellant was only the right to

collect the fees. The right of inspection of the premises was retained by the Municipality inasmuch as it was one of the obligations of the licensee to permit the officers and servants of the Municipal Council authorised to inspect the premises. It is also further stated in the indenture that the petitioner/appellant shall not use or rent the stall of premises for dwelling or purposes other than that for which it is intended and not assign or under let, part with the possession and benefit of the licence or of the liberties and privileges granted under the deed without first obtaining the written consent of the Municipal Council.

6. However, it is contended by learned counsel for the appellant that the appellant was given exclusive possession, therefore it was a lease. In support of it he relied upon the following portion in the document:

"The licence shall be bound by the conditions laid down in the sale notice published on 6.1.1989. He shall maintain the market shops and stalls and he is in possession with the right of leasing the shops and stalls. The licensee shall hand over possession of the buildings and vacant lands on the expiry of term in the same condition on which he is now put in possession".

It is not possible to agree with the contention, because the aforesaid paragraph cannot be read in isolation and it has to be read along with the other portions of the document. It is one of the rules of interpretation or construction of a document that it must be read as a whole. A reading of the document as a whole leaves no doubt that it is not a lease, but it is only a licence.

7. Learned counsel for the appellant has placed reliance on a decision of the Supreme Court in *Qudrat Ullah v. Bareilly Municipality Board*, (1974) 1 S.C.C. 202; A.I.R. 1974 S.C. 396, wherein also a question arose whether the document concerned therein was a licence or a lease. On the construction of the document, their Lordships of the Supreme Court held that it was only a lease and not a licence. The principles on the basis of which the document was held to be a lease, if applied to the facts of the case on hand, would show that the document in the instant case cannot at all be construed to be a lease. It may be relevant to notice the following principles to which reference was made in the aforesaid decision: Merely because the relationship is described as that of licensee and licensor, it will not be a decisive consideration,

what is necessary to be seen is the intention of the parties. In the instant case, we have pointed out that the intention of the parties is explicitly stated and what was auctioned was the right of collecting the fees in the weekly market, and not to lease the market. Another test stated is that the exclusive possession, and in that regard it is stated that the agreement, if it grants a right of exclusive possession, is not in itself conclusive evidence of the existence of a tenancy but it is a consideration of the first importance. In the instant case, we have pointed out that no exclusive possession has been given to the appellant/petitioner and the right of inspection has been retained and the appellant has been enjoined from assigning or parting with possession and benefit of the licence or of the liberties that have been granted to him under the document. In addition to this, it is also necessary to point out that the notification issued for auctioning the right of collecting the fees in the weekly market stated that the auction purchaser shall collect a certain amount from the various types of stalls. Applying the aforesaid tests it is not possible to hold that the document in question in the instant case is a lease deed. As already pointed out, the Municipality never intended to lease out the market in question and no exclusive possession had been given to the petitioner. What was auctioned and when was put up for auction, was the right of collecting the fees in the weekly market. No exclusive possession of the market building as such was given to the appellant. It is a case in which the use of the market in a particular way for a particular purpose, namely, for collecting the fees from the weekly market was given on certain conditions, while the Municipal Council retained its control over the market building. The appellant was not given the property, i.e. market to the exclusion of the Municipal Council. The petitioner/appellant also did not understand that what was given to him was a lease. Taking into consideration all the circumstances surrounding the document and the terms of the document, we came to the conclusion that the document in question is only a licence. Therefore, the learned single Judge is justified in holding that the document in question is a licence and not a lease.

8. For the reasons stated above, we see no ground to admit the appeal and the same is rejected.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.**Present:** *Pratap Singh, J.*

C.R.P.Nos.4497 and 4498 of 1987

29th September, 1993.

Karuppan Chettiar ...*Petitioner*
v.**Karuppiah and others** ...*Respondents.**Civil Procedure Code (V of 1908), O.5, Rule 20 - Substituted service of summons - When can be ordered - Summons issued on three occasions returned for three different reasons - Court, if can order publication in newspapers.*

Under O.5, Rule 20, Civil Procedure Code not only in a case where the court is satisfied that the defendant is keeping out of the way for the purpose of avoiding service but also in a case where for any other reason, the summons cannot be served in the ordinary way, the court shall order summons to be served by substituted service. The learned counsel would submit that this case would fall under the class 'for any other reason the summons cannot be served in the ordinary way'. On all the three occasions, the summons were returned for three different reasons. In the circumstances, it cannot be said that the order of the court below directing the party to take steps for substituted service cannot be considered an erroneous one. Applying the ratio of the ruling in *Doraiswami Aiyer v. Balasundaram Aiyar*, 52 M.L.J. 477, the order of the lower appellate court cannot be held to be erroneous. [Para. 7]

Cases referred to:*C.A.Balu v. G.Joseph Raj*, 1990 T.L.N.J. 260. [Para. 5]*S.T.Sankaran v. Raja Ramalingam*, (1990) 2 L.W. 461. [Para. 6]*Padmanabhan v. R.R.Shah*, (1988) 1 L.W. 1. [Para. 6]*Doraiswami Aiyar v. Balasundaram Aiyar*, 52 M.L.J. 477. [Para. 7]*Rajagopalachari v. Subramanian*, A.I.R. 1932 Mad. 472. [Para 7]

Petitions under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Judge, Pudukottai, dated 10.11.1987 and made in C.M.A.Nos.26 of 1987 and 20 of 1987

(E.P.No.582 of 1984 in O.S.No.368 of 1985 dated 23.7.1987) (E.A.No.633 of 1985 in E.P.No.582 of 1984 in O.S.No.368 of 1965 on the file of D.M.C., Pudukottai, respectively).

G.K.Selvarajan, for Petitioner.*N.Krishnaveni*, for Respondent No.3.

The Court made the following

ORDER: C.R.P.No.4497 of 1987 is filed against the order in C.M.A.No.26 of 1987 on the file of the District Court, Pudukottai, confirming the order passed in E.P.No.582 of 1984 on the file of the District Munsif's Court, Pudukottai.

2. C.R.P.No.4498 of 1987 is filed against the order in C.M.A.No.20 of 1987 on the file of the District Court, Pudukottai, confirming the order in E.A.No.633 of 1985 in E.P.No.582 of 1984 on the file of the District Munsif's Court, Pudukottai.

3. The short facts are: Respondents have obtained a decree for specific performance of an agreement of sale against the revision petitioner. Since the revision petitioner did not execute the sale deed as per the decree, the respondents filed E.P.No.582 of 1984 for execution of the sale deed by the court. In E.P.No.582 of 1984 an *ex parte* order was passed and the court had executed the sale deed. While so, the revision petitioner filed E.A.No.633 of 1985 to set aside the *ex parte* order passed in E.P.No.582 of 1984 alleging that he was not served with any notice and that he came to know of the *ex parte* order only on the previous day of the filing of the application. That was resisted by the respondents. After enquiry, the learned District Munsif had dismissed E.A.No.633 of 1985 and allowed E.P.No.582 of 1984. Aggrieved by the said orders, the revision petition filed C.M.A.Nos.20 and 26 of 1987 respectively. Having failed there, he has come forward with these revision petitions.

4. Mr.Selvarajan, learned counsel appearing for the revision petitioner, would submit that in the execution petition, substituted service by publication in Dina Malar was ordered on 8.3.1985 and after publication, the executing court had proceeded with the execution. Learned counsel would submit that the circumstances which would enable the court to order substituted service by publication were not present in this case and hence, the order of the court below directing substituted service by publication in the newspaper is incorrect and the *ex parte* order passed on such publication is equally erroneous. I have heard the learned counsel for the respondent on the above aspects.

5. I have carefully considered that submissions made by rival counsels; O.5, Rule 20, C.P.C., provides for substituted service. It reads as follows:

(1) Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(1A) Where the court acting under Sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

(2) *Effect of Substituted service:* Service substituted by order of the court shall be as effectual as if had been made on the defendant personally.

(3) *Where service substituted, time for appearance to be fixed:* Where service is substituted by order of the court, the court shall fix such time for the appearance of the defendant as the case may require.

In *C.A. Balu v. G. Joseph Raj and another*, 1990 T.L.N.J. 260, the Division Bench of this Court has occasion to consider the applicability of O.5, Rule 20, C.P.C. The Division Bench has laid that O.5, Rule 20(i) of the court lays down that there must be satisfaction on the part of the court that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way. The resort to substituted service is not a matter of course. It could also be stated that there is a duty cast on the court to record in writing the factum of its own satisfaction about the defendant's evasion of service. But at least there must be an indication that adequate and convincing materials were placed before the court for it to arrive at the satisfaction that the defendant was keeping out of the way for the purpose of avoiding service or the summons could not be

served in the ordinary way. Without the satisfaction of the conditions, namely, that the defendant is keeping out of the way to avoid service, the court will not be in order to direct substituted service. The non-fulfilment of the condition set down in the provision, the satisfaction which is necessary before the court orders substituted service, would amount to material irregularity justifying the setting aside of an *ex parte* decree.

6. In *S.T. Sankaran v. Raja Ramalingam*, (1990) 2 L.W. 461, this Court had held that adopting of dilatory tactics by the defendant was not a reason to obviate the necessity for strict compliance with law pertaining to service of summons. In *Padmanabhan v. R.R. Shah and four others*, (1988) 1 L.W. 1, another Division Bench of this Court had held that in a case where summons was not served on defendant, due to wrong address being given by the plaintiff, though he was aware of the correct address, publication in a newspaper is not sufficient.

7. Certain facts which are relevant need be stated at the outset: In E.P.No.582 of 1984 on 15.11.1984 it was reported that the judgment-debtor is dead and on 29.11.1984 a memo was filed by the petitioner stating that the judgment-debtor is alive and notice was ordered. On 29.1.1985, there is an endorsement that the judgment-debtor refused to receive notice and hence not served. On that endorsement, the learned District Munsif had ordered notice by post and through court. On 28.2.1985, the notices were not returned, and the District Munsif had passed an order 'await' and posted the case to 8.3.1985. On 8.3.1985, the endorsement is that the correct address was not given and hence notice could not be served. On that endorsement the learned District Munsif had ordered steps for substituted service by publication in 'Dina Malar'. Obviously, a petition was filed and substituted service was ordered by publication in Dina Malar. On 8.4.1985, the paper publication was filed and the petition was allowed, on the date on which substituted service was ordered, the endorsement was that because correct address was not given, notice was not served. Thus, at the first time, when notice was issued to the revision petitioner, it was returned with the endorsement that judgment-debtor was dead and then the decree-holders filed memo that judgment-debtor is alive and then notice was ordered and it was returned with an endorsement that

judgment-debtor refused to receive notice. Then for the third time, notice was taken and it was returned with an endorsement that correct address was not given. Only on the fourth occasion, the learned District Munsif had ordered steps for substituted service for publication in 'Dinamalar' and then had ordered substituted service. Mrs. N. Krishnaveni, would submit that three times service of notice could not be secured and only on the fourth occasion, the learned District Munsif had ordered steps for substituted service and that the learned District Munsif was perfectly in order in doing so. Under O.5, Rule 20, C.P.C. not only in a case where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service but also in a case where for any other reason, the summons cannot be served in the ordinary way, the court shall order summons to be served by substituted service. The learned counsel would submit that this case would fall under the clause "for any other reason the summons cannot be served in the ordinary way". On all the three occasions, the summons were returned for three different reasons. In the circumstances, it cannot be stated that the order of the court below, directing the party to take steps for substituted service cannot be considered an erroneous order. In *Doraiswami Aiyar v. Balasundaram Aiyar*, 52 M.L.J. 477, this Court had held that the advisability of effecting service by substituted service is a matter primarily for the trial court alone under O.5, Rule 20 of the Civil Procedure Code and the appellate court has no jurisdiction to consider whether the order of the trial court for substituted service was on sufficient or insufficient grounds and it has only to see whether the order was issued according to law and whether the trial court was satisfied that the conditions required by O.5, Rule 20 of the Civil Procedure Code were fulfilled; if so, then the order was legally made. Applying the ratio of this ruling, the order of the lower appellate court cannot be held to be erroneous. In *Rajagopalachari v. Subramaniam*, A.I.R. 1932 Mad. 472, it was held that O.5, Rule 20 invests the court with jurisdiction to order substituted service where it is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason that summons cannot be served in the ordinary way. If, at the time the court is so satisfied

then the service cannot be invalidated by showing that its belief was erroneous. On the facts of this case, the last two rulings are applicable and hence I am unable to accept the submission made by Mr. Selvarajan that the orders of the court below, directing the respondent to take steps for substituted service and ordering substituted service are liable to be set aside.

8. The lower appellate court has also pointed out that the revision petitioner had not figured as a witness and substantiated his case. What all he has stated in his affidavit in support of the application were denied and disputed by the respondent, he has not come forward as a witness to substantiate the allegation made in his affidavit that he came to know of the *ex parte* order only on 15.9.1985. On that ground also, the petitioner's claim is liable to be set aside. When E.A.No.633 of 1985 is dismissed, E.P.No.582 of 1984 will have to be allowed. Both the orders of the courts below are not liable to be set aside.

9. In view of the above, both the civil revision petitions fail and shall stand dismissed. No costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.3388 of 1993 24th November, 1993.

Ram Mandiri and another ...*Petitioners*
v.

Ranganatha Naidu ...*Respondent.*

Civil Procedure Code (V of 1908), Sec.115 - Revision - Document sought to be admitted in evidence - No ground of objection stated - Admission ordered - Order if can be revised.

Within the narrow confine of Sec.115, Civil Procedure Code, the order admitting a document in evidence at a time when no grounds were stated in the objection in the same, cannot be agitated by way of a revision. [Para. 4]

Petition under Sec.115 of Act V of 1908 praying

the High Court to revise the order of the court of the District Munsif, Ranipet, dated 7.9.1993 and made in I.A.No.425 of 1993 in O.S.No.368 of 1993. *R.Subramanian*, for Petitioners.

The Court made the following.

ORDER: This civil revision petition is directed against the order passed by District Munsif, Ranipet, admitting the document, which is marked as Ex.B-2.

2. Short facts are: The petitioners have filed the suit in O.S.No.368 of 1993 for permanent injunction against the respondent. That was resisted by the respondent. Then trial had commenced. The second petitioner was examined as P.W.1. He was cross-examined by the learned counsel for the respondent. During cross-examination, it was elicited that they had filed the suit against the respondent and his brother in O.S.No.289 of 1989 in the trial court and they initiated the court that they had settled the matter out of court and then the suit was dismissed and that Ex.B-1 is copy of the decree. It was further elicited from him that the suit property in this suit was the suit property in the prior suit also. Then it was elicited from him that there was a panchayat in the presence of certain named persons. Then he was questioned about the muchalika written in that panchayat. Though he initially denied, later he has admitted that a muchalika was written in that panchayat and that he has signed in it and that Ex.B-2 is that panchayat muchalika. The marking of that document was objected. The learned District Munsif had rejected the objection on the ground that no reasons whatsoever were stated for marking of the document and so the objections were rejected. Against the order of the learned Magistrate, marking the muchalika as Ex.B-2 this revision petition is filed.

3. Mr.R.Subramanian, the learned counsel appearing for the petitioner, would submit that the muchalika deed would amount to a partition and that it was not registered and hence it did not satisfy the provisions of the Registration Act and should not have been admitted in evidence.

4. I have carefully considered the submissions made by the learned counsel. The first thing is that no such ground was put forth before the court below while marking of the document was objected to. Secondly, as per the evidence given by P.W.1, there was a muchalika written in the panchayat and he had signed in it. The certified copy

of this Ex.B-2 is filed along with the petition. On a careful perusal of the same, I find that it does not require any registration. In it, it is stated that all the five persons mentioned have settled the matter concerned in O.S.No.368 of 1993. It is also stated that hereafter with regard to that site, there was no dispute between the parties. Thereafter certain specific extents had been specified. It does not state that only by virtue of this document, the partition was effected between the parties. So I am unable to accept the submission made by the learned counsel. Thirdly, within the narrow confine of Sec.115, C.P.C., the order admitting a document in evidence at a time when no grounds were stated in the objection in the same, cannot be agitated by way of a revision.

5. In view of the above, the revision petition does not deserve admission and shall stand dismissed.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.Nos.327 and 328 of 1993

22nd September, 1993.

Union of India, Union Territory of Pondicherry represented by the Chief Secretary, Government of Pondicherry, Pondicherry and others

...Appellants

v.

P.Manogaran, Secretary, Pondicherry Bar Association, Pondicherry and others *...Respondents.*

Constitution of India (1950), Chapter V of Part VI - Union Territory of Pondicherry - Jurisdiction extended by the High Court of Madras - Pondicherry (Administration) Act, 1962 (Central Act 49 of 1962). Art.230 of the Constitution of India empowers the Parliament to enact law extending the jurisdiction of a High Court to, or exclude the jurisdiction of the High Court from, any Union Territory Act 49 of 1962 known as the Pondicherry (Administration Act, 1962) was passed by Parliament. This Act

came into force on the 16th August, 1962. Among other things, the Act has extended the jurisdiction of the High Court of Madras to Pondicherry. As per Sec.2(d) of the Act, the expression 'High Court' means the High Court at Madras. Sec.9 of the Act specifically extends the jurisdiction of the High Court to Pondicherry. The heading of such section is 'extension of the jurisdiction of the Madras High Court to Pondicherry'. It states "as from the 6th day of November, 1962, the jurisdiction of the High Court shall extend to Pondicherry". Sec.10(1) of the Act provides that the jurisdiction exercisable by the *cour de cassation*, the *cour Superieur d' arbitrage* and the *conseil d' etat* of France' in respect of the former French Establishments under the law in force immediately before the appointed day shall be exercisable by the High Court of Madras in respect of Pondicherry. Sub-sec.(2) of Sec.10 of the Act only deals with the pending appeals and other proceedings and also all original proceedings. According to this provision, all those proceedings shall stand transferred to the High Court of Madras and shall be disposed of by the High Court in the exercise of jurisdiction conferred on it by the Act as if such appeals and proceedings had been filed before it. This section does not in any way limit the scope, ambit and extent of Sec.9 of the Act. Sec.10 of the Act provides as to exercise of jurisdiction in judicial matters by the High Court and also as to how the pending appeals, all other proceedings and original proceedings shall be dealt with. Sec.11 of the Act enabled the advocates who were entitled to practice before the tribunal, Superior d' Appeal of Pondicherry to practise in the High Court of jurisdiction, Madras in relation to cases coming before the High Court from Pondicherry, Sec.12 of the Act enabled the High Court to make rules from time to time. Other provisions of the Act do not touch upon the issue in question. Therefore, it is not necessary to refer to them. Thus, there is nothing contained in the Act which can be said to indicate that the jurisdiction exercisable by the High Court under Chapters V and VI of Part VI of the Constitution is not available to it by reason of extension of its jurisdiction under Sec.9 of the Act over the Union Territory of Pondicherry.

[Paras. 5, 6]

The provisions relating to Union Territories are contained in Part VIII of the Constitution. Art.241, which falls under Part VIII of the Constitution,

relates to "High Courts for Union Territories". However, it may be pointed out that under this article the Parliament may by law constitute a High Court for a Union Territory or declare any court in any such Territory to be a High Court for all or any of the purposes of the Constitution. Therefore, it is clear from Art.241 of the Constitution that it provides for constitution of a High Court for the Union Territory declaring any one of the Courts existing in the Union Territory to be a High Court. Art.241 does not provide for extension of the jurisdiction of any High Court to, or exclude the jurisdiction of it from, the Union Territory. It provides for constitution of a High Court for a Union Territory, or to declare any court existing in such territory to be High Court. This is specifically dealt with by Art.230 of the Constitution. As already pointed out, there is no other provision in the Constitution, dealing with either establishment of a High Court for a Union Territory or extension of the jurisdiction of any High Court to a Union Territory. Therefore, Sec.9 of the Act is relatable to Art.230 of the Constitution. That being so, the question that will arise for consideration is as to when once the jurisdiction of the High Court of Madras is extended to the Union Territory of Pondicherry, whether it can be considered only the extension of the judicial jurisdiction of the High Court or, and also of the jurisdiction the High Court of Madras enjoys under the Constitution in relation to the State for which it is established. It may be pointed out that the judiciary is not a department of the Government. It is independent of the executive. It is as much an organ of the Constitution as the Legislature and the Executive. The Constitution ensures separation of powers and independence of the judiciary. As pointed out by the Supreme Court in *Dixitulu's case*, A.I.R. 1979 S.C. 193, the entire scheme of Chapters V and VI of Part VI of the Constitution and epitomised in Arts.229 and 235, has been assiduously designed by the Founding Fathers to ensure independence of the High Court and the subordinate judiciary. It must be presumed that the Parliament was fully conscious of this position. The judiciary being one of the organs of the Constitution, independent of the other two, the High Court exercises jurisdiction not only on the judicial side as is provided under the Constitution and the laws, but it also exercises the administrative control over the judicial wing of the State

which includes subordinate judiciary. Therefore, when the jurisdiction of the High Court of Madras was extended under the Act, all that jurisdiction, administrative and judicial enjoyed by the High Court of Madras under the Constitution, as contemplated in Chapters V and VI of Part VI of the Constitution must be held to have been extended over the subordinate judiciary of the Union Territory of Pondicherry. In this connection, it is contended by learned counsel for the appellants that Art.230 does not specifically provide that whenever a jurisdiction of a High Court is extended to a Union Territory, the jurisdiction exercisable by the High Court under Chapter VI of Part VI of the Constitution shall also be available to it. Therefore, when once the jurisdiction of the High Court of Madras was extended to the Union Territory of Pondicherry, it included all the powers exercisable under Chapters V and VI of Part VI of the Constitution by the High Court of Madras. It was the totality of jurisdiction as was enjoyed by the High Court of Madras under Chapters V and VI of Part VI, that was extended and not a part of the jurisdiction, namely, the judicial power in Sec.9 does not say that only the jurisdiction relating to judicial matters is extended. The expression 'jurisdiction of the High Court, occurring in Sec.9 of the Act cannot at all be confined to only the judicial matters. Sec.10 of the Act also does not limit the scope and ambit of Sec.9 of the Act. On the contrary, Sec.10 of the Act specifically makes it clear by using the words, "without prejudice to the generality of the provision of Sec.9", that it does not either control or limit the scope and ambit of the provision contained in Sec.9 of the Act. The jurisdiction over the judicial matters arising from the subordinate judiciary without having any administrative control over it, will not have any meaning inasmuch as it will not be able to ensure independence of the subordinate judiciary the absence of the powers exercisable under Chapters V and VI of the Constitution. Such administrative control over the subordinate judiciary to ensure independence of the judiciary which is one of the basic features of the Constitution is absolutely necessary, rather such a power is inalienable or inseparable. In this regard, we are also of the view that no specific provision was required to be made in the Act, empowering the High Court to exercise the power under Chapters V and VI of Part VI of the Constitution over the subordinate judiciary in

the Union Territory of Pondicherry. When once the jurisdiction of the High Court was extended, the powers under Chapters V and VI of Part VI of the Constitution, as a matter of course, became available to it over the subordinate judiciary in the Union Territory of Pondicherry over which jurisdiction of the High Court was extended. This is also clear from the wordings in Arts.233 and 234 of the Constitution. Art.233(1) specifically provides that appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. The words "exercising jurisdiction in relation to such State" are very material inasmuch as it is the High Court of Madras, which exercises the jurisdiction in relation to the Union Territory of Pondicherry. In this regard, we are also of the view that no specific provision was required to be made in the Act, empowering the High Court to exercise the power under Chapters V and VI of Part VI of the Constitution over the subordinate judiciary in the Union Territory of Pondicherry. When once the jurisdiction of the High Court was extended, the powers under Chapters V and VI of Part VI of the Constitution, as a matter of course, became available to it over the subordinate judiciary in the Union Territory of Pondicherry over which jurisdiction of the High Court was extended. This is also clear from the wordings in Arts.233 and 234 of the Constitution. Art.233(1) specifically provides that appointments to persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. The words "exercising jurisdiction in relation to such State" are very material inasmuch as it is the High Court of Madras, which exercises the jurisdiction in relation to the Union Territory of Pondicherry. However, it is contended by learned Senior Counsel appearing for the appellants that Art.367 specifically opens with the words, "unless the context otherwise requires" therefore it is submitted that while interpreting the Constitution on applying the General Clauses Act, the context in which the word 'State' occurs in Chapter VI of Part VI cannot be lost sight of. It may be pointed out that the whole Chapter VI of Part VI relates to subordinate courts. Therefore, the word "State" is used

in Chapter VI of Part VI in the context of subordinate courts. Therefore, the expression "State" in Part VI of Chapter VI includes Union Territory also. The jurisdiction of the High Court is extended to the Union Territory of Pondicherry. If such extension of jurisdiction is to be meaningful, the extent and the scope of such jurisdiction are to be determined in the light of the distribution of powers and independence of the judiciary ensured under the Constitution. Therefore, necessarily the expression 'State' occurring in Chapter VI of Part VI shall have to be read as including Union Territory also. [Paras. 5, 6, 7 & 8]

Cases referred to:

Chief Justice of A.P. v. Dixitulu, A.I.R. 1979 S.C. 193; 1979 Lab.I.C. 1672; (1979)2 S.C.C. 24. [Para. 4]

Chandra Mohan v. State of U.P., A.I.R. 1966 S.C. 1987. [Para. 4]

Chandramouleeshwar v. Patna High Court, A.I.R. 1970 S.C. 370. [Para. 4]

Shamsher Singh v. State of Punjab, A.I.R. 1974 S.C. 2192; 1974 Lab.I.C. 1280. [Para. 4]

Punjab and Haryana High Court v. State of Haryana, A.I.R. 1975 S.C. 613. [Para. 4]

State of Assam v. S.N.Sen, (1972)2 S.C.J. 558; A.I.R. 1972 S.C. 1028. [Para. 4]

State of Assam v. Kuseswar Saikia, A.I.R. 1970 S.C. 1616. [Para. 4]

State of Orissa v. Sudhansu Sekhar Misra, A.I.R. 1968 S.C. 647. [Para. 4]

Tara Singh v. State of Rajasthan, A.I.R. 1975 S.C. 1487. [Para. 4]

State of Haryana v. Inder Prakash Anand, A.I.R. 1976 S.C. 1841. [Para. 4]

Joginder Nath v. Union of India, A.I.R. 1975 S.C. 511. [Para. 4]

Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461; (1973)4 S.C.C. 225. [Para. 7]

R.Krishnamoorthy, Senior Counsel for *K.S.Ahamed*, Government Pleader for Pondicherry, assisted by *P.Narasimhan*, Senior Counsel (Central Government), for Appellants.

G.Masilamani Senior Counsel for *T.P.Manoharan*, for Respondent No.1.

P.Punithavathi, for Respondent No.2.

A.S.Venkatachalamoorthy, Government Pleader, for Respondent No.3.

The Judgment of the Court was delivered by *K.A.Swami, C.J.*: These two writ appeals are preferred against the common judgment dated

21.1.1993, passed in W.P.Nos.3642, 9391 and 14035 of 1992. W.P.No.3642 of 1992 was filed by Sri P.Manogaran, Secretary, Pondicherry Bar Association, whereas W.P.No.9391 of 1992 was filed by the Pondicherry Bar Association and W.P.No.10435 of 1992 was filed by one R.Vadivelu. The prayers made in W.P.Nos.3642 and 9391 of 1992 are similar inasmuch as they have sought for quashing of the appointment of Sri Edward Kumar, V.A., Special Officer-cum-Subordinate Judge, Judicial Department, Pondicherry, with a only difference that in W.P.No.9391 of 1992, a writ of *quo warranto* to oust him from the office and whereas in W.P.No.10435 of 1992, apart from challenging the appointment of Sri Edward Kumar, V.A., the appointment of S.R.Pushpavalli, L.Veeranath Rao, G.Patrick and G.Rajeswarya, is challenged. Learned single Judge has held that the appointment of Sri Edward Kumar is not in accordance with the rules of recruitment and the provisions of the Constitution. Therefore, the appointment of Edward Kumar, V.A., has been quashed, whereas the appointments of others have been upheld. While parting with the case, the learned single Judge has also observed that though the jurisdiction of the High Court of Madras has been extended to Pondicherry, but nevertheless the administrative control of the High Court over the judicial wing of the Union Territory of Pondicherry has not been given effect to. Therefore, it is high time that the High Court should assume its administrative control over the judicial wing of the Union Territory of Pondicherry. Both the appeals are filed by the Union of India, District Judge and Secretary to Government. Edward Kumar, V.A., though filed a writ appeal, against the order of the learned single Judge, setting aside his appointment. Subsequently withdrew that appeal and the same was dismissed as withdrawn. Therefore, there is not much to be decided in the appeals. However, it is urged on behalf of the respondents that the question as to the administrative control of the High Court over the judicial wing of the Union Territory of Pondicherry is necessary to be decided since in the absence of any authoritative pronouncement, the Union Territory of Pondicherry is of the opinion that the administrative control of the High Court of Madras does not extend over the judicial wing of the Union Territory of Pondicherry. In the light of this, it is submitted by the learned counsel appearing for the appellants that they would also

like to have the decision of the High Court on this matter, so that the legal position may become clear to them.

2. In the light of these submissions we have heard both sides on the question as to whether extending of the jurisdiction of the High Court of Madras to Pondicherry did not include, or did not vest in the High Court of Madras, the administrative control over the judicial wing of the Union Territory of Pondicherry as contemplated by Chapter VI of Part VI of the Constitution.

3. It is not in dispute that by reason of extending of jurisdiction of the High Court of Madras to Pondicherry by Sec.9 of the Pondicherry (Administration) Act, 1962 (Central Act 49 of 1962) the jurisdiction exercisable by High Court under Chapter V of Part VI of the Constitution is exercisable by the High Court of Madras over the Union Territory of Pondicherry. The doubt is entertained only as to the availability of power to the High Court of Madras under Chapter VI of Part VI of the Constitution over the judicial wing of the Union Territory of Pondicherry. Chapter VI of Part VI of the Constitution deals with the administrative control of the High Court over the subordinate courts. Art.233 of the Constitution which deals with the appointment of persons to be, and the posting and promotion of, District Judges, is as follows:

"233. *Appointment of District Judges:* (1) Appointments of persons to be and the posting and promotion of district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

Art.234 provides that the appointment of persons other than District Judges to the Judicial Service of the State shall be made by the Governor of the State in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. The High Court has been vested with the control over district courts and courts subordinate thereto including several matters connected thereto under Art.235 which reads thus:

"235. *Control over subordinate courts:* The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

4. The extent of the power of the High Court, as contained in Chapters V and VI of Part VI of the Constitution, has been explained in clear terms by the Supreme Court in *Chief Justice of Andhra Pradesh v. Dixitulu*, A.I.R. 1979 S.C. 193, thus:

"33. We now turn to Chapter VI. It is captioned: 'subordinate courts'. It consists of Articles which provide for matters relating *inter alia* to appointment and control of persons who man posts in the subordinate judiciary. According to the scheme of this Chapter, subordinate judiciary has been classified into District Judges and members of the 'Judicial Service'. Art.236 defines the expression 'District Judge' to include 'Judge of a City Civil Court, Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of Small Causes Court, Chief Presidency Magistrate, Additional Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge'. The Article defines 'judicial service' to mean 'a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge.

34. Art.233 gives the High Court an effective voice in the appointment of District Judges. Clause (1) of Article peremptorily requires that 'appointments of persons to be and the posting and promotion of District Judges' shall be made by the Governor 'in consultation with the High Court'. Clause (2) of the Article provides for direct appointment of District Judges from Advocates or pleaders of not less than seven years standing, who are not already in the service of the State or of the Union. In the matter of such direct appointments, also,

the Governor can act only on the recommendation of the High Court. Consultation with the High Court under Art.233 is not an empty formality. An appointment made in direct or indirect disobedience of this constitutional mandate, would be invalid. (See: *Chandra Mohan v. State of U.P.*, A.I.R. 1966 S.C. 1987 and *Chandramouleshwar v. Patna High Court*, A.I.R. 1970 S.C. 370. 'Service' which under Clause (1) of Art.233 is the first source of recruitment of District Judges by promotion, means the 'judicial services' as defined in Art.236.

35. The word 'posting' as used in Art.233, in the context of 'appointment' and 'promotion' means the first assignment of an appointee or promotee to a position in the cadre of District Judges. It cannot be understood in the sense of 'transfer'. (See: *Ranga Mohammed case*, A.I.R. 1976 S.C. 903).

36. Art.234 enjoins that the rules in accordance with which appointments of persons other than District Judges to the judicial service of a State are to be made, shall be framed by the Governor in consultation with the High Court and the Public Service Commission. The expression 'judicial service' in this Article, carries the same connotation as defined in Art.236.

37. Art.235 is the pivot around which the entire scheme of the chapter revolves. Under it, 'the control over District Courts and courts subordinate thereto including the posting and promotions of, and the grant of leave to persons belonging to the judicial service of a State' is vested in the High Court.

38. The interpretation and scope of Art.235 has been the subject of several decisions of this Court. The position crystallised by these decisions is that the control over the subordinate judiciary vested in the High Court under Art.235 is exclusive in nature, comprehensive in extent and effective in operation. It comprehends a wide variety of matters. Among others, it includes:

(a)(i) Disciplinary jurisdiction and a complete control subject only to the power of the Governor in the matter of appointment, dismissal, removal, reduction in rank of District Judges, and initial posting and promotion to the cadre of District Judges. In the exercise of this control, the High Court can hold inquiries

against a member of the subordinate judiciary, impose punishment other than dismissal or removal, subject, however, to the conditions of service, and a right of appeal, if any, granted thereby and to the giving of an opportunity of showing cause as required by Art.311(2).

(ii) In Art.235, the word 'control' is accompanied by the word 'vest' which shows that the High Court alone is made the sole custodian of the control over the judiciary. The control vested in the High Court being exclusive and not dual, an inquiry into the conduct of a member of the judiciary can be held by the High Court alone and no other authority. (*State of West Bengal v. Nripendra Nath Bagchi*, A.I.R. 1966 S.C. 447, *Shamsher Singh v. State of Punjab*, A.I.R. 1974 S.C. 2192; 1974 Lab.I.C. 1280 and *Punjab and Haryana High Court v. State of Haryana* (sub nom *Narendra Singh Rao*, A.I.R. 1975 S.C. 613.

(iii) Suspension from service of a member of the judiciary with a view to hold a disciplinary inquiry.

(b) Transfers, promotions and confirmation of such promotions, of persons holding posts in the judicial service, inferior to that of District Judge. *State of Assam v. S.N.Sen*, (1972) 2 S.C.J. 558; A.I.R. 1972 S.C. 1028 and *State of Assam v. Kuseswar Saikia*, A.I.R. 1970 S.C. 1616.

(c) Transfers of District Judges. *State of Assam v. Ranga Mohammed*, A.I.R. 1976 S.C. 903 and *Chandramouleshwar v. Patna High Court*, A.I.R. 1970 S.C. 370.

(d) Recall of District Judges posted on ex-cadre posts or on deputation on administrative posts. (*State of Orissa v. Sudhansu Sekhar Misra*, A.I.R. 1968 S.C. 647).

(e) Award of selection grade to the members of the judicial service, including District Judges, being their further promotion after their initial appointment to the cadre (*State of Assam v. Kuseswar Saikia*, A.I.R. 1970 S.C. 1616.

(f) Confirmation of District Judges, who have been on probation or are officiating, after their initial appointment or promotion by the Governor to the cadre of District Judges under Art.233. (*Punjab and Haryana High Court v. State of Haryana*, A.I.R. 1975 S.C. 613.)

(g) Premature or compulsory retirement of Judges of the District Courts and of Subordinate Courts. (*State of U.P. v. Batuk Deo Pati*

Tripathi).

39. Since in both these appeals, orders of the premature retirement of the respondents, viz. of Shri Dikshitulu made by the Chief Justice, and of Shri Krishnamurthy by the Governor in consonance with the decision of the High Court are in question, it will be appropriate to amplify the point a little. It is well settled that compulsory retirement *simpliciter*, in accordance with the terms and conditions of service, does not amount to dismissal or removal or reduction in rank under Art.311 or under the Service Rules because, the Government servant does not lose the terminal benefits already earned by him. (See: *Tara Singh v. State of Rajasthan*, A.I.R. 1975 S.C. 1487 and *State of Haryana v. Inder Prakash Anand*, A.I.R. 1976 S.C. 1841.)

40. In the last mentioned case the Government servant was officiating in the cadre of District Judges. The High Court recommended that he should be reverted to his substantive post of senior Subordinate Judge/Chief Judicial Magistrate and, as such, allowed to continue in service till the age of 58 years. Contrary to the recommendation of the High Court, the State Government passed an order under Rule 5.32(c) of the Punjab Civil Service Rules, compulsorily retiring him from service at the age of 55 years. Holding that the order of compulsory retirement was invalid, this Court stressed that the power of deciding whether a judicial officer should be retained in service after attaining the age of 55 years upto the age of 58 years, vests in the High Court and to hold otherwise 'will seriously affect the independence of the judiciary and take away the control vested in the High Court'. The formal order of retirement, however, is passed by the Governor acting on the recommendation of the High Court, that being 'the broad basis of Art.235'. It was explained that 'in such cases it is the contemplation in the Constitution, that the Governor as the head of the State will act in harmony with the recommendation of the High Court'. It was concluded that, 'the vesting of complete control over the Subordinate Judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State'. In other words, while in form, the High Court's decision to

compulsorily retire a subordinate judicial officer in the exercise of its administrative or disciplinary jurisdiction under Art.235 is advisory, in substance and effect, it is well-nigh peremptory.

41. Recently, in *State of Uttar Pradesh v. Batuk Deo Pati Tripathi*, this Court succinctly summed up the whole position as follows:

'The ideal which inspired the provision that the control over District Courts and courts subordinate thereto shall vest in the High Courts is that those wings of the judiciary should be independent of the executive..... It is in order to effectuate that high purpose that Art.235 as construed by the court in various decisions requires that all matters relating to the subordinate judiciary including compulsory retirement and disciplinary proceedings, but excluding the imposition of punishments falling within the scope of Art.311 and the first appointments and promotions, should be dealt with and decided upon by the High Courts in the exercise of the control vested in them.

42. In sum, the entire scheme of Chapters V and VI in Part VI, epitomised in Arts.229 and 235, has been assiduously designed by the Founding Fathers to ensure independence of the High Court and the subordinate judiciary. [*Italics supplied*] In *Joginder Nath and others v. Union of India*, A.I.R. 1975 S.C. 511, while dealing with Art.234 of the Constitution, the Supreme Court has held that the word 'State' in Art.234 would include a Union Territory also.

5. Art.230 of the Constitution empowers the Parliament to enact law extending the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union Territory. Act No.49 of 1962 known as the Pondicherry (Administration) Act, 1962, (hereinafter referred to as 'the Act') was passed by Parliament. This Act came into force on the 16th August, 1962. Among other things, the Act has extended the jurisdiction of the High Court of Madras to Pondicherry. As per Sec.2(d) of the Act, the expression 'High Court' means the High Court at Madras. Sec.9 of the Act specifically extends the jurisdiction of the High Court to Pondicherry. The heading of the said section is 'extension of the jurisdiction of the Madras High Court to Pondicherry'. It states "as from the 6th day of November, 1962, the jurisdiction of the High Court shall extend to

Pondicherry". Sec.10 of the Act reads thus:

"Without prejudice to the generality of the provisions of Sec.9, the High Court shall have, in respect of Pondicherry, all such jurisdiction as under the law in force immediately before the appointed day was exercisable in respect of the former French Establishments by the *cour de cassation*, the *cour superieur d' arbitrage* and the *conseil d' etat* of France:

Provided that while determining appeals from decisions of courts and tribunals in Pondicherry, the High Court shall, as far as may be, follow the same procedure and have the same power to pass any judgment, decree or order thereon, as it follows and has while determining appeals from decisions of Courts in the State of Madras."

The contention of the learned counsel for the appellants is that though Sec.9 of the Act extends the jurisdiction of the High Court of Madras to Pondicherry, but the said section has to be read along with Sec.10. Therefore, the High Court can only exercise such jurisdiction as under the law in force immediately before the appointed day was exercisable by the courts specified in Sec.10 of the Act. On the contrary, it is the contention of the respondents that by Sec.9 of the Act, the jurisdiction of the High Court of Madras is extended to Union Territory of Pondicherry; that this provision is enacted under Art.230 of the Constitution of India, which provides that Parliament may by law extend the jurisdiction of the High Court to, or exclude the jurisdiction of the High Court from any Union Territory, as such, the extension of jurisdiction of the High Court of Madras means the jurisdiction it enjoyed. Therefore, it could exercise the jurisdiction it enjoys under Chapters V and VI of Part VI of the Constitution.

6. Sec.10(1) of the Act provides that the jurisdiction exercisable by the *cour de cassation*, the *cour superieur d' arbitrage* and the *conseil d' etat* of France' in respect of the former French Establishments under the law in force immediately before the appointed day shall be exercisable by the High Court of Madras in respect of Pondicherry. Sub-sec.(2) of Sec.10 of the Act only deals with the pending appeals and other proceedings and also all original proceedings. According to this provision, all those proceedings shall stand transferred to the High Court of Madras and shall be disposed of by the High Court in the exercise of jurisdiction

conferred on it by the Act as if such appeals and proceedings had been filed before it. This section does not in any way limit the scope, ambit and extent of Sec.9 of the Act. Sec.10 of the Act provides as to exercise of jurisdiction in judicial matters by the High Court and also as to how the pending appeals, all other proceedings and original proceedings shall be dealt with. Sec.11 of the Act enabled the advocates who were entitled to practise before the tribunal, Superior d' Appeal of Pondicherry to practise in the High Court of Madras in relation to cases coming before the High Court from Pondicherry, Sec.12 of the Act enabled the High Court to make rules from time to time. Other provisions of the Act do not touch upon the issue in question. Therefore, it is not necessary to refer to them. Thus, there is nothing contained in the Act which can be said to indicate that the jurisdiction exercisable by the High Court under Chapters V and VI of Part VI of the Constitution is not available to it by reason of extension of its jurisdiction under Sec.9 of the Act over the Union Territory of Pondicherry. Hence, it is not possible to accept the contention.

7. The provisions relating to Union Territories are contained in Part VIII of the Constitution. Art.241, which falls under Part VIII of the Constitution, relates to "High Courts for Union Territories". However, it may be pointed out that under this Article the Parliament may by law constitute a High Court for a Union Territory or declare any court in any such Territory to be a High Court for all or any of the purposes of the Constitution. Therefore, it is clear from Art.241 of the Constitution that it provides for constitution of a High Court for the Union Territory or declaring any one of the Courts existing in the Union Territory to be a High Court. Art.241 does not provide for extension of the jurisdiction of any High Court to, or exclude the jurisdiction of it from, the Union Territory. It provides for constitution of a High Court for a Union Territory, or to declare any court existing in such territory to be High Court. This is specifically dealt with by Art.230 of the Constitution. As already pointed out, there is no other provision in the Constitution, dealing with either establishment of a High Court for a Union Territory or extension of the jurisdiction of any High Court to a Union Territory. Therefore, Sec.9 of the Act is relatable to Art.230 of the Constitution. That being so, the question that will arise for

consideration is as to when once the jurisdiction of the High Court of Madras is extended to the Union Territory of Pondicherry, whether it can be considered only the extension of the judicial jurisdiction of the High Court or, and also of the jurisdiction the High Court of Madras enjoys under the Constitution in relation to the State for which it is established. It may be pointed out that the judiciary is not a department of the Government. It is independent of the executive. It is as much an organ of the Constitution as the Legislature and the Executive. The Constitution ensures separation of powers and independence of the judiciary. As pointed out by the Supreme Court in *Dixitulu's* case, referred to above, the entire scheme of Chapters V and VI of Part VI of the Constitution epitomised in Arts.229 and 235, has been assiduously designed by the Founding Fathers to ensure independence of the High Court and the subordinate judiciary. It must be presumed that the Parliament was fully conscious of this position. The judiciary being one of the organs of the Constitution, independent of the other two, the High Court exercises jurisdiction not only on the judicial side as is provided under the Constitution and the laws, but it also exercises the administrative control over the judicial wing of the State which includes subordinate judiciary. Therefore, when the jurisdiction of the High Court of Madras was extended under the Act, as contended by the learned counsel for the respondents, all that jurisdiction, administrative and judicial enjoyed by the High Court of Madras under the Constitution, as contemplated in Chapters V and VI of Part VI of the Constitution must be held to have been extended over the subordinate judiciary of the Union Territory of Pondicherry. In this connection, it is contended by learned counsel for the appellants that Art.230 does not specifically provide that whenever a jurisdiction of a High Court is extended to a Union Territory, the jurisdiction exercisable by the High Court under Chapter VI of Part VI of the Constitution shall also be available to it. It is also contended that whenever a High Court is constituted for the Union Territory, as per Art.241 of the Constitution, the provisions of Chapter V of Part VI have been made applicable and if the Constitution makers intended that the High Court shall also exercise the power as contemplated in Chapters V and VI of Part VI over the subordinate judiciary, a provision similar to the one contained

in Art.241(2) of the Constitution, would have also been provided in Art.230 of the Constitution.

8. When the High Court at Bombay (Extension of Jurisdiction to Goa, Daman and Diu) Act, 1981 (Act No.26 of 1981), was passed by the Parliament extending the jurisdiction of the High Court at Bombay to the Union Territory of Goa, Daman and Diu, a specific provision was also made under Sec.5 of that Act, stating that:

"The provisions of Chapter VI of Part VI of the Constitution shall apply to the High Court at Bombay in relation to the exercise of its jurisdiction to the Union Territory of Goa, Daman and Diu, subject to the following exceptions and modifications, namely:

(a) the references in the said Chapter to 'State' except where it occurs in the expression 'Governor of the State' shall be construed as references to the Union Territory of Goa, Daman and Diu;

(b) in Clause (1) of Art.233 and in Art.234, the references to the Governor of the State, and in Art.237, the reference to the Governor, shall be construed as references to the Administrator of the Union Territory of Goa, Daman and Diu;

(c) the provisions of Art.233-A shall not apply;

(d) in Art.234, the reference to the State Public Service Commission shall be construed as a reference to the Union Public Service Commission."

Therefore, it is submitted on behalf of the appellants that as the Act does not contain any provision similar to Sec.5 of the Act No.26 of 1981, it cannot be held that the administrative control of the High Court of Madras also extends over the subordinate judiciary in the Union Territory of Pondicherry under Chapter VI of Part VI of the Constitution. As already pointed out, Sec.9 extends the jurisdiction of the High Court of Madras to Pondicherry. Earlier, we have also pointed out about the independence of the Judiciary and the powers exercisable by the High Court under Chapters V and VI of Part VI of the Constitution over the subordinate judiciary in the State. Therefore, when once the jurisdiction of the High Court of Madras was extended to the Union Territory of Pondicherry, it included all the powers exercisable under Chapters V and VI of Part VI of the Constitution by the High Court of Madras. It was the totality of jurisdiction as was enjoyed by the High

Court of Madras under Chapters V and VI of Part VI, that was extended and not a part of the jurisdiction, namely, the judicial power in Sec.9 does not say that only the jurisdiction relating to judicial matters is extended. The expression 'jurisdiction of the High Court, occurring in Sec.9 of the Act cannot at all be confined to only the judicial matters. Sec.10 of the Act also does not limit the scope and ambit of Sec.9 of the Act. On the contrary, Sec.10 of the Act specifically makes it clear by using the words, "without prejudice to the generality of the provision of Sec.9", that it does not either control or limit the scope and ambit of the provision contained in Sec.9 of the Act. The jurisdiction over the judicial matters arising from the subordinate judiciary without having any administrative control over it, will not have any meaning inasmuch as it will not be able to ensure independence of the subordinate judiciary in the absence of the powers exercisable under Chapters V and VI of the Constitution. Such administrative control over the subordinate judiciary to ensure independence of the judiciary which is one of the basic features of the Constitution is absolutely necessary, rather such a power is inalienable or inseparable. In this regard, it is relevant to notice another portion of the decision of the Supreme Court in *Dixitulu's case*, *A.I.R. 1979 S.C. 193*; *1979 Lab.I.C. 1672*; *(1979)2 S.C.C. 24* as to the principle of interpretation of Constitution.

"Where two alternative constructions are possible, the court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion, or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment. These canons of construction apply to the interpretation of our Constitution with greater force, because the Constitution is a living, integrated organism having a soul and consciousness of its own. The pulse beats emanating from the spinal cord of its basic framework can be felt all over its body, even in the extremities of its limbs. Constitutional exposition is not mere literary garniture, nor a mere exercise in grammar. As one of us (*Chandrachud, J., as he then was*) put it in *Kesavananda Bharati v. State of Kerala*, *A.I.R. 1973 S.C. 1461*; *(1973)4*

S.C.C. 225:

While interpreting words in a solemn document like the Constitution, one must look at them not in a school-masterly fashion, not with the cold eye of a lexicographer, but with the realization that they occur in 'a single complex instrument in which one part may throw light on the other' so that the construction must hold a balance between all its parts."

Therefore, we have to choose that interpretation, which accords with the scheme of the Constitution and the basic structures of it. If the interpretation placed by the learned counsel appearing for the appellants is accepted, the subordinate judiciary will be under the administrative control of the Executive and the High Court will only be exercising the judicial powers which will not ensure independence of the judiciary, which includes subordinate judiciary also, is one of the basic structures of the Constitution. Further, there is no provision in the Constitution, or in the Act in question, that in the event of extension of the jurisdiction of an existing High Court to a Union Territory, the powers exercisable by it under Chapters V and VI of Part VI will not be available unless specifically conferred. In this regard, we are also of the view that no specific provision was required to be made in the Act, empowering the High Court to exercise the power under Chapters V and VI of Part VI of the Constitution over the subordinate judiciary in the Union Territory of Pondicherry. When once the jurisdiction of the High Court was extended, the powers under Chapters V and VI of Part VI of the Constitution, as a matter of course, became available to it over the subordinate judiciary in the Union Territory of Pondicherry over which jurisdiction of the High Court was extended. This is also clear from the wordings in Arts.233 and 234 of the Constitution. Art.233(1) specifically provides that appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. The words "exercising jurisdiction in relation to such State" are very material inasmuch as it is the High Court of Madras, which exercises the jurisdiction in relation to the Union Territory of Pondicherry. Similarly, Art.234 also uses the same expression. The expression 'State' occurring in Chapter VI of Part VI of the Constitution also includes the Union

Territory. (See: *Joginder Nath's case*, A.I.R. 1975 S.C. 511 referred to earlier). As per Art.367 of the Constitution, General Clauses Act is applicable for the interpretation of the provisions of the Constitution. The General Clauses Act specifically provides that the expression 'State' includes Union Territory also. However, it is contended by learned Senior Counsel appearing for the appellants that Art.367 specifically opens with the words, "unless the context otherwise requires" therefore it is submitted that while interpreting the Constitution on applying the General Clauses Act, the context in which the word 'State' occurs in Chapter VI of Part VI cannot be lost sight of. It may be pointed out that the whole Chapter VI of Part VI relates to subordinate courts. Therefore, the word "State" is used in Chapter VI of Part VI in the context of subordinate courts. Therefore, the expression "State" in Part VI of Chapter VI includes Union Territory also. The jurisdiction of the High Court is extended to the Union Territory of Pondicherry. If such extension of jurisdiction is to be meaningful, the extent and the scope of such jurisdiction are to be determined in the light of the distribution of powers and independence of the judiciary ensured under the Constitution. Therefore, necessarily the expression 'State' occurring in Chapter VI of Part VI shall have to be read as including Union Territory also.

9. With reference to Sec.10 of the Act, it is contended that the High Court of Madras, on the extension of jurisdiction over the Union Territory of Pondicherry can exercise only such powers as were exercisable by the various courts and authorities in the Union Territory functioning when the Act came into force. It is also brought to our notice that those courts mentioned in Sec.10 of the Act did not exercise any of the powers, now exercisable under Chapter VI of Part VI of the Constitution. Therefore, it is contended that the High Court of Madras cannot exercise those powers over the subordinate judiciary of Pondicherry. We have already pointed out that Sec.10 of the Act cannot override or limit the scope and ambit of Sec.9 of the Act. On the contrary, Sec.10 itself states that the provisions contained therein are without prejudice to the provisions contained in Sec.9 of the Act. While interpreting Sec.9 read with Art.230 of the Constitution, we have held that the extension of jurisdiction of the High Court of Madras means the extension of the

jurisdiction, which the High Court of Madras enjoyed under Chapters V and VI of Part VI of the Constitution. That being the position, the control over the subordinate judiciary of the Union Territory of Pondicherry is vested in the High Court of Madras and the powers that are available to it under Chapters V and VI of Part VI of the Constitution are exercisable by it over the subordinate judiciary of the Union Territory of Pondicherry.

10. It is also submitted by learned senior counsel appearing for the appellants that in the event this Court were to hold that the powers under Chapters V and VI of Part VI of the Constitution are exercisable by the High Court of Madras over the subordinate Judiciary of the Union Territory of Pondicherry, the Government of Pondicherry will suitably amend the Pondicherry Judicial Service Rules, 1980 and also the other connected Acts and the Rules pertaining to the jurisdiction of the High Court over the subordinate judiciary and also the establishment of the Courts. In view of the above undertaking given on behalf of the Government of Pondicherry, which we place on record, we do not consider it necessary to issue any *mandamus* to amend the Pondicherry Judicial Service Rules and the provisions of the other enactments and the Rules, except stating that the undertaking shall be complied with, within a period of six months from today. We also further direct that the High Court of Madras shall also take such steps as are necessary for the purpose of exercising its control over the subordinate judiciary in the Union Territory of Pondicherry, as per the provisions contained in Chapters V and VI of Part VI of the Constitution of India.

11. Subject to the aforesaid directions and undertaking given by the Union Territory of Pondicherry, the writ appeals are disposed of. There will, however, be no order as to costs.

R.S.

Directions given.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Pratap Singh, J.

C.R.P.No.824 of 1988 17th September, 1993.

S.Sadayandi and another ...Petitioners
v.

D.S.Pudupatty Co-operative Building Society
represented by its Secretary ...Respondent.

(A) *Civil Procedure Code (V of 1908), O.21, Rule 72 - Tamil Nadu Co-operative Societies Act (LIII of 1961), Sec.91 - Recovery of loan payable by number to a co-operative society - Deputy Registrar of co-operative societies passing award - Execution petition filed in Court for realisation of amount - Society, if can purchase property of debtor in court-auction sale without prior permission of court.*

Once the matter was brought to the civil court for execution in accordance with the provisions of the Civil Procedure Code, all provisions contained therein regarding execution would come into play. While so, the decree holder himself cannot purchase the property in court auction sale without getting permission of the court to bid in the court auction sale as enjoined by O.21, Rule 72 of the Civil Procedure Code. [Para. 4]

(B) *Limitation Act (XXXVI of 1963), Art.132 - Court-auction sale confirmed on 17.6.1985 - Petition for delivery filed on 10.8.1986 - If in time.*

When the confirmation of the sale was on 17.6.1985 and the petition for delivery was filed on 10.8.1986, it is barred by time by virtue of Art.132 of the Limitation Act. [Para. 4]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the court of the District Munsif, Uthamapalayam, Madurai District, dated 30.10.1987 and made in E.A.No.575 of 1986 in E.P.No.28 of 1981.

P.Sankaran, for Petitioners.

The Court made the following

ORDER: This civil revision petition is directed against the order passed in E.A.No.575 of 1986 in E.P.No.28 of 1981 on the file of the District Munsif, Uthamapalayam.

2. The short facts are: The revision petitioners were landlord to the respondent-society. For that amount, the respondent moved before the Deputy Registrar of Co-operative Societies and the said

Deputy Registrar had passed an award. To realise the amount given in the award, the respondent filed E.P.No.28 of 1981 for attachment and sale of the properties belonging to the revision petitioners. In the Court auction sale, the respondent himself had purchased the property. Later, the respondent filed E.A.No.573 of 1986 for delivery, and delivery was ordered. Aggrieved by the said order, this revision has been filed.

3. Mr.Sankaran, learned counsel, appearing for the revision petitioners, would submit that by virtue of Sec.91 of the Tamil Nadu Co-operative Societies Act, 1961, which was in force at the time of court auction sale, the proceedings were in accordance with the Civil Procedure Code and inasmuch as the respondent had not obtained permission to bid in the court auction sale as enjoined by O.21, Rule 72 of the Code of Civil Procedure, the very purchase by the respondent was invalid and consequent delivery was equally invalid. He would further submit that the time for seeking delivery through court was only one year from the date of confirmation of the sale and that in this case, the sale was confirmed on 17.6.1985 and this petition for delivery was filed on 10.8.1986 and that it was barred by limitation and on that ground also, the order directing delivery by the court below cannot be sustained.

4. I have carefully considered the submissions made by the learned counsel. I find that both the grounds urged by the learned counsel are well founded. Once the matter was brought to the civil court for execution in accordance with the provisions of Civil Procedure Code, all provisions contained therein regarding execution would come into play. While so, the decree-holder himself cannot purchase the property in court auction sale without getting permission of the court to bid in the court auction sale as enjoined by O.21, Rule 72 of the Civil Procedure Code. The learned counsel for the petitioner would further submit that no such permission was obtained. Consequently, the sale as well as the delivery sought for in pursuance of the sale are not tenable and the order of the court below directing delivery would not stand to scrutiny. Furthermore, when the confirmation of the sale was on 17.5.1985 and the petition for delivery was filed on 10.8.1986 and as stated by the learned counsel, it is barred by time, by virtue of Art.132 of the Limitation Act.

5. Hence the order of the court below directing

delivery is not correct and is liable to be set aside. Hence, the revision is allowed setting aside the order passed in E.A.No.571 of 1986 and consequently E.A.No.575 of 1986 shall stand dismissed. No costs.

B.S. ---- Pennon allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Pratap Singh, J.

C.R.P.No.3919 of 1987 1st September, 1993.

Varadappa Gounder and others ...Petitioners
v.

Karuppa Goundar ...Respondent.

Civil Procedure Code (V of 1908), O.22, Rules 3 and 4 - Limitation Act (XXXVI of 1963) Arts.120 and 121 - Preliminary decree in suit for partition passed - Plaintiff filing application for passing of final decree - Plaintiff dying - Son of plaintiff praying to implead himself as legal representative of deceased plaintiff - Allegation that by virtue of will left behind by plaintiff he was sole legatee - Petition filed nearly four years after the death of plaintiff - Petition if barred by limitation - Petitioner if can be impleaded as legal representative in spite of existence of other heirs.

A Full Bench of this Court has held in *Perumal Pillai v. Perumal Chetty*, 55 M.L.J. 253 that O.22, Rules 3 and 4, Civil Procedure Code do not apply to cases where a preliminary decree was passed and before the passing of the final decree, the plaintiff died and a petition was filed for getting impleaded as the legal representative of the deceased plaintiff. The ruling squarely applies to the facts of this case. In view of the rulings in *Krishna Kumar v. N.G.Naidu*, A.I.R. 1975 Mad. 174, *Kadir Mohideen Marakkayar v. M.V.Muthukrishna Ayyar*, I.L.R. 26 Mad. 230 and *Harihar Prasad v. Balmiki Prasad*, A.I.R. 1975 S.C. 733, the portion is clear that the claim of the respondent (plaintiff's son) to be impleaded as a legal representative cannot be resisted on the ground that there are other heirs. It is always open to others to come on record. By

impleading the respondent as the legal representative of the deceased, he cannot claim that he is the sole legal representative of the deceased when the will relied upon by him has not been proved. Subject to this observation alone, his claim to be impleaded as the legal representative is allowed.

[Paras. 6 & 10]

Cases referred to:-

Perumal Pillai v. Perumal Chetty, (1928)55 M.L.J. 253. [Para. 6]

Packirisamy Parayar v. Arumboo Ammal, 1982 T.L.N.J. 374. [Para. 7]

Krishnakumar v. M.G.Naidu, (1974)2 M.L.J. 168: A.I.R. 1975 Mad. 174: 88 L.W. 272. [Para. 9]

Kadir Mohideen Marakkayar v. N.V.Muthukrishna Ayyar, I.L.R. 26 Mad. 230. [Para. 9]

Harihar Prasad v. Balmiki Prasad, A.I.R. 1975 S.C. 733. [Para. 9]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Thiruchengode dated 29.4.1987 and made in I.A.No.502 of 1982 in O.S.No.184 of 1982.

S.P.Subramaniam, for Petitioners.

V.Radhakrishnan, for Respondent.

The Court made the following

ORDER: This civil revision petition is directed against the order in I.A.No.502 of 1982 in O.S.No.184 of 1982 on the file of the District Munsif, Thiruchengode.

2. Short facts are: Respondent's father, Mottaian alias Adakkathia Gounder, filed the suit in O.S.No.527 of 1959, for partition and separate possession of his 1/5 share in the suit property. In that suit, on 16.7.1960 a preliminary decree was passed. Later he filed I.A.No.698 of 1965 for passing of a final decree. A commissioner was appointed to suggest the modes of division and he had filed his report. The defendants filed I.A.No.1268 of 1967 putting forth their objections to the Commissioner's report and sought appointment of a fresh commissioner. That application was dismissed on 4.7.1967. A revision petition, filed against that order before this Court, was also dismissed. By then I.A.No.698 of 1965 was pending. On 12.5.1970 the plaintiff died and so I.A.No.698 of 1965 was allowed to be dismissed on 30.6.1970. Later the respondent filed I.A.No.1424 of 1974 under O.22, Rule 3, Code of Civil Procedure on 1.7.1974 praying to implead himself as the legal representative of the deceased plaintiff alleging

that though his father had left other heirs, by virtue of the will executed by his father on 19.8.1970, he was the sole legatee, and he should be impleaded as the legal representative of the deceased plaintiff. His claim was resisted by the revision petitioners, who are defendants 3 to 6 in the suit, and other defendants. After enquiry, the court below had allowed the petition. Aggrieved by that order, defendants 3 to 6 have come forward with this revision petition.

3. Mr. S. P. Subramanian, learned counsel appearing for the revision petitioners, would submit that in the counter affidavit filed in the court below, they have disputed the will propounded by the respondent and they have also given the details of other legal representatives, viz. junior widow, 5 more sons and 3 daughters apart from the respondent through his two wives and without impleading them the order of the court below impleading the respondent alone is not correct and on that ground the petition ought to have been dismissed as not maintainable. Learned counsel further submitted that the plaintiff died on 12.5.1970, that 90 days time is given for impleading the legal representatives and that time would come to an end by 4.8.1970 as per Art. 120 of the Limitation Act; and similarly time to set aside an abatement is 60 days and in this case that time will run from 4.8.1970 and come to an end on 4.10.1970 and by that time no petition was filed to set aside the abatement and while so this petition filed on 1.7.1974 is barred by time.

4. *Per contra*, Mr. V. Radhakrishnan, learned counsel appearing for the respondent, would submit that in a partition suit where a preliminary decree was passed, O. 22, Rules 3 and 4, C.P.C., are not applicable as there is no question of abatement at all, and so the question of limitation does not arise. He would further submit that admittedly the respondent is one of the sons of the deceased plaintiff and as such impleading him as legal representative is sustainable, that he can represent the entire estate of the plaintiff, that the claim of other legal representatives has to be worked out between themselves and that would not stand in the way of the respondent getting himself impleaded as the legal representative of the deceased plaintiff.

5. I have carefully considered the submissions made by the rival counsels. I shall first take up the question of limitation. Art. 120 of the Limitation

Act stipulates a period of 90 days for an application under the Code of Civil Procedure, 1908, to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent made a party and the time has to be computed from the date of death of the plaintiff, appellant, defendant or respondent, as the case may be. As per Art. 121 for an application under the Code of Civil Procedure to set aside an abatement the limitation of sixty days shall run from the date of abatement. In the instant case, the date of death of the deceased plaintiff was 12.5.1970 and the petition to implead was filed on 1.7.1974. If Arts. 120 and 121 are applied, the application is clearly barred by time.

6. But this is a case where preliminary decree was passed on 16.7.1960 and final decree is yet to be passed. While so, the plaintiff died on 12.5.1970, Mr. V. Radhakrishnan, would rely upon the ruling of the Full Bench of this Court reported in *Perumal Pillai v. Perumal Chetty*, (1928) 55 M.L.J. 253. In that case, the preliminary decree in a mortgage suit was passed on 18.11.1921. The plaintiff died on 25.2.1922. On 17.2.1925, the respondent in the civil revision petition put in an application under Sec. 151, Civil Procedure Code, and Sec. 5 of the Limitation Act praying that the abatement of the suit be set aside. Learned Judges have pointed out that the decision must turn on the question whether or not the suit did abate, three months after the death of the plaintiff, or as the question presents itself in this case, whether or not a suit can abate or will abate after a preliminary decree therein has been passed. Following question was referred to the decision of the Full Bench:

“whether O. 22, Rules 3 and 4, Civil Procedure Code, apply to cases of death after the passing of a preliminary decree?”

The Full Bench answered the reference by expressing its opinion that O. 22, Rules 3 and 4, C.P.C., do not apply to the present state of circumstances and remitted back the case to the Division Bench. Thus the Full Bench had held that O. 22, Rules 3 and 4, C.P.C. do not apply to cases where a preliminary decree was passed and before the passing of the final decree the plaintiff died and a petition was filed for getting impleaded as the legal representative of the deceased plaintiff. The above ruling squarely applies to the facts of this case.

7. Mr. V. Radhakrishnan, would also rely upon the

ruling in *Packirisamy Parayar v. Arumboo Ammal*, 1982 T.L.N.J. 374, wherein Mohan, J. (as he then was) after referring the above quoted Full Bench ruling held likewise that O.22, Rules 3 and 4, C.P.C., do not apply to cases of death after the passing of the preliminary decree. In view of the above, I do not accept the submission made by Mr.S.P.Subramanian that the petition was barred by time.

8. I have to consider the next submission made by Mr.S.P.Subramaniam, learned counsel for the petitioner. The claim of the respondent that he is one of the sons of the deceased is not in dispute. According to the revision petitioners, the deceased had left his junior widow, 5 more sons and three daughters apart from the respondent, and so without impleading them, the order of the court below is not correct.

9. Mr.V.Radhakrishnan, learned counsel in order to support his submissions, relied upon the decision reported in *Krishnakumar v. M.G.Naidu*, (1974)2 M.L.J. 168; A.I.R. 1975 Mad. 174; 88 L.W. 272. In that case, the question came up before the High Court in the following manner: During the pendency of the suit, the second defendant died. The plaintiff filed a petition to implead his own son as legal representative of the second defendant alleging that the second defendant has left a Will under which the plaintiff's son was legatee. That claim was resisted by the first defendant. The trial court dismissed the petition and aggrieved by the same, the revision has been filed before this Court and the matter came up for consideration. Natarajan, J. (as he then was) had laid as follows:

"The recognition of a rival contender as the legal representative of a deceased party in a pending action is only to facilitate the early disposal of the pending action. Any recognition of right given by a court in such a proceeding will not confer rights on the recognised representative in the estate or property of the deceased person, nor will such a finding operate as *res judicata* in subsequent proceedings. [Italics supplied]. The very fact that no appeal is provided from an order passed under O.22, R.5, C.P.C. will go to show that the order cannot be characterised as one 'finally decided by a court' as contemplated in Sec.11, C.P.C."

In *Kadir Mohideen Marakkayar v. N.V.Muthukrishna Ayyar*, I.L.R.26 Mad 230, a Division Bench of this Court held as follows:

"As already stated, on the application of the plaintiff, the first defendant's name was entered on the record in the place of the deceased defendant as his legal representative. In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion, the decree passed in such suit will bind such estate. It will of course be open to any other person who is or claim to be the legal representative of the deceased defendant to apply to have his name also entered on the record as a legal representative in the place of the deceased defendant."

The Apex Court had referred to this Division Bench ruling of this Court and had approved it in *Harihar Prasad v. Balmiki Prasad*, A.I.R. 1975 S.C. 733.

10. In view of the above rulings relied on by Mr.V.Radhakrishnan, the position is clear that the claim of the respondent to be impleaded as a legal representative cannot be resisted on the ground that there were other heirs. It is always open to others to come on record. By impleading the respondent as the legal representative of the deceased, he cannot claim that he is the sole legal representative of the deceased when the will relied upon by him has not been now proved. Subject to this observation alone, his claim to be impleaded as the legal representative is allowed. For the reasons stated above, I am unable to accept the submission made by Mr.S.P.Subramaniam.

11. The learned counsel for the revised petitioner would submit that there are no pending proceedings and at this stage the respondent cannot seek himself to be impleaded as the legal representative of the deceased. In the suit, already preliminary decree was passed and till final decree is passed it must be deemed to be pending proceedings and as such I am unable to accept this submission also. He submits that since the will was given up the respondent, he cannot be impleaded as the legal representative of the deceased. As already pointed out by me, the respondent cannot claim by getting himself impleading that he is the sole heir of the deceased. None of the submissions made on behalf of the revision petitioner finds acceptance with me.

12. The civil revision petition, therefore, fails and shall stand dismissed. No costs.

B.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Pratap Singh, J.

C.R.P.Nos.1288 and 1289 of 1988

5th October, 1993.

Kathan Muthiriyar and another ...Petitioners
v.

Gopal Rathinam and another ...Respondents.

(A) *Tamil Nadu Cultivating Tenants Protection Act (XXXIII of 1963), Sec.6-B - Cultivating tenant failing to deposit arrears of rent in Revenue Court within time granted - Application by landlord for eviction - Ordered.*

It has been repeatedly held by this Court that when the cultivating tenant fails to deposit the arrears of rent in the revenue Court within the time granted by the revenue Court, in an application filed by the landlord, the revenue Court has to pass order of eviction.

[Para. 5]

(B) *Tamil Nadu Cultivating Tenants Protection Act (XXXIII of 1963) - Tamil Nadu Cultivating Tenants (Arrears of Rent (Relief) Act XLI of 1989), Secs.1(3), 4 and 6 - Application filed by landlord for eviction of tenant on ground of arrears of rent - Revenue Court giving time for payment - Arrears not deposited till that date - Eviction order passed on 14.4.1988 - Arrears deposited after civil revision petition were filed in High Court - Delivery proceedings if stayed by virtue of Act XLI of 1989.*

By virtue of Sec.1, sub-sec.(3) of the Tamil Nadu Cultivating Tenants Protection Act (XLI of 1989), the Act shall be deemed to have come into force on 1.10.1986 and shall remain in force upto and inclusive of 31.3.1990. A conjoint reading of Secs.4 and 6 of the Act would show that during the period when the Act was in force viz., 1.10.1986 to 31.3.1990, any pending proceeding coming within the ambit of Sec.4 shall stand stayed and by virtue of Sec.6,

after the expiry of period, the proceeding can be proceeded with. In the instant case, eviction was already ordered. But the proceeding is still pending inasmuch as the civil revision petitions were filed against those orders of eviction. So they shall stand stayed till 31.3.1990. Thereafter, it can be proceeded with from the stage where it was left at the time of stay. So now there is no impediment to further proceed and get possession in pursuance of the order of eviction.

[Para. 6]

(C) *Tamil Nadu Cultivating Tenants Protection Act (XXXIII of 1963) - Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act XXXIII of 1990), Secs.5, 7 and 8 - Application by landlord for eviction of tenant on ground of arrears of rent - Time granted to tenants by revenue court - Arrears not deposited - Orders of eviction passed - Revision petitions filed by tenants - Entire arrears deposited subsequently - But current rent not deposited or paid - Orders of eviction, if can be enforced.*

In the instant cases, admittedly, the revision petitioners had not paid or deposited under this Act, the current rent and one-fourth of the arrears of rent. As such the benefits of Sec.5 of the Act XXXVIII of 1990 would accrue to the revision petitioners. Sec.7 provides for relief for payment of arrears in instalments. This again requires the tenant to pay the current rent and one third of the total amount of arrears of rent for the said years. Admittedly, no current rent has been paid by the revision petitioners. Hence neither can they claim benefits of Sec.7 of the Act. Neither Sec.8 of the Act is applicable. On the facts and circumstances of the case, the revision petitioners are neither entitled to claim the benefits of the Act XXXVIII of 1990.

[Para. 9]

Petitions under Sec.115 of Act V of 1908 read with Sec.6-B of Act XXXIII of 1963 Tamil Nadu Cultivating Tenant Protection Act, praying the High Court to revise the order of the Special Deputy Collector (Revenue Court), Lalgudi, dated 14.4.1988 and passed in E.P.No.400 of 1981 in Petition No.1498 of 1986 and E.P.No.596 of 1987 in Petition No.1698 of 1986 respectively.

D.Peter Francis, for Petitioners.

N.Damodaran and A.S.Vijayaraghavan, for Respondents.

The Court made the following

ORDER: These civil revision petitions are directed against the orders passed in E.P.No.400 of 1987 in Petition No.1498 of 1986 and in

E.P.No.596 of 1987 in Petition No.1698 of 1986 on the file of Special Deputy Collector (Revenue Court), Lalgudi.

2. Short facts are: Regarding C.R.P.No.1288 of 1988, the respondent had filed petition for eviction on the ground of arrears of rent. The revenue court found that he was in arrears of rent to the tune of Rs.5,414 and gave time for payment till 31.3.1987. He had not paid the amount. So the respondent filed E.P.No.400 of 1987 and the Revenue court had passed order of eviction. Aggrieved by that order, C.R.P.No.1288 of 1988 is filed.

3. Regarding C.R.P.No.1289 of 1988, the respondent filed petition for eviction on the ground of arrears of rent. Here again, the Revenue Court has found that the revision petitioner had to pay arrears and gave time till 30.10.1987. Since the revision petitioner had not paid the arrears within the specified time, the respondent filed E.P.No.596 of 1987 and the Revenue Court had passed order of eviction. Aggrieved by the said court, C.R.P.No.1289 of 1988 is filed.

4. Mr.D.Peter Francis, the learned counsel appearing for the revision petitioner, would submit that the revision petitioner in C.R.P.No.1288 of 1988 had paid Rs.3,000 before the Revenue Court and later Rs.600 in the execution proceedings and after the civil revision petition was filed, in pursuance of the order passed in the petition for stay, had paid entire arrears and likewise in C.R.P.No.1289 of 1988 also part of the amount was paid earlier and the remaining part was paid after the civil revision petition was filed and thus the entire arrears claimed in the two petitions were paid to the respondent. He would further submit that by virtue of the provisions of Tamil Nadu Act 41 of 1989, entire proceedings, including delivery proceeding was stayed and by virtue of Tamil Nadu Act 38 of 1990, when entire arrears were paid, order of eviction cannot be enforced. *Per contra*, Mr.N.Damodaran, the learned counsel appearing for the respondent in C.R.P.No.1288 of 1988 and Mr.A.S.Vijayaraghavan, the learned counsel appearing for the respondent in C.R.P.No.1289 of 1988, would submit that the provisions of the Tamil Nadu Act 41 of 1989 are not applicable to this case, since the revision petitioners have not complied with the provisions laid therein.

5. I have carefully considered the submissions

made by rival counsels. It is not in dispute that the revenue court had found that the revision petitioners were in arrears of rent and gave time for payment and that these revision petitioners had not paid the entire arrears of rent within the specified date. It is also not in dispute that since the entire rent was not paid within the specified date, the respondent filed two execution petitions and orders of eviction directing delivery were passed. It has been repeatedly held by this Court that when the cultivating tenant fails to deposit the arrears of rent in the revenue court within the time granted by the revenue court, in an application filed by the landlord, the revenue court has to pass order of eviction. As such, order of eviction and directing delivery to the respondent by the court below in these two execution petitions are in order.

6. I shall next consider as to whether Act 41 of 1989 and Act 38 of 1990 which were enacted by the legislature subsequent to the passing of these impugned orders of eviction, will have the effect of vacating the impugned orders. By virtue of Sec.1, Sub-sec.(3) of Act 41 of 1989. The Act shall be deemed to have come into force on 1.10.86 and shall remain in force upto and inclusive of 31.3.1990. As per Sec.4 of the said Act, all applications under the Tenants Protection Act and all proceedings in execution of orders and other proceedings for eviction of a cultivating tenant on the ground that he is in arrears with respect to the rent payable to the landlord and pending before a Revenue Divisional Officer, a court or other authority, as the case may be, shall stand stayed. As per Sec.6 of the said Act, all applications for eviction of a cultivating tenant under the Tenants Protection Act and proceedings stayed under this Act, shall, after the expiry of this period be proceeded with subject to provisions of any law which may then be in force, from the stage which had been reached when the application, suit or proceeding was stayed. A conjoint reading of Secs.4 and 6 referred to supra would show that during the period when the Act was in force viz. 1.10.1986 to 31.3.1990, any pending proceeding coming within the ambit of Sec.4 shall stand stayed, and by virtue of Sec.6, after the expiry of period, the proceeding can be proceeded with. In the instant case, eviction was already ordered. But the proceeding is still pending, inasmuch as these civil revision petitions were filed against those orders of eviction. So they shall stand stayed till 31.3.1990. Thereafter, it can be proceeded with

from the stage where it was left, at the time of stay. So now there is no impediment to further proceed and get possession, in pursuance of the order of eviction. Act 41 of 1989 would not stand in the way.

7. I shall next consider the submission of Mr.D.Peter Francis that by virtue of provision of Act 38 of 1990, the order of eviction shall get vacated. The date of publication of this Act in the gazette was 10.10.1990. I shall at the outset refer to the relevant provisions in this Act. "Current rent" is defined in Sec.3(d) and it reads as follows:

" 'Current rent' means the whole of the rent due for the fasli year commencing on the 1st day of July, 1989 and ending with the 30th day of June, 1990".

Date of publication of the Act is defined in Sec.3(a) of the Act and it reads as follows:

" 'date of the publication of this Act' means the date of the publication of this Act in the Tamil Nadu Government Gazette".

Sec.4 reads as follows:

"4. *Option for payment of arrears of rent:* (1) Any cultivating tenant who is in arrears of rent payable to the landlord for the fasli year ending with the 30th day of June, 1989 and for any previous fasli year (hereinafter referred to as the said years) and outstanding on the date of the publication of this Act shall, within four months from the date of such publication, intimate his option in writing to the competent authority--

(i) to pay the current rent and the one-fourth of the said arrears of rent in the manner specified in part II, or

(ii) to pay the current rent and the one third of the said arrears of rent in the manner specified in Part III, of this Act for availing relief under this Act from the payment of the said arrears of rent.

(2) The option given under Sub-sec.(1) shall be final".

8. Under Sec.5 of the Act, relief is given for payment of arrears of rent. If a cultivating tenant pays to the landlord or deposits in the court or before the competent authority, to the account of the landlord in the manner specified in Sub-secs.(2) and (3)---

(a) the current rent; and

(b) the one-fourth of the total amount of arrears of rent for the said years without interest

In the instant case, the revision petitioner had not exercised the option under Sec.4 of the Act and not made payment or deposit as stipulated under Sec.5 Sub-sec.(1).

9. Sub-secs.(4) and (5) of Sec.5 of the Act are relevant and they read as follows:

"(4) In any suit or proceeding pending on the date of the publication of this Act, for the recovery of the current rent or any arrears of rent for any fasli year in the said years, payable by a cultivating tenant to the landlord or for the eviction of a cultivating tenant for non-payment of any such current rent or any arrears of rent, the court or competent authority shall, *if the cultivating tenant pays or deposits under this Act, the current rent and the one-fourth of the arrears of rent*, and on the application of the cultivating tenant, pass an order dismissing, without costs, the suit or proceeding insofar as such suit or proceeding relates to such recovery or eviction.

(5) If, before the date of the publication of this Act any decree or order has been passed in any suit or proceeding

(i) for the recovery of any arrears of rent referred to in Sub-sec.(4); or

(ii) for the eviction of a cultivating tenant for non-payment of any such current rent or one fourth of the arrears of rent, the court or the competent authority shall, *if the cultivating tenant pays or deposits under this Act, the current rent and the one-fourth of the arrears of rent* and on the application of any person affected by such decree or order whether or not he was a party thereto, vacate the decree or order in so far as such decree or order relates to such recovery or eviction". [*Italics supplied*]

In the instant cases, admittedly, the revision petitioners had not paid or deposited under this Act, the current rent and one-fourth of the arrears of rent. As such, the benefits of Sec.5 would not accrue to the revision petitioners. Sec.7 provides for relief for payment of arrears in instalments. This again requires the tenant to pay the current rent and one-third of the total amount of arrears of rent for the said years. Admittedly, no current rent has been paid by the revision petitioners. Hence neither they can claim benefits of Sec.7 of the Act. Neither Sec.8 of the Act is applicable. On the facts and circumstances of the case, the revision petitioners are neither entitled to claim the

benefits of Act 38 of 1990.

10. None of the submissions made by Mr.D.Peter Francis finds acceptance with me and consequently both the civil revision petitions fail and shall stand dismissed. No costs.

B.S. ----- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *K.A.Swami, C.J. and Somasundaram, J.*

W.A.Nos.1032, 1039 to 1064 of 1993 and W.P.Nos.21082 of 1992, 10663 to 10687 of 1993, 10999 of 1993 and 11557 of 1993 *5th October, 1993.*

Jawahar College Staff Association, 180-A, Block-6, Ncyveli by its Secretary and another

...Appellants

v.

University of Madras represented by its Registrar, Chepauk and others

...Respondents.

(A) Tamil Nadu Private Colleges (Regulation) Act (XIX of 1976), Secs.2(8), 2(a), 2 and 5 - Private College maintained by an educational agency - Approved by or affiliated to a University - If a private college falling within scope of Act - Government granting permission to start a new private college - Order not referring to any particular provision of Act - Permission if referable to Secs.3 and 5.

A reading of Secs.2(8) and 2(4) of the Tamil Nadu Private Colleges (Regulation) Act, 1976 makes it clear that whether a private college is an aided or an unaided college, whether it came into existence either before or after the date when the Act came into force makes no difference as long as it is a college which is maintained by an educational agency and approved by or affiliated to a University and permitted or deemed to be permitted under the Act, it has to be held that it is a Private College falling within the scope of the Act. Whether the order of the State Government granting permission to start a new private college refers to the particular provision(s) of the Act or not, when such power can only be exercised by the State Government under Secs.3 and 5 of the Act, the

competency of the State Government to pass such an order is traceable to Secs.3 and 5 only, irrespective of the fact whether the said sections 3 and 5 are mentioned in the Order granting permission or not.

[Para. 4]

(B) Madras University - Laws of, Chapter XXVI, Statute No.27 - Private Colleges - Appointments to - Prior approval of Syndicate of University, if necessary.

Statute No.27 of Chapter XXVI of the Laws of the University of Madras specifically states that all appointments shall be reported to the Syndicate which shall satisfy itself that they meet the requirements of the University. Therefore, the statute does not say that the appointments are to be made with the prior approval of the Syndicate of the University. The statute does not even use the word 'approval'. It only provides the Syndicate shall satisfy itself that the appointments meet the requirements of the University. Thus, the appointments made by a private college will continue to be operative until the Syndicate states or declares that the appointments do not satisfy the requirements of the University. Thus, the appointments are only subject to the approval but not the prior approval of the Syndicate. Therefore, the appointments will become operative as per the terms of the order of appointment and will remain in force until the same are disapproved by the Syndicate. They cease to be effective from the date then are disapproved.

[Para. 6]

(C) Constitution of India (1950), Art.226 - Tamil Nadu Private Colleges (Regulation) Act (XIX of 1976), Sec.20 - Alternative remedy - Petitioners appointed as lecturers working temporarily for a long time - Seeking regularisation of services - Act providing for appeal to Commissioner for collegiate education and further appeal to tribunal - If can invoke writ jurisdiction of High Court.

The court is of the view that as the Act provides for an appeal to the Commissioner for Collegiate Education and a further appeal to the tribunal against the order of the first appellate authority, it would not be just and proper for this Court to exercise the jurisdiction under Art.226 of the Constitution of India by passing the statutory remedies and to determine the question as to whether the services of the writ petitioners are entitled to be regularised or not. The question of regularisation would depend upon several facts and also the law governing the subject. The

interest of the petitioners is very well safeguarded as the Act provides two appeals. In the event they are not able to secure the relief from the two appellate forums, it would then be open to them to approach this Court under Art.226 of the Constitution of India. [Para. 7]

Case referred to:

Shakar Husain v. Chandroo, A.I.R. 1931 All. 576.
[Para. 6]

Appeals under Clause 15 of the Letters Patent against the Order of AR.Lakshmanan, J., dated 3.9.1993 and made in the exercise of the Special Original Jurisdiction of the High Court in W.M.P.Nos.17608 of 1993, 16279 of 1993, 16280 of 1993, 16281 of 1993, 16282 of 1993, 16283 of 1993, 16284 of 1993, 16285 of 1993, 16286 of 1993, 16288 of 1993, 16289 of 1993, 16290 of 1993, 16291 of 1993, 16293 of 1993, 16294 of 1993, 16295 of 1993, 16296 of 1993, 16297 of 1993, 16298 of 1993, 16299 of 1993, 16300 of 1993, 16301 of 1993, 16302 of 1993, 16303 of 1993, 16304 of 1993 and 16806 of 1993 respectively in W.P.Nos.1157 of 1993, 10663 of 1993 to 10687 of 1993 and 10999 of 1993, etc.

N.R.Chandran, Senior Advocate, for *M/s.Senthil Kumar and R.Aruljothi*, for Appellant in W.A.Nos.1032 of 1993.

U.N.R.Rao, Senior Advocate, for *M/s.N.A.K.Sharma and K.Mahesh*, for Appellant in W.A.Nos.1039 to 1064 of 1993 and for Respondent No.1 in W.P.Nos.10663 to 10687 of 1993 and W.P.No.10999 of 1993.

T.N.Vallinayagani, for Petitioner in W.P.No.10999 of 1993 and for Respondent No.1 in W.A.No.1064 of 1993.

Silambanan, for Petitioner in W.P.No.11557 of 1993.

P.Jothimani, for Respondent No.1 in W.A.No.1032 of 1993 and for Respondent No.3 in W.P.Nos.10663 to 10687 of 1993 and Respondent No.1 in W.P.No.11557 of 1993 and for Respondent No.4 in W.P.No.21082.

K.M.Vijayan, for Respondent No.1 in W.A.Nos.1039 to 1064 of 1993 and for Petitioners in W.P.Nos.21082 of 1992 and 10663 to 10687 of 1993.

The Judgment of the Court was delivered by *K.A.Swami, C.J.*: The writ appeals are preferred against the Order dated 3.9.1993 passed by the learned single Judge in W.M.P.Nos.16279 to 16304 of 1993, 16806 of 1993, 17608 of 1993 and 19245 of 1993. The learned single Judge has issued the following directions:

"The next contention of Mr.U.N.R.Rao and Mrs. Nalini Chidambaram, learned Senior Counsel, is that there cannot be any stay of order of termination. It is true generally, courts do not stay any order of termination. But, there is no axiomatic principle of law that courts can never grant stay of order of termination and a Court exercising jurisdiction under Art.226 of the Constitution of India cannot be shackled by any such principle. It has already been noticed that the order of termination is in gross violation of the provisions of Sec.19(2) of the Tamil Nadu Private Colleges Regulation Act. When the writ petitioners were claiming for regularisation of their temporary services, the respondent management has issued the order of termination and thereby throwing all the 23 and odd teaching staff on the streets. Therefore, I am satisfied on the facts and circumstances of the case, that stay of the termination order should be granted. Even the balance of convenience is in favour of making the stay absolute.

In view of what I have said above, it is unnecessary for me to refer to the elaborate arguments of the counsel for the petitioners as well as the respondent and the decisions relied on by them. Even though at one stage I felt that the main writ petitions filed by various parties themselves could be disposed of Mr.U.N.R.Rao was not agreeable to the said course and wanted to be passed in the Writ Miscellaneous petitions. In the result,

W.M.P.Nos.16279 to 16304 of 1993 are allowed and the interim stay granted on 4.6.1993 is made absolute.

W.M.P.No.19245 of 1993 in W.M.P.No.16302 of 1993 in W.P.No.10685 of 1993 is dismissed. W.M.P.No.17608 of 1993 in W.P.No.11557 of 1993 is dismissed and the interim stay granted on 22.6.1993 is vacated.

W.M.P.No.16806 of 1993 in W.P.No.10999 of 1993 is allowed and the interim stay granted on 17.6.1993 is made absolute.

Having regard to the scope of W.P.Nos.10663 to 10687, 10999 and 11557 of 1993 and 21082 of 1992, they are directed to be listed for final hearing before the concerned Hon'ble Judge on 15.9.1993".

2. When these appeals came up for hearing, we considered it necessary to hear the writ petitions

also, as the arguments in the writ appeals and in the writ petitions were going to be the same. Therefore by consent of both the parties, the writ petitions were directed to be posted along with these appeals. Accordingly, W.P.Nos.10663 to 10687 of 1993, 10999 of 1993, 11557 of 1993 and 21082 of 1992 are also posted along with W.A.Nos.1032 of 1993 and 1039 to 1064 of 1993. We have heard all these writ petitions and writ appeals.

3. In the light of several contentions urged on both sides, the points that arise for consideration are as follows:

(1) Whether the provisions of the Tamil Nadu Private Colleges (Regulation) Act, 1976 apply to the appellant college, viz., Jawahar Science College?

(2) Whether the resolution dated 4.6.1993 passed by the University Syndicate is valid in law?

(3) Whether the appointments made by Jawahar Science College by way of direct recruitment of Lecturers take effect only on the approval of the same by the Syndicate of the University of Madras or as per the terms of appointment order.

(4) Whether the petitioners in W.P.Nos.10663 to 10687 are entitled to be regularised.

Point No.1: Jawahar Science College is an unaided private college. It has been established after the coming into force of the Tamil Nadu Private Colleges (Regulation) Act 1976 (hereinafter referred to as the Act) which came into force on 21st November, 1975. It has been started with the permission of the State Government accorded under G.O.Ms.No.873, Education, dated 24.6.1986. Several conditions are imposed for permitting to open the college. Some of the conditions are: that the private unaided college would be under the control of the Director of Collegiate Education and periodical review and inspection of the colleges will be taken up by the Department of Collegiate Education; that the staff requirement in respect of their number, qualifications, etc., shall conform to the rules and regulations issued by the Government and the University concerned from time to time.

4. The contention of the learned counsel for the College is that as the permission does not refer to the provisions of the Act, it cannot be deemed to have been granted under the provisions of the Act, hence the college cannot be considered to be a private college. In order to decide whether the Jawahar Science College, which is an unaided

Private College, is a Private College within the meaning of that expression as defined in the Act, we have to only look to the relevant provisions of the Act. The object of the Act is to provide for the regulation of private colleges in the State of Tamil Nadu. The expression 'private college' is defined in clause (8) of Sec.2 of the Act, which reads thus:

"(8) 'private college' means a college maintained by an educational agency and approved by, or affiliated to, a university but does not include a college--

(a) established or administered or maintained by the Central Government or the Government or any local authority or any university; or

(b) giving, providing or imparting religious instruction alone, but not any other instructions".

The expression 'educational agency' has been defined in clause (4) of Sec.2 as follows:

"4. 'Educational Agency', in relation to--

(a) any minority college, means any person who, or body of persons which, has established and is administering or proposes to establish and administer such minority college; and

(b) any other private college, means any person or body of persons permitted or deemed to be permitted under this Act to establish and maintain such other private college".

A reading of the above two provisions makes it clear that whether a private college is an aided or an unaided college; whether it came into existence either before or after the date when the Act came into force makes no difference as long as it is a college which is maintained by an educational agency and approved by or affiliated to a university and permitted or deemed to be permitted under the Act it has to be held that it is a Private College falling within the scope of the Act. It is not disputed before us that the college in question is managed and maintained by an educational agency known as Jawahar Education Society consisting of body of persons. It is this society which is permitted to open the college. It is approved by, and affiliated to, the University of Madras. Thus, the private college in question satisfies all the conditions specified in the definition of the expressions 'private college' and "educational agency" under Secs.2(8) and 2(4) respectively of the Act. The act is passed regulating the private colleges in the State of Tamil Nadu providing permission for

establishment and management of private colleges; constitution of college committee; appointment of Special Officer in certain cases, terms and conditions of service of teachers and other persons employed in private colleges; control of private colleges; accounts, audit, inspection and returns; general provisions regarding appeal and revision; penalties and procedure and other miscellaneous matters. The executive power of the State Government to that extent gets circumscribed and it has to exercise its power only in conformity with the provisions of the Act and the Rules framed thereunder. Sec.3 of the Act provides that no person shall, without the permission of the Government and except in accordance with the terms and conditions specified in such permission, establish, on or after the date of commencement of the Act any private college, provided that it shall also be necessary to obtain affiliation of such college to a university. Sec.4 provides for the form of application and statement to be sent for the purpose of granting permission. Sec.5 deals with the grant of permission. Sec.6 covers the private colleges which were in existence on the date when the Act came into force and says that permission to such colleges is deemed to have been granted. Therefore the contention of the learned counsel that the permission granted to the college under G.O.Ms.No.873, Education, dated 24.6.1986 does not refer to the provisions of the Act and as such the permission cannot at all be held to have been granted as per the provisions of the Act, is not tenable. Whether the order of the State Government granting permission to start a new private college refers to the particular provision(s) of the Act or not, when such a power can only be exercised by the State Government under Secs.3 and 5 of the Act, the competency of the State Government to pass such an order is traceable to Secs.3 and 5 only, irrespective of the fact whether the said Secs.3 and 5 are mentioned in the order granting permission or not. Therefore, we are of the view that the college in question is a private college governed by the Act. It may be relevant to notice that the College itself has proceeded on the basis that it is governed by the Act. It has constituted the college committee as per Sec.11 of the Act, which provides for the constitution of college committee. In addition even in the appointment order issued by the college it is specifically stated that the same is in conformity with

and is subject to the provisions of the Rules framed under the Act, known as the Tamil Nadu Private Colleges (Regulation) Rules, 1976, hereinafter referred to as the Rules. Therefore, we have no doubt in our mind that the Act in question governs all the private colleges permitted or deemed to be permitted under the Act whether aided or not, which have been established and maintained by an educational agency and approved by or affiliated to the University and which do not fall within the meaning of sub-clauses (a) and (b) of clause (8) of Sec.2 of the Act. It is not even the case of the college that it falls under Sub-clauses (a) and (b) of clause (8) of Sec.2 of the Act. Therefore, we hold that the Jawahar Science College is a private college within the meaning and the definition, of that expression as contained in clause (8) of Sec.2 of the Act and as such it is governed by the provisions of the Act. Point No.1 is answered accordingly.

Point No.2: The Jawahar Science College, after selecting certain Lecturers appointed them. As per the conditions of affiliation, appointments are required to be approved by the Syndicate of the University, as provided in Statute 27 of Chapter XXVI of the Laws of the University of Madras, which reads thus:

"27. Appointments to the teaching staff of a college shall be made only after the Principal has been given an opportunity of expressing his views.

All appointments shall be reported to the Syndicate which shall satisfy itself that they meet the requirements of the University".

Thus under this provision, the Syndicate has been asked to accord approval to the appointments made by the college. The resolution dated 4.6.1993 passed by the Syndicate reads thus:

"The management/ Secretary to Jawahar Science College, Neyveli, be informed that the recruitment of Teachers presently made is not approved and that all the teachers who have been recruited earlier and who have the requisite qualifications as per rules prevailing at that time of their appointment, be regularised and reported to the University for approval before they consider the recruitment of fresh set of teachers".

We may point out here that the University is not a selecting authority. The authority of the University is only to ensure that the selection of the

Lecturers is made in accordance with the rules governing the selection and appointment, the candidates selected are eligible according to the qualifications prescribed by the University. In other words the syndicate has to satisfy itself that the appointments meet the requirements of the University. The power to select rests with the college committee, as constituted under Sec.11 of the Act. In fact, Sec.14(b) specifically provides that subject to the provisions of the Act and the rules made thereunder, the college committee shall have the power to appoint teachers and other persons of the private college, fix their pay and allowances and define their duties and the conditions of their service. Therefore, the Syndicate was required to examine in the aforesaid manner the appointments forwarded to it by the college for approval, whereas the resolution of the Syndicate does not disclose any of these aspects. Thus the resolution of the Syndicate refusing approval cannot be held to be in accordance with the aforesaid Statute 27. Learned counsel appearing for the University fairly submitted that the University itself has already stayed the operation of the resolution of the Syndicate and the University will take action in accordance with the directions that may be issued by this Court. As the Syndicate has not considered the appointments in the manner it is required to consider and has not given any reason relevant to the issue, the resolution is not valid in law and as such it is liable to be quashed. Point No.2 is answered accordingly.

Point No.3: Statute No.27 of Chapter XXVI of the Laws of the University of Madras has already been extracted while dealing with point No.2. It specifically states that all appointments shall be reported to the Syndicate, which shall satisfy itself that they meet the requirements, of the University. Therefore, the statute does not say that the appointments are to be made with the prior approval of the Syndicate of the University. The statute does not even use the word 'approval'. It only provides that the Syndicate shall satisfy itself that the appointments meet the requirements of the University. Thus, the appointment made by a private college, will continue to be operative until the Syndicate states or declares that the appointments do not satisfy the requirements of the University. Thus the appointments are only subject to the approval but not the prior approval of the Syndicate. Therefore, the appointments will become

operative as per the terms of the order of appointment and will remain in force until the same are disapproved by the Syndicate. In this connection, it is relevant to notice a Full Bench decision of the High Court of Allahabad in *Shakir Husain v. Chandroo*, A.I.R. 1931 All. 576. The words 'approval' and 'permission' came up for interpretation in that case and it was held thus:

"Ordinarily the difference between the approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained".

Therefore, it is clear that the appointments made by a private college will become effective as per the terms contained in the order of appointment, and in the event those appointments are not approved by the Syndicate of the University, they cease to be effective from the date they are disapproved. It, therefore, follows that the appointments of 26 lecturers, inclusive of 6 temporary lecturers, became effective from the date the appointments were made and they are entitled to function and continue to hold the posts till such time their appointments are disapproved by the Syndicate. Point No.3 is answered accordingly. However, we make it clear that this will not enable the college committee to select and appoint a lecturer contrary to the Rules of recruitment and the qualifications prescribed for the post and also to violate the reservations if any.

Point No.4: According to the petitioners in the writ petitions, they have been working as temporary lecturers for several years since 1988 and they claim that they are entitled to be regularised. After appointing the lecturers on selection, the college has terminated their services. They have gone in appeal to the Commissioner for Collegiate Education under Sec.20 of the Act. The appeals are pending before the appellate authority, viz., Commissioner, Collegiate Education. They have filed the present writ petitions on the ground that the appellate authority has expressed the view that the appeals are not maintainable as the Act does not apply to the college in question; that the college is not permitting them to function as Lecturers. The petitioners have sought for a direction to the concerned authorities to regularise their services. We are of the view that as the Act provides for an appeal to the Commissioner for Collegiate Education and a further appeal to the

tribunal against the order of the first appellate authority, it would not be just and proper for this Court to exercise the jurisdiction under Art.226 of the Constitution of India, by-passing the statutory remedies and to determine the question as to whether the services of the writ petitioners are entitled to be regularised or not. The question of regularisation would depend upon several facts and also the law governing the subject. The interest of the petitioners is very well safeguarded as the Act provides two appeals. In the event they are not able to secure the relief from the two appellate forums, it would then be open to them to approach this Court under Art.226 of the Constitution of India. Therefore, we do not consider it necessary to go into this question.

8. A contention is urged that these petitioners are without service even though they have worked for several years as Lecturers, as the college has all of a sudden discontinued their services, therefore, it is not at all possible for them to get on without the service. In this regard, the college is very fair, as it is submitted by the learned counsel for the college that the college will pay the salary that was being paid to them on the date of the order of termination, during the pendency of the appeal before the appellate authority. It is also submitted on behalf of the college that these petitioners can receive the salary and they need not work, because their presence in the college is likely to embarrass the administration. We do not want to express anything on this last submission. However, it is sufficient to place on record the undertaking given on behalf of the college that these petitioners would be paid the salary which was being paid to them on the date the order of termination was passed against each one of them during the pendency of the appeals before the first appellate authority, viz., Commissioner, Collegiate Education. They can go to the college only for receiving salary and on all other days they need not attend the college.

9. It is contended on behalf of the petitioners that there are certain serious allegations made against the appellate authority in the affidavit filed before this Court, therefore the petitioners apprehend that in the background of those allegations the appellate authority may not be able to decide the matter dispassionately. It is not necessary to go into this question in this appeal, because it is submitted by the learned Government Pleader that there is a Joint Director of Collegiate Educa-

tion, who is also equal to the Commissioner of Collegiate Education, and he may be directed to decide the appeals. In view of the fact that there is an alternative authority to decide the appeals, we refrain from expressing anything on the allegations made against the Director of Collegiate Education. The appeals filed by the petitioners are to be directed to be heard by the Joint Director of Collegiate Education. All the contentions urged on behalf of the writ petitioners regarding the validity of the termination of their services and regularisation of their services are left open to be urged before the appellate authority. This order shall not be construed as affecting their contentions in the appeals preferred before the appellate authority. Point No.4 is answered on the above terms.

10. The writ appeals and the writ petitions are disposed of in the following terms:

1. The order dated 3.9.1993 passed by the learned single Judge is set aside.

2. The Jawahar Science College is declared as a Private College falling within the meaning of the Act and it is governed by the Act.

3. The resolution dated 4.6.1993 passed by the University Syndicate refusing to approve the appointments is quashed. The Syndicate is directed to reconsider the appointments forwarded for approval in the light of the observations made in this order and in accordance with law.

4. The appointments of 26 Lecturers made by the Jawahar Science College will continue to be operative and continue to hold good unless they are disapproved by the Syndicate of the University.

5. All the appeals before the Director of Collegiate Education, now known as Commissioner of Collegiate Education filed by the petitioners (temporary lecturers) in the writ petitions shall be transferred by him to the Joint Director of Collegiate Education, who, on receipt of the same, shall issue notices to the appellants and respondents, if any, hear them and decide the appeals in accordance with law within a period of three months from the date of receipt of the papers from the Commissioner of Collegiate Education.

There will be no order as to costs in these writ appeals and writ-petitions.

B.S. ---- *Appeal and petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan and Abdul Hadi, JJ.*

A.A.O.No.1192 of 1993 and C.R.P.No.3099 of 1993 8th December, 1993.

Samou Jean Pierre

...Appellant

v.

Jacqueline Samou

...Respondent.

Divorce Act (IV of 1869), Sec. 32 - Wife's petition for restitution of conjugal rights under - Husband contesting - Wife's application for interim maintenance and legal expenses ordered - Husband not paying the interim maintenance and legal expenses - Defence struck off - Order, if maintainable.

No doubt, an order directing payment of maintenance was made by the learned Judge on 15.7.1993, but that order did not contain a default clause that, in the event of non-payment of maintenance, the defence of the appellant might be struck off. In the absence of such a clause in the order, the learned Judge erroneously struck off the defence which he is not entitled to law. Even if there had been such a clause, the court should consider whether on the facts, the defence should be struck off. [Para. 3]

Cases referred to:

Mahalingam Pillai v. Amsavalli, (1956) 2 M.L.J. 289. [Para. 4]

Jaganmohan Rao v. K.Swarupa, 77 L.W. 488. [Para. 5]

Appeal against the order of the Family Court (Principal Judge), Madras, dated 23.8.1993. and made in F.C.O.P.No.757 of 1991, etc.

R.Subramanian, for Appellant.

K.Kumaraswamy, for Respondent.

The Court made the following

ORDER: *C.M.A.No.1192 of 1993*: This is an appeal filed by the respondent in F.C.O.P.No.757 of 1991 on the file of Family Court, Madras, against an order made on 23.8.1993 by the Principal Judge. The original petition was filed by the respondent herein for restitution of conjugal rights. It is not necessary to set out the allegations made in the original petition for the purpose of this appeal. The appellant is contesting the said petition, after filing a counter statement. The respondent filed I.A.No.578 of 1992 for grant of interim maintenance

at the rate of Rs.1,500 p.m. till the disposal of the main original petition and also for Rs.3,000 by way of legal expenses to conduct the original petition. The appellant filed a counter affidavit in that petition. When that petition was pending, the respondent filed a memo on 31.3.1993. According to the memo, no documentary proof was available to the respondent to prove the properties owned by the appellant. A request is made in the memo to treat the interlocutory application as main original petition and dispose of the same, without proof of documentary evidence. Another memo was filed on 10.3.1993, by the respondent, in which some details of the properties owned by the respondent's parents are mentioned. To that, a reply memo was filed by the appellant on 8.6.1993. The appellant has stated that he was working as an accountant at Holy Redeemer's Finance Corporation honorarily and received no salary or wages. The Principal Judge passed an order in the interlocutory application on 15.7.1993, directing the appellant to pay a sum of Rs.500 by way of maintenance, from the date of the application, namely, 18.8.1992, till the disposal of the original petition, plus a sum of Rs.1,500 by way of legal expenses. He calculated the total amount at Rs.8,100 and directed the appellant to pay the sum on or before 10.8.1993. He posted the original petition to 10.8.1993 for payment of arrears of maintenance.

2. On 10.8.1993, according to the order of the learned Judge, the appellant was absent and as he did not pay the interim maintenance or litigation expenses, as ordered by court, his defence was struck off. Referring to the factum of striking off defence, the learned Judge proceeded to dispose of the main original petition. The respondent was examined as P.W.1. Relying on the evidence given by the respondent, the learned Judge granted a decree for restitution of conjugal rights under Sec.32 of the Indian Divorce Act. Thus, the original petition was allotted. Aggrieved by the same, the appeal has been preferred by the appellant who is the husband.

3. We have no hesitation to hold that the order of the learned Judge striking off the defence of the appellant herein on 10.8.1993 is wholly unsustainable. No doubt, an order directing payment of maintenance was made by the learned judge on 15.7.1993, but that order did not contain a default clause that, in the event of non-payment

of maintenance, the defence of the appellant might be struck off. In the absence of such a clause in the order, the learned Judge erroneously struck off the defence which he is not entitled in law. Even if there had been such a clause, the court should consider whether on the facts, the defence should be struck off.

4. The question has been considered in detail in *Mahalingam Pillai v. Amsavalli*, (1956)2 M.L.J. 289, where a learned Judge of this Court, after referring to the English Law and American Law and the position under the various Divorce Acts including the Indian Divorce Act, said:

"In India the Divorce Act, 1869, is silent as to mode of enforcement of decrees and orders for payment of alimony *pendente lite* and must therefore be enforced according to the provisions of the Code of Civil Procedure for the execution of decrees. It cannot be enforced by strict proceedings in contempt. *White v. White*, *Contra Leadis v. Leadis*. But under the Indian Divorce Act, by reason of Sec.7 which makes the reliefs to be granted as conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being gives relief, the Court can if the husband is the petitioner stay the proceedings *Yorkule v. Christima* or suspend or refuse to make a decree absolute until the alimony *pendente lite* ordered is paid or grant injunction or appoint receiver. Some decisions however have gone to the extent of saying that where the husband is the respondent his defences should not be struck out but he should be proceeded against for contempt: *Codd v. Codd*, *Tarasingh v. Falpal Singh*. But as the order for payment of alimony *pendente lite* does not create a legal debt but it is only a liability to pay, it is purely a personal allowance and the right to alimony cannot be alienated or attached *Campbell v. Campbell*, *Smith v. Smith*, *Watkins v. Watkins*, *Wallas Ltd. v. Lagge*."

Bearing these principles in Mind, if we examine the facts of the case we find, that the order of Basheer Ahmed Sayeed, J., directing the husband to pay alimony *pendente lite* has been contumaciously disobeyed. On account of the fact, however, that this payment has not been made a condition precedent for the hearing of the appeal the appeal cannot be straightaway

dismissed and an opportunity should be given to the husband either to pay up or in the alternative the appeal would stand dismissed by a fixed date after the expiry of a reasonable time given to him to comply with the order....."

5. In *Jaganmohan Rao v. K.Swarupa*, 77 L.W. 488, Chief Justice Ramachandra Iyer held that striking out a defence is a serious matter, and it has to be done after taking every circumstance into consideration. It is worthwhile extracting the relevant passage in the judgment which reads as follows:

".....At the same time, I am of opinion that the order of the learned Judge is not in accordance with sound rule of procedure. Striking out a defence is a serious matter, and it has to be done after taking every circumstances into consideration. There can be no anticipatory or conditional order for striking out a defence for the simple reason that the Court has got to consider the materials as they exist on the date when the order for striking out is passed. In the present case, what the learned Judge had done is to strike out the defence a month after the date of the order if a particular thing was not done. An order of that kind would preclude even the court from taking into account the relevant circumstances on the date when the order is to become operative whether the default should be condoned or not. It is extremely undesirable that courts should so bind themselves. While, therefore, holding that it will be competent for the court in a matrimonial action to strike out the defence if there be proved contumacy on the part of the party, I must also say that an order striking out the defence must be a present and not a prospective order to come into existence on an uncertain event happening or not a prospective order to come into existence on an uncertain event happening or not happening. Such conditional orders are no doubt passed in discretionary matters; but they are inappropriate to orders contemplating a striking out of a defence to an action. I am, therefore, unable to sustain the order of the lower court....."

6. We entirely agree with the reasoning contained in the abovesaid two judgments. We hold that the order of the Family Court dated 10.8.1993, striking off the defence of the appellant is unsustainable. Consequently, the disposal of the main original petition by the learned Judge, on the footing

that there was no defence by the appellant, is equally unsustainable. Hence, the order date 23.8.1993 made in Family Court O.P.No.757 of 1991 is set aside and the matter is remanded for fresh disposal in accordance with law. Accordingly, the civil miscellaneous appeal is allowed.

7. There is another original petition filed by the appellant herein for divorce as against the respondent and the same is pending as O.P.No.174 of 1991 on the file of the Family Court, Pondicherry. The appellant filed Tr.C.M.P.No.14189 of 1991 in this Court for transferring O.P.No.757 of 1991 from the Family Court, Madras to the Family Court, Pondicherry, in order to try it along with O.P.No.171 of 1991. Before that petition came up for orders on 6.8.1992 the petition filed by the appellant in the court at Pondicherry was disposed of, as the respondent remained *ex parte*. The prayer of the appellant was granted by the Family Court, Pondicherry. Hence there was no question of transferring the proceedings pending in the Family Court at Madras, to the court at Pondicherry. Consequently, the transfer C.M.P. was dismissed on 6.9.1992. Subsequently, the respondent filed an appeal in C.M.A.No.356 of 1992 in this Court against the *ex parte* order of the Family Court at Pondicherry. The appeal was allowed by a Division Bench of this Court by order dated 15.3.1993. The *ex parte* order passed by the Family Court at Pondicherry was set aside and the petition was remitted to that court to be disposed of in accordance with law. Thus O.P.No.174 of 1991 is again pending on the file of the Family Court at Pondicherry.

8. Now that we are remanding this O.P.No.757 of 1991 to the Family Court at Madras, we are considering the question whether the two original petitions should be heard by the same court together. We find the evidence will be the same and the interest of justice requires a joint trial of both the original petitions by the same court. The respondent herein has no objection to the original petition at Madras to be transferred to the Family Court at Pondicherry as she is now residing at Pondicherry. Hence, we exercise our *suo motu* power under Sec.24 of the Code of Civil Procedure and transfer O.P.No.757 of 1991 on the file of the Principal Judge, Family Court, Madras, to the file of the Family Court at Pondicherry to be tried along with O.P.No.174 of 1991 pending on its file.

9. The entire records in F.C.O.P.No.757 of 1991

have been brought to this court for the purpose of this appeal. It is not necessary to send back the records to the Family Court at Madras, so that they may be transferred in turn to the Family Court at Pondicherry. That will only involve unnecessary delay and a cumbersome procedure. Instead, we direct the Registry of this Court to send the records directly to the Family Court at Pondicherry, with a memo that the said court must take it on file to be tried along with O.P.No.174 of 1991. A copy of this order shall also be sent along with the records. Apart from that, the Registry must also send a separate memo to the Family Court at Madras, informing the said Court that the original petition has been transferred by the order of this Court to the Family Court at Pondicherry, and appropriate entries may be made in the register in that court at Madras.

10. We direct the Family Court at Pondicherry to take up both the original petitions together for trial and dispose of the same on or before 15.3.1994 and send a report to this Court. The civil miscellaneous appeal is allowed on the above terms, parties will bear their respective costs.

C.R.P.No.3099 of 1993: This civil revision petition is filed by the husband against the order of maintenance passed by the Principal Judge, Family Court at Madras. We have earlier referred to the circumstances under which the order of maintenance has been passed. Learned counsel for the petitioner points out that there is no evidence on record on the side of the respondent to prove the income earned by the petitioner and the court below erred in granting a sum of Rs.600 p.m. by way of maintenance and Rs.1,500 for legal expenses. According to the learned counsel, the order is based on surmises and conjectures and not on any evidence.

12. No doubt the order of the learned Judge is not happily worded, but however, we find sufficient material on record as at present to sustain the grant of interim maintenance to the respondent. In the main original petition, the respondent has categorically stated in paragraph (3) that the petitioner herein is working as Clerk in Holy Redeemer's Finance Corporation, Pondicherry. In the Counter Statement filed by the petitioner there is no denial of the said averment. On the other hand, in paragraph (2), it is stated by the petitioner that the allegations in paragraph (3) of the petition are only partly correct. As he has not

denied this averment specifically, it goes without saying that he accepts the said averment as correct. 13. When the respondent filed the application for interim maintenance, she has stated in the affidavit filed in support thereof that the petitioner herein has got ample means and valuable properties in Pondicherry getting a rental income of more than Rs.8,000 per mensem and his salary would be Rs.3,500. In the counter statement the petitioner has denied that he has got properties and is getting a rental of Rs.8,000 per mensem. He also denied that he is getting a salary of Rs.3,500 from a firm. He has denied that he is employed. He has stated "I am not employed at present". Again, in paragraph (5) of the counter affidavit, he has stated that he is unemployed and is living at the mercy of his aged parents and that he is not earning even a single paisa. We have already referred to the memos filed by the petitioner as well as the respondent before the Family Court. Thus, no evidence was adduced as such before the Family Court in support of the claim made by the respondent in the application for interim maintenance. However, the statement in the original petition and the absence of denial in the counter statement filed by the petitioner herein will prove that the petitioner was employed at least at the time when the original petition was filed. It is also admitted in his reply memo dated 8.6.1993 that he was working at Holy Redeemer's Finance Corporation, but he has stated that he was working honorarily. That statement is given only after a period of nearly two years since the filing of the original petition. That shows that it is an after-thought. Hence, we are unable to accept the version of the petitioner that he is not employed and that he is wholly depending on his parents. If he was employed earlier and he was out of employment at the time of petition for maintenance, he ought to have given the details by producing some certificate to that effect. In the absence of any particulars given by the petitioner, we proceed on the footing that the petitioner is employed and is earning some amount. No doubt, there is no evidence to prove the exact earning. In the original petition the respondent has stated that the petitioner is employed in Holy Redeemer's Finance Corporation, Pondicherry, which is not denied. But no certificate has been produced by the petitioner to show that the income earned by him is nil and that he is working honorarily. In the absence of such evidence, we are not able to find

fault with the conclusion of the learned Judge that the petitioner was earning at least Rs.3,000 p.m. On that basis, the learned Judge has calculated that the amount of maintenance payable to the respondent will be Rs.600 p.m.

14. Under Sec.36 of the Indian Divorce Act, the court on being satisfied of the truth of the statements contained in the petition for alimony, may make an order for payment of alimony, pending the suit as it may deem just. The proviso to Sec.36 of the Act states that alimony pending the suit, shall not exceed one fifth of the husband's average net income for the three years next proceeding the date of the order. It is on that footing, the learned Judge fixed the amount as Rs.600 p.m. We do not find any error in the calculation made by the learned Judge.

15. When the appeal was being argued, it was submitted by learned counsel for the appellant that the respondent has forcibly entered into his house in Pondicherry on the strength of the order given by the Family Court for restitution of conjugal right. It was also submitted by him that she had given a letter to the police authorities when a complaint was made by him wherein she has stated that she would vacate the house, if the order of the Family Court was set aside. It was therefore submitted by learned counsel for the appellant that the respondent should be directed to vacate the premises in which the appellant is residing. After hearing counsel on both sides, we think that it would be just if the respondent is permitted to live in a portion of the house of the petitioner at least during the pendency of the original petitions in the Family Court. Learned Counsel for the respondent submitted that the ground floor of the house in which the appellant is living is vacant and that the respondent may be permitted to live there. Learned counsel for the appellant has ascertained from his client that the said portion is vacant and he has no objection to the respondent residing in the said portion till the disposal of the original petitions. He has also stated that neither the appellant nor his parents would interfere with the occupation of the respondent of the ground floor during the pendency of the proceedings. We also direct the respondent not to interfere with the possession of the appellant and his parents of the first floor of the same house. Where they are residing. She shall vacate the premises if the original petitions are decided against her. On that

condition, we permit the respondent to live in the house of the appellant in the ground floor during the pendency of the proceedings. Such permission is granted on the basis of the consent of the appellant.

16. In view of the fact that we have now permitted the respondent to live in a portion of the house, she will have no necessity to search for a premises for her accommodation and pay rent. Therefore to that extent the amount of maintenance awarded to her should be reduced. Taking all the facts and circumstances of the case, we are of the opinion that a sum of Rs.100 should be deducted from the amount awarded by the lower court. It is not in dispute that the respondent is in occupation of a portion of the house of the appellant from 3.10.1993. Hence, the appellant will be liable to pay a sum of Rs.500 p.m. only by way of maintenance from 1.10.1993, onwards till the disposal of the original petitions. As regards the period from 18.8.1992 to 30.9.1993, the order of the learned Judge granting Rs.600 p.m. will stand. The order granting Rs.1,500 towards legal expenses will also stand. Thus the appellant will be liable to pay a total sum of Rs.8,100 by way of maintenance upto 30.9.1993. He will also be liable to pay a sum of Rs.500 for October, 1993 and another sum of Rs.500 for November, 1993, thus making a total of Rs.9,100. The amount due for December, 1993 will be Rs.500, making a total of Rs.9,600. The appellant shall pay the sum of Rs.9,600 to the respondent on or before 7.1.1994. He shall also pay the sum of Rs.1,500 towards legal expenses on or before the same date, viz., 7.1.1994. As regards the future, appellant shall pay a sum of Rs.500 for the month of January, 1994 on or before 7th of February, 1994 and similarly on or before the 7th of every succeeding month.

17. This civil revision petition is ordered accordingly. There will be no order as to costs.

B.S. ---- Appeal allowed and petition ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *Bakthavatsalam, J.*

W.P.No.18297 of 1993 *4th November, 1993.*

C.Arun Prasad

...Petitioner

v.

**The Headmaster, Municipal H.S.School,
Mayiladuthurai and others** *...Respondents.*

Constitution of India (1950), Art.226 - Natural justice - Principles of - Student expelled from institute on certain charges - Student not informed of charges - No enquiry held - Opportunity to meet charges not given - Expulsion order, if can be interfered with.

It is true that no hard and fast rule can be laid down with regard to the disciplinary action to be taken against a student. It is also true that this Court should be very slow in interfering with the matters of enforcement of discipline and that technicalities of law should not be imported to further the case of a student who had indulged in indiscipline..... But when the Staff Council has passed a resolution as found in the files, a number of charges are seen against the petitioner and others. The petitioner seems to have been expelled on a number of charges which are not known to him and no enquiry is seen. This itself is sufficient to set aside the impugned order before this Court as to violate the principles of natural justice. One cannot import five principles of law and weigh the same in golden scales as held in *Controller of Examinations etc., etc., v. G.S.Sunder, 1992(4) J.T. 204*. Yet the minimum requirement of principles of natural justice has not been followed in this case. It has been held that when the order of expulsion is a quasi-judicial order, there should be sufficient compliance with regard to the principles of natural justice. The student in this case ought to have been informed about the charge or the allegation he has to meet and he ought to have been given an adequate opportunity to meet the said charge. Since that has not been done in this case and that the principles of natural justice have not been followed, the impugned order is liable to be set aside.

[Paras. 5 & 6]

Case referred to:

Controller of Examinations etc., etc., v. G.S. Sunder, 1992(4) J.T. 204. [Para. 5]

Kobad Jehangir Bharda v. Farokh Sidhiwa, A.I.R. 1991 Bom. 16. [Para. 6]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records on the file of the first respondent relating to the resolution No.2 dated 6.8.1993 passed by the teachers association and quash the same.

R.Karuppan, for Petitioner.

Nataraja Sankar, for Respondent No.1.

D.Krishnakumar, Government Advocate, for Respondent Nos.2 & 3.

The Court made the following

ORDER: When the miscellaneous petition came up for hearing by consent of both parties, the main writ petition itself is taken up for final disposal.

2. The writ petitioner is before this Court against an order of expulsion from the first respondent school from 6.8.1993 onwards. This resolution seems to have been passed by the teachers association. The petitioner hails from a poor coolie family and he belongs to Scheduled Caste. It seems that a strike had taken place on 4.8.1993 against the decision for raising the sum of Rs.300 for uniforms. It seems the students abstained from classes and the Sub-Collector interfered with the matter and the police came to the scene and the students were injured. It is alleged in the affidavit that the petitioner was only a spectator of gathering. It seems the school authorities held three students responsible for the said incident and an order of expulsion was passed on 5.8.1993 against (1) Manivannan, (2) Agora Moorthy, and (3) Ramesh, all belonging to 12th Standard. It seems the Headmaster of the school made a complaint to the Inspector of Police against the said persons. It is also alleged in the affidavit that the petitioner was not in any way connected with the incident. It is also alleged that on 5.8.1993, the Tahsildar, the third respondent herein, deputed by the Sub-Collector visited the said school and after enquiry the Tahsildar left. It is also alleged in the affidavit that aggrieved by his report to the Tahsildar, the petitioner was expelled from the school and that the person who passed the order was the acting Headmaster, against whom the petitioner had

complained to the Tahsildar. It is also alleged in the affidavit that the summary expulsion is said to have been resolved by the Teachers Association in the interest of discipline in the school. It is also stated that the three students who were found to be the cause of the mischief, mentioned above, were only suspended initially and that they were re-admitted back to the school and however, one of the said three students named Ramesh, dropped out of the school. On 9.8.1993, it seems the third respondent convened a conciliatory meeting of the teachers, parents and students and that the outcome of the meeting was recommendations by the third respondent to the first respondent to transfer the admission of the student Ramesh to some other school and that the petitioner shall be re-admitted. It is stated that the first respondent has not heeded to the recommendation but the petitioner was kept in suspended animation. It is also stated that when the petitioner approached other schools with a request to re-admit him, he came to know that the first respondent had already requested them not to give admission to the petitioner. It is also stated that the transfer certificate of the petitioner is still with the first respondent and that it has not been enclosed with the order of expulsion. It is also stated in the affidavit that the impugned order is passed behind the back of the petitioner, that it is passed in violation of the principles of natural justice, fair play and equity and as such the impugned order has got to be set aside.

3. A counter-affidavit has been filed by the first respondent Headmaster stating that the petitioner had passed 10th Standard and was studying the XII Standard. It is also claimed in the counter-affidavit that the petitioner developed a tendency to create a confusion and pandemonium in the school atmosphere and disturbed the education of the poor students. It is also stated in the counter-affidavit that considering the economical and social standard of the petitioner, it was tolerated. It is also stated in the counter-affidavit that from the present academic year, it has been decided to observe and enforce the prevailing Rules and regulations relating to the conduct of the students and strict discipline and that as an initial measure the students were advised to come to the school and to attend classes with blue and white uniforms. It is also stated that the staff council of the school welcomed the measure, but the petitioner

with the intention to create disturbance induced the students not to co-operate with the teaching staff and ill-advised other students to disobey their teacher and violate their directions. With regard to the allegation made in para.3 of the affidavit, it is stated that it is not correct to state that the students were wearing the same dress for three days and that the petitioner was attending the school with colourful garments without washing the same for three days. The allegation made in the affidavit with regard to the fact that there was a strike on 4.8.1993 is denied in the counter-affidavit. It is further stated that on 5.8.1993 the abovementioned three students were suspended temporarily as they had attempted to disturb the school's calm atmosphere along with the petitioner. It is also stated that while some of the Post Graduate teachers were conducting science classes in the school laboratory for the XI Standard students, the petitioner collected few other students and attempted to enter into the laboratory with the intention to revoke the order of suspension caused against his friends (against three of them stated earlier). It is also stated in the counter-affidavit that in order to save the life of the students inside the science laboratory, the teachers attending the science class at that time out of the responsibility with the maximum strain objected and prevented the petitioner and his friends from entering into the laboratory. The allegation made in para.7 of the affidavit is denied. It is also stated that the petitioner did not feel sorry for his behaviour and that he refused to listen to the advice of the teachers and that the petitioner stood an example of the worst category of the students. It is also stated that the petitioner has invited his own end out of his own behaviour. It is also stated in the counter-affidavit that the writ petition is not maintainable as the petitioner has filed the writ petition without availing of the alternative remedies (wrongly typed in the counter-affidavit as "without invoking the alternative and prayer sources"). It is also stated that the respondents have no animosity or intention against the petitioner and that if a direction is issued to re-admit the petitioner, the first respondent institutions will be ruined and put to heavy hardship. It is also stated that the agitated students are the friends of the petitioner and suddenly they become wild and attacked the staff, as mentioned above, at their duty time. Three names of the teachers are given in the counter-affidavit.

It is also stated that the three students who were found guilty refused to tender apology and they abused in a bad language, and as such the Headmaster then assembled the staff council and had taken the decision to expel the petitioner from the school. It is also stated that there was no summary expulsion as alleged. It is also stated that the petitioner is not innocent, that he is mischievous and that he had acted as main brain for the bad incident, mentioned above.

4. I have considered the arguments of Mr.R.Karuppan, the learned counsel for the petitioner and of Mr.S.Nataraj Shankar, the learned counsel for the first respondent and of Mr.D.Krishnakumar, learned Government Advocate for the other respondents. Entire files has been produced before this Court by the learned counsel appearing for the first respondent school. I have gone through the files. On a perusal of the files, I find that a report had been sent by one R.Radhakrishnan, on 6.8.1993 to the Sub-Inspector of Police, Mayiladuthurai, in which the name of the petitioner is mentioned stating the petitioner had used the bad language against the teacher. On the basis of the said report, an endorsement is seen, made by K.Rangaraj, the Headmaster-in-charge of the school to the effect that the said three students had been sent for through a peon. It is further endorsed by the Headmaster-in-charge that the said three students were enquired in the presence of teachers and other teachers and however, they were not ready to accept the advice made by him and as such the said letter had been placed before the staff council. The staff council seems to have met on 10.8.1993 and has passed a resolution stating that students (1) N.Agoramoorthy, and (2) K.Manivannan had given apology and that their parents also gave an undertaking that such an incident will not take place and that they may be re-admitted. With regard to the petitioner before this Court, an unanimous resolution has been passed stating certain reasons *i.e.* he is creating loss to the school, attacking teachers, and abusing teachers with bad language and also inducing other students, violating Rules and Regulations of the School. It is also seen from the same resolution that (1) S.Ramesh, (2) G.Thiagarajan, and (3) C.Arunprasad (petitioner herein) have been expelled for misconduct. The petitioner seems to have made a representation to the Tahsildar, Mayiladuthurai on 12.8.1993,

apparently, the concerned school being a municipal school. In the representation sent to the Tahsildar, the petitioner has stated that he will not indulge in bad activities in future and requested the Tahsildar to recommend the school authorities to admit him. The endorsement made on the said representation by the Headmaster of the school shows that the recommendations of the Tahsildar have been considered by the staff council but it reaffirmed the resolution passed on 10.8.1993. A report to the District Educational Officer is sent about the expulsion of the petitioner.

5. It is true that no hard and fast rule can be laid down, with regard to the disciplinary action to be taken against a student. It is also true that this Court should be very slow in interfering with the matters of enforcement of discipline and that technicalities of law should not be imported to further the cause of a student who had indulged in indiscipline. However, if the facts of the case before me are looked upon, I do not see any ground to sustain the summary order of expulsion passed by the school authorities. Files do not show that any sort of enquiry has been done. The Headmaster-in-charge seems to have sent for the petitioner and others and they refused to tender apology. But when the staff council has passed a resolution, as found in the files, number of charges are seen against the petitioner and others. The petitioner seems to have been expelled on a number of charges, which are not known to him and no enquiry is seen. This itself is sufficient to set aside the impugned order before this Court, as it violates the principles of natural justice. One cannot import fine principles of law and weigh the same in golden scales, as held by Mohan, J. speaking for the Bench in *Controller of Examinations etc., etc., v. G.S. Sunder*, 1992(4) J.T. 204. Yet, the minimum requirement of principles of natural justice has not been followed in this case.

6. Though I find, on a perusal of the files, that a complaint has been filed against the petitioner to the Headmaster-in-charge and police, no whisper has been made in the counter-affidavit filed before this Court. Except the bare resolution passed by the staff council, no other material is found in the files warranting expulsion of the petitioner herein. If the expulsion of the petitioner is to be sustained, principles of natural justice ought to have been followed. No notice, indicating allegations or charges is found in the files. This is held to be bad by a

Division Bench of the Bombay High Court in *Kobad Jehangit Bharda v. Farokh Sidhwa*, A.I.R. 1991 Bom. 16. Even in the counter-affidavit I do not see any allegation against the petitioner that he is responsible for the incident of assaulting a teacher, according to the complaint, as found in the files. Though the files show that a complaint has been made by one Radhakrishnan, Teacher stating that the petitioner had come and threatened him, no mention is made in the counter-affidavit about the said complaint, because no enquiry has been made on that complaint. That apart, I do not see any justification in the action of the respondent school in re-admitting other students, who were kept under suspension initially, and expelling the petitioner alone from the school. Though the learned counsel appearing for the respondent school states that the petitioner is a ring leader and he has got to be expelled, as I have already stated, it is to be done following the principles of natural justice. It has not been done here. It has been held that when the order of expulsion is a quasi-judicial order, there should be sufficient compliance with regard to the principles of natural justice. In my view, the student in this case ought to have been informed about the charge or the allegation he has to meet and he ought to have been given an adequate opportunity to meet the said charge. Since that has not been done in this case, and that the principles of natural justice have not been followed, the impugned order is liable to be set aside. Accordingly, the impugned order is set aside. It is open to the respondents to hold an enquiry, if they want to pursue the matter further. But, in my view, the respondent school would be well advised if they take a letter of apology from the petitioner and re-admit him into the school as they have re-admitted the student who started the trouble if they so wish, taking into consideration the petitioner is a XII Standard and examinations are fast approaching in March/ April, 1994. Till the enquiry is over, the petitioner is not entitled to attend the classes. Such an enquiry, if the respondent school proposes to hold as I stated earlier, the enquiry is to be completed on or before 19.11.1993. If there is lack of attendance, the school authorities have to take care of it, if the petitioner is allowed to attend classes. This writ petition is ordered accordingly. No costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Janarthanam, J.

W.P.Nos.19330 to 19333 of 1993 and W.M.P.Nos.30090 to 30093 of 1993 28th October, 1993.

M/s.Chemicals and Plastics India Ltd.

...Petitioner

v.

Special Tahsildar (Urban Land Tax), Mettur

...Respondent.

Constitution of India (1950), Art.226 - Tamil Nadu Urban Land Tax Act (XII of 1966), Sec.20 (1)(a) and proviso to Sec.20(1)(b) - Alternative remedy - Act providing for appeal against levy of urban land tax - Prescribing that appeal will not lie unless tax levied has been paid before appeal is filed - Remedy provided if can be short-circuited by resorting to writ proceedings on ground that appeal is onerous and illusory.

No doubt true it is that the proviso adumbrated to Sub-sec.(1)(b) of Sec.20 of the Tamil Nadu Urban Land Tax Act prescribes that no appeal shall be unless urban land tax levied has been paid before the appeal is filed. To avail of the statutory remedy of appeal as had been provided under the Act, it is but necessary for the petitioner to pay the tax assessed before even the appeals are entertained to the competent authority. The fact that the payment of tax for availing of this statutory remedy of appeal is rather burdensome is not at all a ground to be taken into consideration for allowing the petitioner to resort to knock at the jurisdiction of this Court under Art.226 of the Constitution of India thereby shortcircuiting the statutory remedy of appeal provided under the Act. So long as the statutory provision is available in the Act, it cannot at all be stated that such a provision casts a heavy burden to pay tax before even the appeals are entertained and therefore such a remedy of appeal is rather illusory and not efficacious.

[Para. 9]

Cases referred to:

Cape Brapdy Syndicate v. Inland Revenue, (1921) 1 K.B. 64. [Para. 11]

Commissioner of Income-tax, Patiala v. M/

s.Shahzada Nand & Sons, A.I.R. 1966 S.C. 1342: (1966)1 I.T.J. 635: (1966)60 I.T.R. 392: (1966)1 S.C.J. 715. [Para. 11]

The Commissioner of Sales Tax, U.P. v. M/s.Manual Sen Shyam Lal, A.I.R. 1975 S.C. 1106. [Para. 12] Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorarified mandamus* calling for the records of the respondent culminating in his revised assessment order in Case No.139, 140, 141 and 142/ Mettur/1401, dated 27.8.1993 and quash the same and direct the respondent to determine the market value of the land owned by the petitioner in Mettur Township at Rs.2,400 per ground, etc.

R.Sashidharan, for Petitioner.

T.Ayyasamy, Government Advocate, (Taxes), for Respondent.

The Court made the following

ORDER: M/s.Chemicals & Plastics India Ltd., Madras-86 (petitioner in all W.Ps.) is a public limited company, registered under the Companies Act, 1956, carrying on, *inter alia*, business in the manufacture of Chemicals and Plastics such as polyvinyl chloride, compounds etc. The petitioner, it is said, for the purpose of manufacturing the above chemicals and plastics had large plants and machineries, storage facilities, equipments etc., in a large area of land, totally measuring 1,261 grounds and 1,030 sq.ft., in Mettur Dam, R.S., falling within Mettur Taluk, Salem District. The said area, it is said, had been divided into four blocks, namely, Block No.61(2A), Block No.61(2B), Block No.62(1) and Block No.64(1).

2. The Tamil Nadu Urban Land Tax Act, 1966, (Tamil Nadu Act XII of 1966 - for short 'the Act') had been extended to Mettur Municipality by the Tamil Nadu Urban Land Tax Amendment Act, 1991 (Tamil Nadu Act I of 1992), which must be deemed to have come into force on and from first July, 1991. After the coming into force of the said Act, the petitioner was stated to have filed individual returns in respect of the aforesaid four blocks under Sec.7-D of the Act.

3. The Special Tahsildar (Urban Land Tax, Mettur (respondent in all W.Ps.), on perusal of the returns so received, passed individual assessment orders of even date, namely, 15.6.1993 in Case Nos.139 (Block No.61(2A), 140 (Block No.61(2B), 141 (Block No.62(1) and 142 (Block No.64(1)

levying urban land tax on and from fasli 1401, determining the market value at Rs.16,800. Subsequently, the petitioner was stated to have received a notice dated 6.7.1993 from the respondent in all the four cases under Sec.32(1) of the Act seeking to revise the assessments on the ground of 40% concession extended instead of 10% concession.

4. The petitioner was stated to have submitted a reply dated 20.7.1993 to the respondent objecting to the proposal for *suo motu* revision of assessment, after the assessment orders had been passed. After taking into consideration the objections, the respondent passed revised assessment orders in all those four individual cases of even date, namely 27.8.1993 and intimated the petitioner that an appeal against the levy of urban land tax in those orders lie to the Tamil Nadu Urban Land Tax Tribunal (for short 'Tribunal') under Sec.20(1)(a) of the Act within thirty days from the date of receipt of those orders.

5. The petitioner, without resorting to file appeals before the Tamil Nadu Urban Land Tax Tribunal, resorted to the present actions praying for issue of writs of *certiorari* and *mandamus* to quash those orders and direct the respondent to determine the market value of the land at Rs.2,400 per ground, contending that the market value of the land had been determined much against the settled principles of law, besides stating that the appeal remedy, as had been provided under Sec.20 of the Act is rather onerous and illusory, in the sense of an appeal not having been entertained, unless urban land tax levied is paid.

6. The petitioner also filed W.M.P. Nos.30090 to 30093 of 1993 praying for interim stay of those orders pending disposal of these writ petitions.

7. When these writ petitions, along with W.M.Ps., came up for admission to-day (28.10.1993), this Court, directed Mr.T.Ayyasamy, learned Government Advocate (Taxes) to take notice and he accordingly did so, and arguments of either learned counsel were heard.

8. There is no pale of controversy that as against the impugned individual assessment orders, the petitioner did not at all file appeals before the tribunal and instead the present actions had been resorted to. The reasons given for not availing of the statutory remedy of appeal as has been provided under Sec.20 of the Act, is that such appeal provision is rather illusory and not efficacious for

the reason of casting an undue burden on the shoulders of the affected party like the petitioner, in the sense of being required to pay the tax assessed before ever the appeals are entertained.

9. No doubt true it is that the proviso adumbrated to Sub-sec.(1)(b) of Sec.20 of the Act prescribes that no appeal shall lie, unless urban land tax levied has been paid before the appeal is filed. To avail of the statutory remedy of appeal, as had been provided under the Act, it is but necessary for the petitioner to pay the tax assessed, before ever the appeals are entertained by the competent authority. The fact that the payment of tax for availing of this statutory remedy of appeal is rather burdensome is not at all a ground to be taken into consideration for allowing the petitioner to resort to knock at the jurisdiction of this Court under Art.226 of the Constitution of India, thereby short-circuiting the statutory remedy of appeal provided under the Act. So long as such a statutory provision is available in the Act, it cannot at all be stated that such a provision casts a heavy burden to pay tax before ever the appeals are entertained and therefore, such a remedy of appeal is rather illusory and not efficacious.

10. In a taxing statute like the present Act, there is no question of any emotive appeal of harshness of the provisions casting undue burden on the shoulders of the assessee. The plain meaning of the statutory provisions must be strictly adhered to by the court without having any sway or consideration, other than the explicit provisions adumbrated therein.

11. At this juncture, the interpretative approach to be adopted in respect of a taxing statute may be referred to and the same is getting revealed by the classic statement of Rowlatt, J., in *Cape Brapdy Syndicate v. Inland Revenue Commrs.*, (1921) 1 K.B. 64 at 71 and the Apex Court of this country had an occasion to refer to and extract such a classic statement in paragraph (8) of its decision in the case of the *Commissioner of Income-tax, Patiala v. M/s. Shahzada Nand & Sons*, A.I.R. 1966 S.C. 1342: (1966)1 I.T.J. 635: (1966)60 I.T.R. 392: (1966)1 S.C.J. 715 and it runs as under:

"In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

To this may be added a rider in a case of reasonable doubt the construction most beneficial to the subject is to be adopted. But even so, the fundamental rule of construction is the same for all statutes, whether fiscal or otherwise.

The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just or expedient."

12. The Supreme Court, in the process of consideration of the duty of the Court to interpretation of statute and dealing with the effect and importance of the maxim "*ut res magis valeat quam pereat*" in the case of *The Commissioner of Sales Tax, U.P. v. M/s. Manual Sen Shyam Lal, A.I.R. 1975 S.C. 1106* at paragraph 27 said thus:

"A statute is supposed to be an authentic repository of the legislative will and the function of a court is to interpret it "according to the intent of them that made it." From that function, the court is not to resile. It has to abide by the maxim *ut res magis valeat quam pereat*, lest the intention of the legislature may go in vain or be left to evaporate into thin air. Where that intent is clearly expressed in the language of the Act, there is little difficulty in giving effect to it. But where such intent is covert and couched in language which is imperfect, imprecise and deficient, or is ambiguous or enigmatic and external aids to interpretation are few, scanty and indeterminate, the court may, despite application of all its experience, ingenuity and ratiocination, find itself in a position no better than that of a person solving a cross word puzzle with a few given hints and hunches. In such a situation, a mere reference to the High Court of a question for opinion may not afford an adequate solution. Only Legislative amendment may furnish an efficacious and speedy remedy."

13. With the rules of construction, as extracted above, in mind, the facts of these actions, if scanned and sifted, it goes without saying that the legislative intent, as had been clearly expressed under Sec.20 of the Act must have to be given effect to, without any reservation whatever and if this Court resorted to entertain these actions, by short-circuiting the statutory remedy, as had been provided

under the Act, it would tantamount to give a go-by to the statutory provisions thus adumbrated under the Act, in the sense that exercise of power under Art.226 of the Constitution of India, can go to the extent of violating such a clear statutory provision.

14. In this view of the matter, all these writ petitions deserve to be dismissed, even at the admission stage and they are accordingly dismissed. Consequently, W.M.Ps. are also dismissed. There shall, however, be no order as to costs, in the circumstances.

B.S. ----- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.3716 of 1987 30th August, 1993.

Dakshinamurthy ...*Petitioner*
v.
Raman and another ...*Respondents.*

Civil Procedure Code (V of 1908), O.41, Rule 5 - Stay - Suit for declaration of title and injunction - Decreed - Appeal dismissed - Second appeal filed - Stay of operation of decree of lower court not granted - Decree holder, if barred from executing decree on ground that second appeal was pending.

It is a known principle of law that mere filing of the appeal will not amount to stay of the operation of the decree of the lower Courts. Until the decree of the courts below are set aside and the decree holder is entitled to claim the benefits of the same and unless there was a stay by the appellate court. The court below is wrong in dismissing the petition filed in E.P.No.485 of 1986 on the ground that the second appeal is pending. [Para. 4]

B.Ramamoorthy, for Petitioner.

S.Nagarajan, for Respondents.

The court made the following

ORDER: The civil revision petition is directed against the order passed in E.P.No.485 of 1986 in O.S.No.1521 of 1981 on the file of the District

Munsif Court, Villupuram.

2. Short facts are: The revision petitioner had filed a suit for declaration of title and for injunction in O.S.No.1521 of 1981 and got the decree in his favour. The same was confirmed in the appeal before the lower appellate court. While so, the respondents have filed the second appeal in this Court and it is still pending (S.A.No.1891 of 1985). According to the revision petitioner, the respondents have not obtained stay of the operation of the order of injunction granted by the courts below. In that background, he has filed E.P.No.485 of 1986 under O.21, Rule 32(1) praying to proceed against the respondents for Contempt of Court. That was resisted by the respondents on the ground that the second appeal is pending. The court below has dismissed the execution petition. Aggrieved by that order, the plaintiff has come forward with this civil revision petition.

3. Mr.B.Ramamoorthy, learned counsel for the revision petitioner would submit that the revision petitioner had obtained decree for declaration of title and for injunction and it has been confirmed by the lower appellate court and there is no stay in the second appeal and while so, the court below is wrong in dismissing the petition on the ground that the second appeal is pending.

4. I find that the submission of the learned counsel for the petitioner is well founded. It is a known principle of law that mere filing of the appeal will not amount to stay of the operation of the decree of the lower courts. Until the decrees of the courts below are set aside, and the decree-holder is entitled to claim the benefits of the same and unless there was a stay by the appellate court. The court below is wrong in dismissing the petition filed in E.P.No.485 of 1986 on the ground that the second appeal is pending. Hence the matter is to be remitted back to the court below for proceeding with the E.P. in accordance with law.

5. In view of the above, the civil revision petition is allowed setting aside the order passed in E.P.No.485 of 1986 in O.S.No.1521 of 1981 and the matter is remitted back to the court below for taking the said E.P. to its original files and disposing it afresh according to law and in the light of the observations made in this order.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: K.M.Natarajan, J.

W.P.No.9424 of 1984 3rd November, 1993.

Narayanaswamy and another ...Petitioners
v.

The Special Tahsildar for Land Acquisition, Adi-
Dravidar Welfare, Tiruppur and another

...Respondents.

Land Acquisition Act (I of 1894), Sec. 18 - Reference to civil court - Land acquired - Landholder disputing correctness of amount - Awarded as compensation - Receiving amount under protest - If sufficient to refer matter to civil court to decide issue.

It is seen that admittedly at the time of receiving the amount, the petitioner protested against the quantum of the said sum and that while receiving the amount, the petitioner made an endorsement on the receipt stating 'received under protest'. In the considered opinion of the court, the ratio laid down by the Division Bench of this Court, in *Venkataswami Naidu v. The State of Madras, (1964) 1 M.L.J. 262*, squarely applies to the facts and circumstances of the present case and applying the said ratio laid down by the Division Bench of this Court in the decision referred to above, this writ petition has to be allowed and the matter has got to be referred to the civil court for adjudication. [Para. 4]

Cases referred to:

The Deputy Collector, Revenue, Karaikal v. Angeline Devadoss, 1992 Writ L.R. 137. [Para. 4]

Venkataswami Naidu v. The State of Madras, (1964) 1 M.L.J. 262. [Para. 4]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 1st respondent to refer the matter to the civil court for determining the amount of compensation payable to the petitioner for the acquisition of their land in S.No.408/2 to an extent of 17 1/2 cents in Angeripalayam, Chettipalayam Village, Palladam Taluk, Coimbatore District.

P.Shanmugham, for Petitioner.

M.M.Sundaresh, Government Advocate, for Respondents.

The Court made the following

ORDER: The above writ petition has been filed for the issuance of a writ of *mandamus*, directing the first respondent to refer the matter to the civil court for determining the amount of compensation payable to the petitioner for the acquisition of their land in S.No.408/2 to an extent of 17 1/2 cents in Angeripalayam, Chettipalayam Village, Palladam Taluk, Coimbatore District.

2. Brief facts which are necessary for the disposal of this writ petition can be stated as follows:

The petitioners are the joint owners of an extent of 17.50 cents in S.No.408/2, Angeripalayam, Chettipalayam Village, Palladam Taluk, Coimbatore District. Proceedings were taken under the Land Acquisition Act (hereinafter referred to as 'the Act') by the respondents for the purpose of providing house sites to Adi Dravidars. According to the petitioner, though no notice under Secs.9(3) and 10 of the Act was issued to him, the petitioner was informed that he should appear before the first respondent on 30.3.1984 and accordingly he appeared before the first respondent on that day. At that time, the petitioner was informed that a sum of Rs.5,390.65 was being awarded as compensation to him towards his share of 17 1/2 cents in G.S.No.408 Chettipalayam. Immediately, the petitioner told the first respondent that the amount as determined by the first respondent was very low and that the petitioner was not prepared to accept the said sum, for which the first respondent replied him that, if the petitioner was disputing the correctness of the amount awarded by the first respondent, the petitioner could receive the said sum only under the protest and that ultimately, the civil court on a reference under Sec.18 of the Act would decide the correct amount of compensation payable to the petitioner's share. Therefore, the petitioner had received the said sum of Rs.5,390.65 under protest. The petitioner had also signed the receipt stating 'received under protest'. Subsequently, though the petitioner was expecting that the first respondent would refer the matter relating to the determination of amount towards compensation payable to him to the civil court, he did not receive any notice from the civil court in that regard. But the petitioner came to know from the land owner one Kuppammal that the first respondent was referring the matter for

determination of enhanced compensation in respect of the other land owner, viz., one Jagadambal alone and not the case of the petitioner, which necessitated the petitioner to submit a representation on 30.6.1984 to the first respondent. According to the petitioner till the date of filing of the present writ petition, the matter had not been referred to the civil court for adjudication under Sec.18 of the Act. It was only under those circumstances, the present writ petition came to be filed.

3. A counter-affidavit has been filed on behalf of the respondents, wherein it is stated that notices under Secs.9(3) and 10 of the Act were issued on 13.3.1984, that after receipt of the said notices the petitioner also appeared for the enquiry and that compensation amount was also received by the petitioner. It is further stated in the counter-affidavit that it is true that the amount was received only under protest, but no application was received from the petitioner within six weeks for referring the matter to civil court as contemplated under Sec.18(2) of the Act and that no representation was received by the Land Acquisition Officer on 30.6.1984. It is also specifically stated in the counter that as the claim for enhanced compensation is not based on any documentary evidence, this writ petition deserves to be dismissed as devoid of merit.

4. I have heard the rival submissions made by the learned counsel appearing for both parties. It is seen that admittedly at the time of receiving the amount, the petitioner protested against the quantum of the said sum and that while receiving the amount, the petitioner made an endorsement in the receipt stating 'received under protest'. According to the learned counsel appearing for the petitioners, this itself is sufficient to refer the matter to the civil court for the purpose of deciding the issue under Sec.18 of the Act. Learned counsel appearing for the petitioners also drew my attention to a Division Bench judgment of this Court reported in *The Deputy Collector, Revenue, Karaikal v. Angelene Devadoss*, 1992 Writ L.R. 137, wherein the Division Bench of this Court after referring to the earlier judgment rendered by a Division Bench of this Court in *Venkataswami Naidu v. The State of Madras*, (1964) 1 M.L.J. 262, has held as follows:

".....In the present case the written endorsement of protest could not be read in futility.

Obviously, the petitioner had a desire to obtain enhanced compensation. She had expressed that desire by making the written endorsement of protest. On the facts and circumstances of the case, we think it is legitimate to construe the written endorsement of protest as nothing short of a demand for reference and that should suffice the purpose of Sec.18(1) of the Act."

In my considered opinion, the said ratio laid down by the Division Bench of this Court in the decision referred to supra squarely applies to the facts and circumstances of the present case and applying the said ratio laid down by the Division Bench of this Court in the decision referred to above, this writ petition has to be allowed and the matter has got to be referred to the civil court for adjudication. 5. In the result, this writ petition shall stand allowed, as prayed for by the petitioners. The first respondent is directed to refer the matter to the civil court for determining the amount of compensation payable to the petitioners under Sec.18 of the Act. There will be no order as to costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.Nos.1399 and 1405 of 1993 8th November, 1993.

Karupayi and others *Petitioners*
v.
Narayanan ...*Respondent.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Secs.10(3) (a)(i), 10(3)(c) and 10(5)(a) - Landlord filing eviction petition against all seven tenants - Securing possession through court in five petitions - Not occupying those premises after getting*

possession and continuing petition against remaining two tenants - If cannot maintain them under Sec.10(3)(a)(i) - If will have to face consequence provided under Sec.10(5)(a).

In the present case, the landlord wanted the entire building, consisting of the above referred to all the portions thereof for his own residential occupation. That is why he filed seven rent control petitions against all the seven tenants. When such is the case, when he secures possession through court in the abovesaid five portions out of the seven if he does not occupy those five portions after he gets possession in each of the five cases, not only it could be said that his requirement itself for his own occupation was really not *bona fide*, but he would also face the statutory consequence provided under Sec.10(3)(a) of the Act, which says where a landlord who has obtained possession of a building in pursuance of any order under Sec.10(3) does not himself occupy it within one month from the date of obtaining possession, the tenant who has been evicted may apply to the Controller for an order directing restoration of possession to him. [Para. 3]

(B) *Practice and Procedure - Relief in suit moulding - Subsequent events - How far it be taken note of.* If the court has to decide that the subsequent event has to be taken note of to mould the relief, it must see no specific provision on fairplay is violated and there is absence of other disentitling factors or just circumstances. [Para. 4]

Cases referred to:

Pasupuleti Venkateswarlu v. The Motor and General Traders, A.I.R. 1975 S.C. 1409. [Paras. 3, 4]
K.Ganesan v. K.Padmavathi Ammal, 100 L.W. 381. [Para. 4]

S.Parthasarathy, for Petitioners.

N.Thiagarajan, for Respondent.

The Court made the following

ORDER: These two civil revision petitions filed by the respective tenants under the Tamil Nadu Buildings (Lease and Rent Control) Act, (hereinafter referred to as 'the Act'), relating to two different portions of the same building. They are against the same landlord, and are taken up together since they involve same question of law, though at the appellate stage two separate appellate orders were passed, both dated 17.2.1993. Both the tenants have failed in both the courts below, since concurrently eviction order has been passed against each of them under Sec.10(3)(a)(i)

of the Act. Actually, on the whole, the same landlord filed 7 R.C.O.Ps. including the present R.C.O.P.Nos.244 of 1981 and 241 of 1981 for evicting 7 different tenants occupying the different portions of the abovesaid same building under Sec.10(3)(a)(i) of the Act, on the footing that he *bona fide* required the entire building, that is, all the 7 portions thereof, for his own residential occupation. But, with reference to five R.C.O.Ps., other than the present ones, the landlord obtained *ex parte* eviction orders through court and also got possession of the respective portions thereof in 1983 itself, while the present R.C.O.Ps. were pending. The present R.C.O.Ps. were disposed of only on 26.8.1987 by the Rent Controller and the said order dated 26.8.1987 in each of the two cases has also been confirmed by the respective appellate orders dated 17-2-1993 in R.C.A.Nos.78 of 1987 and 77 of 1987 respectively.

2. The only submission of the learned Counsel for the petitioner in each of the civil revision petitions is that the landlord having taken possession of the abovesaid five portions from the other five tenants, the present R.C.O.Ps. are not maintainable, except under Sec.10(3)(c) of the Act, and not under Sec.10(3)(a)(i) thereof and that the R.C.O.Ps. have to be dismissed even under Sec.10(3)(c) of the Act since the relative hardship spoken to therein has been neither pleaded nor proved.

3. Initially he has argued that the subsequent event of the landlord taking possession of the abovesaid five portions must be taken into account in the present case and the court should have held that the present two petitions should be dismissed, since the abovesaid Sec.10(3)(c) requirement is not satisfied. In this connection he relies on the decision in *Pasupuleti Venkateswarlu v. The Motor and General Traders, A.I.R. 1975 S.C. 1409*. However at a later stage of his argument he did not very much press the abovesaid contention or rely on such decision. The learned counsel for the respondent has submitted that the said decision will not apply to the present case.

3-A. In the said Supreme Court case, the landlord of a large building had leased out, in separate portions, the building to several tenants and the eviction petition that was considered by the Supreme Court in the said case related to only one such portion occupied by a tenant, whose eviction was sought for under Sec.10(3)(a) and (b) of the

Andhra Pradesh Rent Control Act. There too, no doubt the landlord came into possession during the pendency of the abovesaid eviction petition therein, of some other portion in the said large building and hence it was held that the said subsequent event of landlord taking possession of the abovesaid another portion must be taken note of. So holding, the Supreme Court dismissed the said eviction petition. But, there is a vital difference between the said case and the present one. From the judgment in the said Supreme Court case, it cannot be said that the landlord therein filed several rent control petitions for evicting all the tenants occupying the different portions of the said large building and got eviction orders against some of them and occupied those portions, while the other rent control petitions were pending.

3-B. In the present case, as already mentioned, even initially the claim of the landlord was quite clear. He wanted the entire building, consisting of the above referred to all the portions thereof for his own residential occupation. That is why he filed seven rent control petitions against all the seven tenants. When such is the case, when he secures possession through court in the abovesaid five portions out of the seven if he does not occupy those five portions after he gets possession in each of the five cases, not only it could be said that his requirement itself for his own occupation was really not *bona fide*, but he would also face the statutory consequence provided under Sec.10(5)(a) of the Act, which says where a landlord who has obtained possession of a building in pursuance of any order under Sec.10(3) does not himself occupy it within one month from the date of obtaining possession, the tenant who has been evicted may apply to the Controller for an order directing restoration of possession to him.

4. So, it is clear that *Pasupuleti Venkateswarlu v. The Motor and General Traders, A.I.R. 1975 S.C. 1409* will have no application to the present case. That apart, in the said decision itself, regarding how far subsequent events have to be taken note of in deciding a list, the following significant observation has been made:

"It is basic to our procedural jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mis-

stress of the judicial process. If a fact, arising after the *lis* has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice subject, of course, to the absence of other disentitling factors or just circumstances." [*emphasis supplied*]

Thus I find while reconciling the abovestated two basic principles, if the court has to decide that the subsequent event has to be taken note of to mould the relief, it must see "no specific provision or fairplay is violated" and there is "absence of other disentitling factors or just circumstances". Applying the said Rule, it is clear that in the present case, in view of the abovesaid subsequent event of landlord taking possession of the abovesaid five portions cannot be taken note of in the present case. The contention that the landlord in the present case should not have taken possession of the abovesaid five portions at all till the present two R.C.O.Ps. are finally disposed of will be very unfair to the landlord. The decision in *K. Ganesan v. K. Padmavathi Ammal*, 100 L.W. 381, relied on by the court below also squarely supports the case of the landlord.

5. Then, the learned counsel for the petitioners slightly modified his argument saying that since the landlord has taken possession of the abovesaid five portions and has even partitioned the said portions by altering the positions of walls therein, the landlord cannot be still held to have the *bona fide* requirement for occupying the portions coming under the present R.C.O.Ps.

6. First of all there is a fallacy in this argument also. Only if the abovesaid subsequent event can be taken note of, it could be considered whether in the light of the abovesaid subsequent event, the requirement is *bona fide* or not. But, once it has been held that the said subsequent event cannot be taken note of in the present case, the other question does not at all arise. That apart, the learned counsel for the respondent/ landlord rightly points out that the landlord, a peon in a bank, took loan from the said bank for buying the said entire building of seven portions for his own occupation and that there is also no cross-examination on

such evidence given by the landlord as P.W.1 in each of the present two cases. He also rightly points out that both to Ex.A-2 petition- notice in R.C.O.P.No.244 of 1981 and Ex.A-1 petition notice in R.C.O.P.No.241 of 1981, there was no reply at all by the respective tenants. In those notices also the landlord has expressed his requirement for all the seven portions of the building. In fact the said notice is a common notice addressed to all the abovesaid tenants.

7. That apart, the said learned counsel also points out that in Ex.A-1, a rough sketch of the entire building of seven portions is also attached and no exception has been taken to the said sketch by the tenants when they gave evidence. The said sketch shows that out of the entire building, the portions occupied by four of the abovesaid five tenants, viz., Noorudeen, Govindaraj, Mani and Valliammai are small portions in the north western corner of the entire building and the portion occupied by the other tenant, viz., Kesavan, out of the abovesaid five persons, is in the south eastern corner and in between the abovesaid four portions and the abovesaid Kesavan's portion, is the portion occupied by the tenant Karuppayi in C.R.P.No.1399 of 1993. Further, as per the said sketch, the portion of Ponnusami the tenant in C.R.P.No.1405 of 1993 is further east of the abovesaid Kesavan's portion. Thus, the manner in which the portions of the abovesaid five persons are situate, would clearly show that simply because the landlord had occupied those five portions, his requirement for the entirety of the building for his own use would not become any the less *bona fide*. Further, admittedly on the date of the two present petitions, the landlord was only living in a rented building.

8. In the result, there is no merit in these civil revision petitions and hence they are dismissed. No costs.

B.S.

Petitions dismissed.

[Full Bench]
**IN THE HIGH COURT OF JUDICATURE AT
 MADRAS.**
 [Special Original Jurisdiction]

Present: Srinivasan, Bakthavatsalam and
 Abdul Hadi, JJ.

W.P.No:6191 of 1990 22nd November, 1993.

Philip Jeyasingh ...Petitioner
 v.

**The Joint Registrar of Co-operative Societies,
 Chidambaram Region, Tuticorin and others.**

...Respondents.

*Constitution of India (1950), Art 136 - Special Leave
 Petitions under - Dismissal without giving reasons -
 Effect - It will amount to a declaration of law -
 Special leave granted and appeal dismissed - Effect.*
 It has been held by the Supreme Court in several
 cases that mere dismissal of a special leave peti-
 tion without giving any reasons will not amount to
 declaration of law laid down by the judgment
 against which the special leave petition was filed.

[Para. 7]

Cases referred to:

*Philip Jeyasingh v. The Joint Registrar of Co-opera-
 tive Societies, (1992)1 L.W. 216. [Paras. 1, 5, 10]*
*R.Tamilarasan v. Director of Handlooms and Tex-
 tiles, (1991)2 L.W. 409 (F.B.). [Paras. 2, 4, 5, 7, 10,
 11]*

*A.Natarajan v. Registrar of Co-operative Societies,
 (1991)2 L.L.J. 296: (1991)2 L.W. 420. [Paras. 2, 7]*
*K.Ganesan v. Special Officer, Salem Co-operative
 Sugar Mills Ltd., (1992)2 L.W. 406. [Para. 3]*

*Co-operative Central Bank Ltd. v. Additional In-
 dustrial Tribunal, (1969)2 L.L.J. 698. [Para. 5]*
*S.S.Dhanoa v. Municipal Corporation Delhi, (1981)2
 L.L.J. 231. [Para. 5]*

*Salem District Co-operative Sector Bank Employ-
 ees Union v. A.Natarajan, (1992)2 L.W. 30 (J.S.).
 [Para. 7]*

*Supreme Court Employees Welfare Association v.
 Union of India, A.I.R. 1990 S.C. 334. [Para. 7]*

*Union of India v. All India Services Pensioners
 Association, (1988)2 S.C.C. 580. [Para. 8]*

Narendra Prasadji v. State of Gujarat, (1975)1

S.C.C. 11. [Para. 10]

Petition under Art.226 of the Constitution of
 India, praying that in the circumstances stated
 therein, and in the affidavit filed therewith the
 High Court will be pleased to issue a writ of
certiorari calling for the records of the third re-
 spondent relating to the disciplinary enquiry initi-
 ated against the petitioner at the directions of the
 respondents 1 and 2 and to quash the order of
 dismissal dated 14.5.1991 made by the third re-
 spondent and to permit the petitioner file the
 supplemental affidavit raising additional grounds.
 (Prayer amended as per order of court dated
 19.7.1991 in W.M.P.No.13522 of 1991).

V.Shanmugham, for Petitioner.

V.Raghupathy, Additional Government Pleader,
 for Respondent Nos.1 and 2.

C.Chenniwamy, Senior Counsel for M/
s.T.N.Vallinayagam and Ponni Ambalavanan, for
 Respondent No.3.

The Order of the Full Bench was made by
Srinivasan, J.: We are somewhat surprised that
 this matter has been referred to us once again,
 though it has been considered by a Full Bench to
 which one of us was a party earlier and by judg-
 ment dated 22nd January, 1992, the reference had
 been answered. The judgment is reported in *Philip
 Jeyasingh v. The Joint Registrar of Co-operative
 Societies, (1992)1 L.W. 216.*

2. The question referred to that Full Bench was
 "can the judgment of the Full Bench in
*R.Tamilarasan v. Director of Handlooms and Tex-
 tiles, (1991)2 L.W. 409* be characterised as one *per
 incuriam* or *obiter dicta* as opined by the Division
 Bench of this Court in *A.Natarajan v. Registrar of
 Co-operative Societies, (1991)2 L.L.J. 296: (1991)2
 L.W. 420*. The question was answered in para-
 graph 63 of the judgment which reads thus:

"We have no hesitation in answering the ques-
 tion referred to us in the negative and holding
 that the judgment of the Full Bench in
*R.Tamilarasan v. Director of Handlooms and
 Textiles, (1991)2 L.W. 409: (1991)2 L.L.J. 296
 (F.B.)*, is not *per incuriam* or *obiter dicta* and
 the view taken by the Division Bench in
*A.Natarajan v. Registrar of Co-operative Socie-
 ties, (1991)2 L.L.J. 296: (1991)2 L.W. 420*, is
 not correct. We hold that the judgment of the
 Full Bench is a valid precedent binding on

Division Benches and single Judges of this Court as well as subordinate courts."

3. The last sentence in the judgment clearly holds that the judgment of the Full Bench in *R. Tamilarasan v. Director of Handlooms and Textiles*, (1991) 2 L.W. 409 (F.B.), is a valid precedent binding on Division Benches, single Judges of this Court as well as Subordinate Courts. In spite of that clear direction, this matter has once again been referred to, to a Full Bench by a single Judge who had nothing to do except to follow the Full Bench in (1991) 2 L.W. 409 (F.B.) and dismiss the writ petition as not maintainable. He has been persuaded to refer the matter again to a Full Bench in view of the judgment of a single Judge of this Court in *K. Ganesan v. Special Officer, Salem Co-operative Sugars Mills Ltd.*, (1992) 2 L.W. 406, on which reliance was placed by learned counsel for the petitioner. Referring to the observation in that judgment that the case was being referred to a larger Bench with a request to the Hon'ble the Chief Justice to constitute a larger Bench, which can go into the correctness or otherwise of the pronouncements of the Full Bench in *Tamilarasan's case* (1989) 1 L.L.J. 588, the learned Judge observed in this case "since already the very decision rendered by the Full Bench in this very case has already been referred to the Hon'ble the Chief Justice for consideration by a larger Bench by P.S. Mishra, J. I have no other go, but to have this matter directed to be posted and considered along with the reference already made by the learned Judge as referred to above."

4. The view taken by the learned Judge that he has no other go but to refer the matter to a Full Bench is not correct. In this very case, as noticed by the learned Judge himself, the Full Bench had already answered the reference and held that the decision in *Tamilarasan's case*, (1991) 2 L.W. 409 (F.B.) was binding upon the Division Bench as well as the single Judge. The only consequential result of that answer given by the Full Bench was to dismiss the writ petition as not maintainable. The learned single Judge ought not to have referred the matter to the Full Bench just because another single Judge has chosen to question the correctness of the later Full Bench also.

5. Learned counsel for the petitioner contends that the question whether a writ petition is maintainable as against the Special Officer of a Co-operative society was not considered in *Tami-*

larasan's case, (1991) 2 L.W. 409 (F.B.), and, therefore, the question was still open to be considered by the single Judge. According to learned counsel, it is that question which has now been referred to a larger Bench by the single Judge. We are unable to accept this contention. In *Tamilarasan's case*, (1991) 2 L.W. 409 (F.B.), the respondents in one of the writ petitions was the Special Officer of the concerned co-operative society. The question arose whether the writ petition could be maintained. In fact in paragraph 24 of the judgment, the question has been considered by the Full Bench in that case. The said paragraph reads as follows:

"The issue can be looked from another angle.

The Supreme Court in *Co-operative Central Bank Ltd. v. Additional Industrial Tribunal*, (1969) 2 L.L.J. 698, has held that the bye-laws of a cooperative society framed in pursuance of the provisions of the Act cannot be held to be law or to have the force of law. This also supports the view that a co-operative society is not a statutory functionary. Whether the fact that whenever the governing body is superseded and in its place a Special Officer or other Government official is appointed to administer the affairs of the society makes any difference has to be considered now. We are of the view that having regard to the decision of the Supreme Court in *S.S. Dhanoa v. Municipal Corporation Delhi*, (1981) 2 L.L.J. 231, the position is that it does not make any difference. Any officer appointed in the place of the governing body stepping into the shoes of the governing body and discharging the functions as such definitely is not a Government servant. In the case referred to above the Supreme Court has clearly held that when the services of an Indian Administrative Officer are placed at the disposal of a co-operative society, he was not discharging the functions as a public servant." There can be no doubt that the Full Bench took the view that the position would not be different whether the co-operative society is represented by the Board of Directors or a Special Officer. Hence, the contention that the question was not decided in *Tamilarasan's case*, (1991) 2 L.W. 409 (F.B.), is not acceptable. This matter has been considered by the Full Bench in *Philip Jeyasingh v. The Joint Registrar of Co-operative Societies*, (1992) 1 L.W. 216. In paragraph 50 of the judgment, the Full

Bench referring to *Tamilarasan's case*, (1991)2 L.W. 409 (F.B.) said,

"Hence, the Full Bench had to consider (1) whether a society managed by a Board of Directors was amenable to the jurisdiction of this Court under Art.226 of the Constitution of India, and (2) whether a society managed by a Special Officer was amenable to the said jurisdiction."

Thus, it has been held that *Tamilarasan's case*, (1991)2 L.W. 409 (F.B.) decides not only that a writ petition against a cooperative society represented by Board of Directors is not maintainable but also that a writ petition against cooperative society represented by Special Officer is not maintainable.

6. In those circumstances, no question survives for consideration in the present case.

7. However, learned counsel for the petitioner submits that the Division Bench judgment in *A.Natarajan v. Registrar of Co-operative Societies*, (1991)2 L.L.J. 296; (1991)2 L.W. 420, which held that the judgment in *Tamilarasan's case*, (1991)2 L.W. 409 (F.B.) was not valid as it was *per incuriam* and *obiter dictum* was challenged in the Supreme Court of India by a Special Leave Petition. Learned counsel submits that in view of the fact that the special leave petition has been dismissed by the Supreme Court after admission, the Supreme Court is deemed to have upheld the view expressed by the Division Bench in that case. Therefore, it is submitted that the view taken by the Full Bench in *Tamilarasan's case*, (1991)2 L.W. 409 (F.B.) as well as in this case by the later Full Bench is no longer good law. We are unable to accept this contention. A copy of the order of the Supreme Court in the special leave petition which was later registered as Civil Appeal No.4357 of 1991 has been produced before us by learned counsel for the petitioner. The order of the Supreme Court in *Salem District Co-operative Sector Bank Employees' Union v. A.Natarajan*, (1992)2 L.W. 30 (J.S.), reads thus:

"All that the High Court has stated is that until the by-laws are changed, the service condition cannot be altered. We see no reason to interfere. The appeal is, accordingly, dismissed. No costs."

It has been held by the Supreme Court in several cases that mere dismissal of a special leave petition without giving any reasons will not amount to

declaration of law laid down by the judgment against which the special leave petition was filed. One such judgment is reported in *Supreme Court Employees Welfare Association v. Union of India*, A.I.R. 1990 S.C. 334. The Court said that when no reason is given, but a special leave petition is dismissed simpliciter, it cannot be said that there has been a declaration of law by the Supreme Court under Art 141. In fact, the said ruling was referred to by the Full Bench in this case in its judgment dated 22nd January, 1992 in paragraph 58 of the judgment. After referring to a number of decisions of the Supreme Court, the Full Bench said that the dismissal of a special leave petition simpliciter without reason will not be a declaration of law by the Supreme Court and, therefore, the confirmation of the judgment of the Division Bench by dismissal of the civil appeal in the present case will not amount to a declaration of law that a writ petition against co-operative society is maintainable.

8. Learned counsel invites our attention to the judgment of the Supreme Court in *Union of India v. All India Services Pensioners Association*, (1988)2 S.C.C. 580. In that case, the court held that if reasons are given by the Supreme Court when dismissing a special leave petition, that decision becomes binding under Art.141 of the Constitution of India as it declares the law on the subject. In the present case, we have already quoted the order of the Supreme Court in the civil appeal. We find that the question which is before us has not been considered by the Supreme Court and no declaration of law has been made by the Supreme Court. Hence, the ruling in *Union of India v. All India Services Pensioners Association*, (1988)2 S.C.C. 580, will not apply to the present case.

9. Learned counsel contends that in any case where special leave has been granted and civil appeal has been taken on file and a decision is rendered dismissing the appeal, it would automatically declare the law on the subject. We are unable to accept that contention. Civil appeal has been dismissed only on some other ground and not on the ground that a writ petition was sustainable against co-operative society. That question was not considered by the Supreme Court at all.

10. Learned counsel refers to the judgment of the Supreme Court in *Narendra Prasadji v. State of Gujarat*, (1975)1 S.C.C. 11. In that case, the Supreme Court held that a Bench of 5 Judges of that

Court cannot sit in judgment over the correctness or otherwise of the views expressed by an earlier Bench consisting of five Judges. Learned counsel submits that the view expressed in *Tamilarasan's case*, (1991) 2 L.W. 409 (F.B.), could not have been considered by the Full Bench which decided this case earlier by the judgment dated 22nd January, 1992 *Philip Jeyasingh v. The Joint Registrar of Co-operative Societies*, (1992) 1 L.W. 216. The circumstances under which that Full Bench was constituted have been set out in detail in the judgment of the Full Bench. There is no need to refer to the same in this judgment. The Full Bench has taken the view that the decision of the Full Bench in *Tamilarasan's case*, (1991) 2 L.W. 409 (F.B.) cannot be characterised *per incuriam* or *obiter dictum* and it is a valid precedent. The Full Bench has also pointed out the questions decided in *Tamilarasan's case*, (1991) 2 L.W. 409 (F.B.).

11. In the circumstances, the present reference to a Full Bench is not really sustainable, but having regard to the fact that this case has been pending for quite a long time and the parties will suffer if we send back the matter to be decided by a single Judge once again, we pass the order in the writ petition itself, by exercising our discretionary power under O.1, Rule 7 of the Appellate Side Rules. We are also of the view that the writ petition has itself been referred to us. In view of the judgment of the Full Bench in *Tamilarasan's case*, (1991) 2 L.W. 409 (F.B.), this writ petition is not maintainable and it is dismissed with costs. Counsel fee Rs.3,000 to be shared equally by counsel for respondents 1 and 2 and counsel for the third respondent.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No.3616 of 1992 23rd November, 1993.

Rajeswari ...Petitioner
v.
Dhanammal ...Respondent.

*Civil Procedure Code (V of 1908), O.6, Rule 2 -
MLJ 51*

Variance between pleadings and proof - Party if can abandon his case - Claim relief on basis of other party's plea - Party seeking relief on facts established on record though at variance with his own pleading - Relief, if can be granted.

It is no doubt true that the decisions in *Govindaraj v. Kandaswami Gounder*, (1956) 2 M.L.J. 578, *Subramania Mudaliar v. Ammapet Co-operative Society*, (1960) 2 M.L.J. 477, *P.Saraswati v. Lakshmi*, A.I.R. 1978 Mad. 361 and *Madhavan v. Kannammal*, (1990) 2 L.W. 274 reiterate the principle that a party cannot abandon his own case and claim relief only on the basis of the other party's case. But, it must be noted that even in the last of the abovesaid decisions viz., (1990) 2 L.W. 274, it is pointed out that the principle that one party cannot abandon his own case and claim relief on the basis of the other party's plea is not applicable where one party does not seek relief on the basis of the plea of the other party but only on the facts established on record, though they are at variance with his own pleading. [Para. 10]

Cases referred to:

Govindaraj v. Kandaswami Gounder, (1956) 2 M.L.J. 578. [Para. 9]
Subramania Mudaliar v. Ammapet Co-operative Society, (1960) 2 M.L.J. 477. [Para. 9]
P.Saraswathi v. Lakshmi, (1977) 2 M.L.J. 179: A.I.R. 1978 Mad. 361. [Para. 9]
Madhavan v. Kannammal, (1990) 2 L.W. 274. [Paras. 9, 10]
Narayan v. Gopal, A.I.R. 1960 S.C. 100. [Para. 10]
Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court (II Additional Judge), Madras, dated 4.9.1992 and made in I.A.No.12454 of 1991 in O.S.No.4059 of 1979.

P.Devadass, for Petitioner.

S.Balasubramanian, for Respondent.

The Court made the following

ORDER: The defendant is the petitioner in this civil revision petition against the reversing judgment dated 4.9.1992 in C.M.A.No.29 of 1992 on the file of the 2nd Additional City Civil Court, Madras, by the respondent/ plaintiff, whereby the lower appellate court has dismissed I.A.No.12454 of 1981 filed by the petitioner herein in the trial court in O.S.No.4059 of 1979 for purchase of the suit land under Sec.9 of the Tamil Nadu City Tenants Protection Act (hereinafter referred to as 'the Act').

2. The said suit O.S.No.4059 of 1979 is by the respondent for ejectment of the petitioner from the suit land of an extent of 3,086 sq.ft., claiming that one 50' x 14 1/2' land is in the abovesaid 3,086 sq.ft., land was leased out to the petitioner under Ex.A-1 agreement dated 13.6.1975, but the petitioner had trespassed into the other remaining portion of the said suit property. In the said suit, the petitioner filed written statement, *inter alia*, claiming that the entire 3,086 sq.ft., was leased out along with the shed thereon and that the signature of the petitioner was obtained in Ex.A-1 only on misrepresentation or without letting her know about the contents of the said agreement.

3. Even though the abovesaid application has been disposed of, it is admitted by both the parties that the abovesaid suit is still pending. In fact, it is said that there was also another suit O.S.No.1246 of 1979 in the same trial court, filed by the same plaintiff, for a mandatory injunction relating to the same suit property and that the said suit also is still pending. No doubt, it appears that initially both the said suits and the abovesaid application were tried together and common evidence was let in, but as found from the order of the trial court in the abovesaid I.A.No.12454 of 1981, pursuant to the petition filed by the respondent/plaintiff herself, ultimately only the application was taken up for enquiry and not the other two suits and the evidence recorded was treated only as evidence in respect of the said application only.

4. Now, even though in the written statement, filed by the petitioner in the abovesaid O.S.No.4059 of 1979, which was originally filed in 1979, the petitioner pleaded that the lease was land and shed thereon, in the affidavit in support of I.A.No.12454 of 1981, which was filed in 1981, the petitioner took a different stand pleading that the lease was only of the abovesaid suit land and that pursuant to the permission given by the landlord the superstructure was put up by her. (No doubt, it appears that an amended written statement was filed, that too in 1979 itself, but that there too, in the amended portion though it is stated that the tenant was entitled to purchase the land, the original plea that the lease is of land and superstructure thereon, has not been in any way changed). Likewise, in the counter to the said application also, the respondent/ plaintiff took a stand different from what was taken in the plaint, contending that the lease was for land and superstructure thereon. It must

also be noted that prior to the filing of the suit, the plaintiff, in his suit notice Ex.B-2, dated 30.1.1979 and subsequent rejoinder Ex.B-4 dated, 12.2.1979 also maintained the plea that the lease was only of land. Likewise, prior to the suit, in Ex.B-3, dated 5.2.1979, the reply to the suit notice and the reply to the rejoinder Ex.A-137, dated 15.2.1979, both by the tenant, the plea was that the lease was of land and shed thereon.

5. However, the landlord claims that there was a lease agreement which came into being under Ex.A-1 dated 13.6.1975. The said Ex.A-1 has been signed only by the petitioner/tenant. According to the said Ex.A-1, the petitioner has taken the lease of land only, but not the entire suit land, but only 50' x 14 1/2'. But the case of the petitioner with reference to Ex.A-1 is that though she signed Ex.A-1, she signed it without knowing the contents and the landlord, by misrepresentation, obtained Ex.A-1 from her stating that the lease mentioned in Ex.A-1 was for entire suit land of 3,086 sq.ft.,

6. At any rate, it appears that in view of the Amending Act 2 of 1980 to the Act, which came into force on 3.3.1980, providing for the application of the parent Act to tenancies which commenced prior to the said date, the abovesaid shifting stands were adopted by either of the parties, as stated above.

7. In the above context, though the application was allowed by the trial court on the footing that the lease was for the land only, the lower appellate court reversed the said decision and held that the lease was really of land and shed thereon even as per the original written statement of the petitioner and that hence it held that the said application itself was not maintainable.

8. Now, in the light of the arguments of both the learned counsel, the only question before me is whether the abovesaid lease is of land only or of land and superstructure thereon. While the main argument of the learned counsel for the petitioner/ defendant is that consistently upto the filing of the plaint, the plaintiff's case was only that the lease was only of land and that hence there can be no objection for the maintainability of the abovesaid application. Further he also points out that the plaintiff- landlady, as P.W.1, also admitted in the witness box that the lease was only that of land.

9. On the other hand, the learned counsel for the

respondent- plaintiff submits that the plea of the defendant in the written statement and earlier was only that the lease was that of land and shed thereon and that she cannot go back from the said plea and seek to get a relief, not based on the original plea set up by her. In this connection, the learned counsel relies on decision like *Govindaraj v. Kandaswami Gounder*, (1956)2 M.L.J. 578, *Subramania Mudaliar v. Ammapet Co-operative Society*, (1960)2 M.L.J. 477, *P.Saraswathi v. Lakshmi*, (1977)2 M.L.J. 179. A.I.R. 1978 Mad. 361 and *Madhavan v. Kannammal*, (1990)2 L.W. 274 to contend that a party cannot abandon his own case and claim relief on the basis of the other party's case.

10. I have considered the rival submissions. It is no doubt true that the above referred to decisions cited by the learned Counsel for the respondent reiterate the principle that a party cannot abandon his own case and claim relief only on the basis of the other party's case. But, it must be noted that even in the last of the abovesaid decisions, viz., *Madhavan v. Kannammal*, (1990)2 L.W. 274, it is pointed out that the principle that one party cannot abandon his own case and claim relief on the basis of the other party's plea, is not applicable where one party does not seek relief on the basis of the plea of the other party, but only on the facts established on record, though they are at variance with his own pleading. In the present case also, as I have already pointed out, despite the above referred to shifting stand by either of the parties, the plaintiff landlady herself has deposed in her chief-examination as follows:

“1975ல் எதிர்வாதி என்னிடம் இடம் வாடகைக்கு கேட்டார். எதிர்வாதி என்னிடம் 50' x 14.5' இடம் வாடகைக்கு கேட்டார். நான் வாடகைக்கு தருவதாக எதிர்வாதியிடம் ஒரு ஒப்பந்தம் எழுதி வாங்கினேன். எதிர்வாதி ஒப்பந்தம் எழுதிக் கொடுத்தார். எதிர்வாதி என்னிடம் வாடகைக்கு எடுத்த சொத்தின் அளவு 50' x 14.5' எதிர்வாதி எனக்கு எழுதிக் கொடுத்த வாடகைப் பத்திரம்தான் எக்ஸ்டாட் எ.1.”

In view of this admission in evidence by the plaintiff-landlady herself, even as per the abovesaid ruling in *Madhavan v. Kannammal*, (1990)2 L.W. 274, there is no bar for granting relief based on the said evidence (and not the pleading) of the other

party, viz., the plaintiff, even though the said evidence is at variance with the defendant's original plea in the written statement. Further since the abovesaid evidence given by the landlady is actually an admission by her regarding the nature of the lease, there can be no bar for entertaining the abovesaid application by the defendant for purchasing the demised property pursuant to Sec.9 of the Act. So, the lower appellate court has erred in having held that the abovesaid application itself is not maintainable, without taking note of the legal position enunciated in the abovesaid *Madhavan v. Kannammal*, (1990)2 L.W. 274 and also the law that a party could be given relief based on the categorical admission of the other party in the witness box. (vide: also *Narayan v. Gopal*, A.I.R. 1960 S.C. 100.) Since the lower appellate court has thus exercised its jurisdiction illegally or with material irregularity, the impugned order is liable to be set aside and C.M.A.No.29 of 1992 has to be remanded back to the lower appellate court for fresh disposal. In the light of the aforesaid admission by the respondent- plaintiff there is no necessity to deal with the various tax receipts, exhibited by the petitioner/ defendant. They have also come into being only after the suit.

11. The lower appellate court shall decide the abovesaid C.M.A.No.29 of 1992 afresh on the footing that the abovesaid I A No.12454 of 1981 is maintainable. It is for the lower appellate court now to see whether the relief could be granted in the said application under Sec.9 of the Act on its merits, and if so, to what extent. In other words, as already indicated, according to the defendant, the lease was with reference to the entire suit land of 3,086 sq.ft., and not simply 50' x 14 1/2' therein as contended by the plaintiff and also as mentioned in Ex A-1. In view of the rival pleadings of either parties regarding Ex.A-1 the lower appellate court will consider the abovesaid application on merits and decide whether the lease is for the entire suit land of 3,086 sq.ft., or only for 50' x 14 1/2' therein. After the lower appellate court comes to a decision as to the extent of the lease, no doubt it should decide whether the petitioner is entitled to the rights under Sec.9 of the Act, taking into consideration the abovesaid amending Act 2 of 1980. Then, if it comes to the decision that the petitioner is entitled to the benefits under Sec.9 of the Act then as per Sec.9 itself, it should also decide the minimum extent required for the petitioner's

convenient enjoyment and proceed to deal with the said application further pursuant to the said section.

12. In the result, the civil revision petition is allowed, the judgment and decree of the lower appellate court are set aside and C.M.A.No.29 of 1992 is remanded back to the lower appellate court for fresh disposal according to law in the light of the observations in paragraph 11 supra. No costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Ratnam, J.

C.R.P.No.288 of 1993 29th October, 1993.

Palaniraja and others ...*Petitioners*
v.
Jayalakshmi ...*Respondent.*

French Code Civil, Art.2262 - French Code de Commerce, Art.179 - French Establishments (Application of Laws) Order, 1954, Sec.6 extending applicability of provisions of Negotiable Instruments Act (1881) - Effect of - Law in provisions of French Code de Commerce insofar as bills of exchange, promissory notes etc., were concerned, if ceased to have effect - Limitation for suits on promotes - Three years or thirty years - Starting point for limitation - Promissory notes dated 18.8.1982 and 25.3.1983 - Demand for repayment made by notice dated 13.3.1988 - Suit instituted on 30.3.1988 - If barred by limitation.

Under Sec.6 of the French Establishments (Application of Laws) Order, 1954, unless otherwise specially provided in the Schedule, all laws in force in the French Establishment immediately before the commencement of the order which correspond to the enactments specified in the schedule, shall cease to have effect save as respects things done or omitted to be done before such commencement. Serial No.2 in the schedule is the Negotiable Instruments Act, 1881 and no special

provision has been made in the schedule with reference to the provisions of that Act. From this, it would follow that the provisions of the Negotiable Instruments Act became applicable on and from 1.11.1954 and the provisions of the French Code de Commerce, particularly Arts.183, 184, 185 and 179 would cease to apply in respect of the promissory notes, bills of exchange etc..... Though it may be that there was a provision in the French Code de Commerce in Art.179 providing for a period of limitation of three years, that provision also ceased to have effect on the extension of the applicability of the provisions of the Negotiable Instruments Act, 1881. In that view, it would follow as held in *Sendamarai Ammal's case*, (1984)1 M.L.J. 342, though in relation to a suit on a mortgage that Sec.29(2) read with Sec.3 of the Limitation Act, 1963 has the effect of preserving the period of limitation made available earlier under the French Code Civil and in view of Art.2262 of the French Code Civil which would be a local law within the meaning of Sec.29(2) of the Limitation Act, 1963, its provisions have to be read into the schedule to the Limitation Act *mutatis mutandis*. Viewed thus, under Art.2262 of the French Code Civil, the period of limitation is thirty years and that period would be available to the respondent for instituting the suit. Even assuming that Art.179 of the French Code de Commerce stood preserved despite Sec.6 of the French Establishments (Application of Laws) Order, 1954, the suit instituted cannot be regarded as barred by limitation *Kandaswami Mudaliar's case*, (1993)1 L.W. 574, relied on by the learned counsel for the petitioner referring to Art.179 held that the word 'Maturity' in relation to promissory note could refer only to the date of demand and in this case, the demand has been made on 13.3.1988 and the suit having been instituted on 30.3.1988 within three years from the date of demand even as per Art.179 would be in time. [Para. 3]

Cases referred to:

Kandaswami Mudaliar v. Muthukrishna Moorthy, (1993)1 L.W. 574. [Para. 2]

Sendamarai Ammal v. Vijaya Rajagopal Chettiar, (1984)1 M.L.J. 324. [Paras. 2, 3]

Rajamannar Chettiar v. Velayuthu Chettiar, (1984)2 M.L.J. 467. [Para. 2]

Mary Roy v. State of Kerala, A.I.R. 1986 S.C. 1011. [Para. 2]

Petition under Sec.115 of Act V of 1908 praying

the High Court to revise the order of the court of the First Additional Subordinate Judge, Pondicherry, dated 27.3.1992 and made in O.S.No.124 of 1988.

Mrs. Pushpa Satyanarayanan, for *T.R. Rajagopalan* and *T.R. Rajaraman*, for Petitioners.

Miss. V. Sumathi, for Respondent.

The Court made the following

ORDER: This civil revision petition has been preferred by defendants 1 and 3 to 5 in O.S.No.124 of 1988, First Additional Subordinate Judge's Court, Pondicherry, against the finding in favour of the respondent-plaintiff in the suit relating to the preliminary issue on limitation. In the suit (O.S.No.124 of 1988) instituted by the respondent, she had prayed for the recovery of a sum of Rs.31,429 together with interest, said to be due on two promissory notes dated 18.8.1982 and 25.3.1983 for Rs.15,000 and Rs.4,100 respectively. Prior to the institution of the suit, on 13.3.1988 by a notice the respondent made a demand for the repayment of the principal amounts together with interest and since that was not complied with, the suit was instituted on 30.3.1988. Amongst others, an objection was raised by the petitioners in the written statement to the effect that the suit was barred by limitation. That issue was taken up as a preliminary issue and the court below following an unreported decision in *M. Illampuranam v. M. Balakrishnan*, C.R.P.No.649 of 1983, dated 3.8.1987 found that the period of limitation of thirty years provided under Art.2262 of the French Code Civil would apply and the suit was instituted in time. Aggrieved by the finding so rendered, the petitioners, who are the first defendant and the legal representatives of the deceased second defendant have invoked the revisional jurisdiction of this Court under Sec.115, C.P.C.

2. Learned counsel for the petitioners, encouraged by a recent judgment in *Kandasami Mudaliar v. Muthukrishna Moorthy*, (1993)1 L.W. 574 contended that in respect of promissory notes, Art.179 of the French Code de Commerce, would apply and that provided for a period of limitation of three years and therefore, the suit instituted on 30.3.1988, was barred. In addition, it was submitted that even after coming into force of Sec.6 of the French Establishments (Application of Laws) Order, 1954, extending the applicability of the provisions of the Negotiable Instruments Act (XXVI of 1881). Art.179 of the French Code de

Commerce, continued to apply, providing for a period of limitation of three years and therefore, the suit instituted by the respondent, was barred. On the other hand, learned counsel for the respondent contended that after the coming into force of Sec.6 of the French Establishments (Application of Laws) Order 1954, the provisions of the Negotiable Instruments Act, 1881, were extended to Pondicherry Territory and on such extension, the provisions of French Code de Commerce ceased to have effect and therefore, Art.179 of the French Code de Commerce and the other related provisions, had no application whatever. Learned counsel further submitted that on the extension of the provisions of the Limitation Act, 1963 to the Pondicherry territory with effect from 1.1.1964, the normal period of limitation in respect of the suits on promissory notes would only be three years, but, under Sec.29(2) of the Limitation Act, 1963, read with Sec.3 thereof, the provisions of French Code Civil prescribing a period of thirty years, would be in the nature of a special law and that has to be read into the schedule of the Limitation Act with reference to the period of limitation prescribed for the institution of suits and if so done, under Art.2262 of the French Code Civil, a period of thirty years would be available and the court below, was, therefore, right in its conclusion with regard to the question of limitation. Reliance in this connection was also placed on the decisions in *Sendamarai Ammal v. Vijaya Rajagopal Chettiar*, (1984)1 M.L.J. 324, *Rajamannar Chettiar v. Velyauthu Chettiar*, (1984)2 M.L.J. 467 and *Mary Roy v. State of Kerala*, A.I.R. 1986 S.C. 1011.

3. The short question that arises for consideration is whether the court below was right in the view it took regarding the question of limitation. Under Sec.6 of the French Establishments (Application of Laws) Order, 1954, unless otherwise specially provided in the Schedule, all laws in force in the French Establishments, immediately before the commencement of the order, which correspond to the enactments specified in the schedule, shall cease to have effect, save as respects things done or omitted to be done before such commencement. Serial No.2 in the schedule is the Negotiable Instruments Act, 1881 and no special provision has been made in the Schedule with reference to the provisions of that Act. From this it would follow that the provisions of the Negotiable Instruments

Act become applicable on and from 1.11.1954 and the provisions of the French Code de Commerce, particularly, Arts.183, 184, 185 and 179 would cease to apply, in respect of the promissory notes, bills of exchange, etc., The argument of learned counsel for the petitioner that Art.179 providing for a limitation of three years would continue to operate, unaffected by the extension of the application of the provisions of the Negotiable Instruments Act, 1881, on and from 1.11.1954, is unacceptable, for, there was a wholesale substitution of all provisions in the French Code de Commerce in relation to bills of exchange, promissory notes, etc., by extending the applicability of the provisions of the Negotiable Instruments Act. When the provisions of the Negotiable Instruments Act were extended to the Pondicherry territory, the corresponding law in the provisions of the French Code de Commerce, insofar as bills of exchange, promissory notes, etc. were concerned, ceased to have effect and though it may be that there was a provision in the French Code de Commerce in Art.179 providing for a period of limitation of three years, that provision also ceased to have effect, on the extension of the applicability of the provisions of the Negotiable Instruments Act, 1881. It may be that the provisions in the French Code de Commerce were a combination of the law relating to promissory notes, bills of exchange, etc., and also with reference to the period of limitation in respect of these instruments. However, on the extension of the provisions of the Negotiable Instruments Act, 1881, to the Pondicherry territory, all the provisions of the French Code de Commerce, in relation to bills of exchange and promissory notes, ceased to have any effect and it is further seen that there is no modification provided in the schedule, in relation to the applicability of the provisions of the Negotiable Instruments Act. Under these circumstances, all the provisions of the French Code de Commerce relating to bills of exchange, promissory notes, etc., inclusive of the provision in Art 179, providing for limitation, should be regarded as having ceased to apply. In that view, it would follow as held in *Sendamarai Ammal's case*, (1984)1 M.L.J. 324, though in relation to a suit on a mortgage, that Sec.29(2) read with Sec.3 of the Limitation Act.1963, has the effect of preserving the period of limitation made available earlier under the French Code Civil and in view of Art.2262 of

the French Code Civil, which would be a local law, within the meaning of Sec.29(2) of the Limitation Act, 1963, its provisions have to be read into the Schedule to the Limitation Act *mutatis mutandis*. Viewed thus, under Art 2262 of the French Code, Civil, the period of limitation is thirty years and that period would be available to the respondent for instituting the suit. Even assuming that Art.179 of the French Code de Commerce stood preserved, despite Sec.6 of the French Establishments (Application of Laws) Order, 1954, the suit instituted cannot be regarded as barred by limitation. *Kandasami Mudahar's case*, (1985)1 L.W. 574, relied on by learned counsel for the petitioner, referring to Art.179 held that the word 'maturity' in relation to promissory note, could refer only to the date of demand and in this case, the demand had been made on 13.3.1988 and the suit, having been instituted on 30.3.1988, within three years from the date of demand, even as per Art.179 would be in time.

4. For the foregoing reasons, the contention put forward by learned counsel for the petitioners that the suit instituted by the respondent is barred, cannot be accepted and the court below was right in its conclusion on the preliminary issue relating to limitation. The civil revision petition is dismissed with costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Ratnam, J.*

C.R.P.No.1069 of 1991

29th October, 1993.

Women's Indian Association (Regd.) represented by its Secretary, Parvathi Srinivasan, Madras

...Petitioner

v.

V.Mangudi

...Respondent.

Madras City Tenants Protection Act (III of 1922), Sec 9 - Tenant filing suit against landlord for relief of

mandatory injunction directing landlord to restore electricity supply cut off by the landlord - Landlord filing written statement - Projecting a counter-claim for recovery of possession of property from tenant and for relief of ejectment of tenant - Copy of written statement not proved to have been served on counsel for tenant - But reply statement of tenant filed - Tenant again filing application claiming benefits of Sec.9 more than thirty days after claim for relief of ejectment - Application if barred by time.

Under Sec.9 of the Madras City Tenants Protection Act, on the institution of a suit in ejectment or proceeding under Sec.41 of the Presidency Small Causes Courts Act, 1882, by the landlord, the tenant entitled to compensation under Sec.3 may apply to the court within one month after the service on him of summons for an order that the landlord shall be directed to sell the whole or part of the land for a price to be fixed by the court from the aforesaid provision, it is clear that it is intended to apply to a case where a suit is instituted by the landlord for the ejectment of the tenant, in which case, on the service of summons in the suit on the tenant within thirty days from the date of such service, he may apply to the court praying for the reliefs under Sec.9 of the Act. In this case, the respondent (tenant) had instituted the suit O.S.No.5988 of 1986 and the claim for ejectment was made by the petitioner (landlord) herein in the written statement by way of a counter-claim. While under O.8, Rule 6-A(4), Civil Procedure Code, the counter-claim shall be treated as a plaint, here is no provision made with reference to the service of summons as such, in a counter-claim made in a written statement treating it as a plaint. Where the purpose of service of summons is to put the opposite party, to a litigation on notice of the claim made and to enable him to meet it by appearing before the court on a date specified, the service of a written statement containing a counter-claim on the counsel for the opposite party, as in this case, would, in any view be the same as service of summons in a suit, though in form, a counter-claim. In this case, only in the course of the counter-claim made by the petitioner, the possession of the respondent was actually threatened and the service of the written statement on the course, as in this case, would be sufficient, in the view of the court, to have put the respondent on notice of his threat to possession and the need to take steps to meet such a threat. Further, in this case, though

there is no endorsement as such regarding service of the written statement containing the counter-claim on the counsel for the respondent before the trial court, yet, it is seen that on 17.12.1986, the respondent had filed a reply statement meeting the case set out in the written statement by way of a counter-claim. Even in regard to the reply statement filed by the respondent on 17.12.1986, no endorsement had been obtained from the counsel for the petitioner (defendant in the trial court). However, the reply statement filed on 17.12.1986 could not have been so filed unless it be that a copy of the written statement containing the counter-claim was also made available to the counsel for the respondent and the respondent after the service of the written statement filed by the petitioner on 1.9.1986 on the counsel for the respondent appearing in the trial court. That would be effective service of summons for purposes of Sec.9 of the Act. On the facts of this case, it must be held that the earliest point of time when the respondent had knowledge of the threat held out in respect of his possession was on 1.9.1986 when the written statement containing the counter-claim was made or at least on 17.12.1986 when the respondent filed a reply statement, computing the period of thirty days from either of the aforesaid dates, the application in I.A.No.4611 of 1987 filed on 25.2.1987 was barred by time. [Para. 4]

Cases referred to:

Srinivasa Iyengar v. Khader Mohideen Rowther, (1964) 1 M.L.J. 323. [Paras. 3, 4]

Thoyammal v. Rathnavelu Nadar, A.I.R. 1927 Mad. 113. [Para. 3]

Petition under Sec.115 of Act V of 1908/25 of Act IX of 1987 praying the High Court to revise the order of the Court of the VI Additional Judge, City Civil Court, Madras, dated 11.1.1991 and made C.M.A.No.106 of 1990 (I.A.No.4611 of 1987 in O.S.No.5898 of 1986, XIV Assistant Judge, City Civil Court, Madras).

V.Ashok Viswanath, for Petitioner.

P.L.Narayanan, for Respondent.

The Court made the following

ORDER: The defendant in O.S.No.5898 of 1986, First Assistant Judge, City Civil Court, Madras, is the petitioner in this civil revision petition, directed against the order of the lower appellate court holding that the petition in I.A.No.4611 of 1987 filed by the respondent herein, claiming benefits under Sec.9 of the Madras City Tenants

Protection Act (hereinafter referred to as the 'Act'), is in time. In order to appreciate the controversy between the parties, it would be necessary to refer briefly to the circumstances giving rise to these proceedings. On 25.8.1986, the respondent herein instituted O.S.No.5898 of 1986 against the petitioner praying for the relief of mandatory injunction directing the petitioner to restore electricity supply stated to have been cut off by the petitioner on 20.9.1985 without assigning any reason, on the footing that he is a tenant in respect of a piece of land measuring 1,350 sq.ft., on a monthly ground rent of Rs.20 under the petitioner and the superstructure belonged to him. In the written statement filed by the petitioner, *inter alia*, it was stated that the respondent is not a tenant at all, but a trespasser and that he was not entitled to pray for the reliefs in the suit. In addition, in the written statement the petitioner projected a counter-claim for recovery of possession of the property from the respondent and prayed for the relief of ejectment of the respondent, after paying the requisite court-fee, therefor. Though the written statement to this effect containing a counter-claim for recovery of possession from the respondent was filed into court on 1.9.1986, it is seen that there is no endorsement on the written statement filed, for service of the copy of the written statement on the counsel for the respondent. Even so, a reply statement verified on 25.11.1986, was filed by the respondent on 17.12.1986 again, without any endorsement for service thereof, on the counsel for the petitioner in the trial court. Therein, the respondent repudiated the claim of the petitioner that he is a trespasser and reiterated that he is entitled to the relief of mandatory injunction for the restoration of the electricity supply to the premises in question. While matters stood thus, the respondent filed I.A.No.4611 of 1987 in the suit, O.S.No.5898 of 1986 on 25.2.1987, claiming the benefits of Sec.9 of the Act and praying that he should be permitted to purchase the land. That application was resisted by the petitioner, among others, on the ground that the application was barred by limitation.

2. The learned first Assistant Judge, City Civil Court, Madras, found that after the filing of the written statement by the petitioner on 1.9.1986, the suit had been adjourned to 17.10.1986 and again, to 18.11.1986 for framing issues and subsequently, a reply statement was filed by the

respondent on 17.12.1986 and that the respondent was fully aware of the counter-claim in the written statement (regarding his ejectment) filed by the petitioner even on 17.10.1986, but had not filed an application claiming benefits under Sec.9 of the Act within one month and therefore, the application filed on 25.2.1987, was barred by limitation. Aggrieved by this, the respondent preferred an appeal in C.M.A.No.106 of 1990 before the 6th Additional Judge, City Civil Court, Madras. The lower appellate court found that the claim put forward in the written statement for ejectment as a counter-claim, did not tantamount to service of summons on the respondent, as contemplated under Sec.9 of the Act and that the respondent had also not been directly and independently informed of the proceedings in ejectment initiated by the petitioner and, therefore, the conclusion of the trial court that the application was filed out of time, cannot be accepted. Ultimately, the lower appellate court allowed I.A.No.4611 of 1987 and directed the trial court to appoint a commissioner and ascertain the market value of the property and further directed the respondent to pay the amount so ascertained in one lump sum.

3. In challenging the correctness of the order so passed, learned counsel for the petitioner contended that having regard to the provisions of O.10 and O.8 of the Code of Civil Procedure and the filing of the reply statement by the respondent on 17.12.1986 meeting the counter-claim in ejectment of the respondent made in the written statement filed by the petitioner, and the filing of the petition by the respondent claiming benefits under Sec.9 of the Act beyond thirty days from the date of the reply statement. The application filed was clearly out of time. It was also further submitted that in a case like this where the relief of ejectment is prayed for in the written statement and by way of a counter-claim therein, the service of summons as contemplated by Sec.9 of the Act cannot be effected, though that would not mean that there is no period prescribed at all for the filing of an application claiming benefits under Sec.9 of the Act, but that the filing of the reply statement by the respondent on 17.12.1986, meeting the case of ejectment put forward by the petitioner at least should be taken as the point of time from which the period of thirty days prescribed under Sec.9 of the Act would begin to run and therefore, the

application filed by the respondent on 25.2.1987 was barred by limitation. Reference in this connection was also made to certain observations in the decision reported in *Srinivasa Iyengar v. Khader Mohideen Rowther*, (1964) 1 M.L.J. 323. *Per contra*, learned counsel for the respondent strenuously contended that short of service of summons on the defendant in the suit, there is no question of filing an application claiming the benefits of Sec.9 of the Act, within thirty days of the date of such service of summons and as in this case, there was no service of summons in the suit as ordinarily understood, the view taken by the lower appellate court was correct. Learned counsel also placed reliance upon the decision reported in *Thoyanmal v. Rathnavelu Nadar*, A.I.R. 1927 Mad. 113.

4. Before proceeding to consider the contentions so advanced, it would be necessary to refer to a few undisputed facts. After the institution of the suit on 25.8.1986 and the service of summons in the suit on the petitioner, a written statement was filed by the petitioner on 1.9.1986. In that written statement, the petitioner, by means of a counter-claim, prayed for ejectment of the respondent on the ground that he is a trespasser. The written statement so filed does not bear any endorsement for service of a copy thereof on the counsel for the respondent in the trial court. Even so, the respondent had filed a reply statement on 17.12.1986, repudiating the claim made by the petitioner in the written statement by way of a counter-claim. It is thereafter, on 25.2.1987, the respondent filed an application claiming the benefits under Sec.9 of the Act. Under Sec.9 of the Act, on the institution of a suit in ejectment or proceeding under Sec.41 of the Presidency Small Cause Courts Act, 1882, by the landlord, the tenant, entitled to compensation under Sec.3 may apply to the court within one month, after the service on him of summons, for an order that the landlord shall be directed to sell, the whole or part of the land, for a price to be fixed by the court. From the aforesaid provision, it is clear that this is intended to apply to a case, where a suit is instituted by the landlord for the ejectment of the tenant, in which case, on the service of summons in the suit on the tenant, within thirty days from the date of such service, he may apply to the court praying for the reliefs under Sec.9 of the Act. In this case, the respondent had instituted the suit, O.S.No.5898 of 1986 and the claim for ejectment was made by the petitioner herein, in the

written statement, by way of a counter-claim. The respondent had been represented by counsel in the suit, O.S.No.5898 of 1986. Under the provisions of O.3, Rule 3 of the Code of Civil Procedure, process served on the recognised agent of party shall be as effectual, as if the same had been served on the party in person, unless the court otherwise directs. Further, under O.3, Rule 5, C.P.C. process served on the pleader, who has been duly appointed to act in court for any party, shall be presumed to be duly communicated and made known to the party whom the pleader represents and, unless the court otherwise directs, shall be as effectual for all purposes, as if the same had been given to or served on the party in person. Again, under O.8, Rule 6-A(2), Civil Procedure Code, counter-claim shall have the same effect as a cross suit and under Sub-rule 4 of the O.8, Rule 6-A, the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. It is in the background of the aforesaid provisions relating to service and the nature of a counter-claim, that the need for service of summons as in a suit, for purposes of Sec.9 of the Act, has to be considered. In the Law Lexicon, reprint edition 1987, by P.Ramanatha Aiyar, at page 1236, the word "summons" has been stated to be a process issued from the office of a court of Justice requiring the person to whom it is addressed to attend the court for the purpose therein stated. Essentially, a summons is a communication emanating from a court under the signature of the Presiding Officer and addressed to a person to appear before the court and answer the claim made against him in the suit or other proceeding. Primarily, therefore, the object of the issue of summons is to put the opposite party in a suit or proceeding on notice of the claim made in the suit or proceeding as well as the basis therefor and also to call upon him to meet the claim made. It is in this context, the observations relied on by learned counsel for the petitioner in *Srinivasa Iyengar's case*, (1964) 1 M.L.J. 323, become relevant. Referring to the argument that the word 'summons' has got to be understood in the context as any process of court by which the possession of the tenant is actually threatened to be taken away, Jagadisan, J. pointed out that it may be that such construction is just and equitable but, that the word 'summons' clearly indicated summons in the suit and the reference to a 'summons' in Sec.9 of the Act is only to a suit.

However, that decision did not deal with a situation as in the present case. While under O.8, Rule 6-A(4), Civil Procedure Code, a counter-claim shall be treated as a plaint, there is no provision made with reference to the service of summons as such, in a counter-claim made in a written statement, treating it as a plaint. When the purpose of service of summons is to put the opposite party to a litigation on notice of the claim made and to enable him to meet it by appearing before the court on a date specified, the service of a written statement containing a counter-claim, on the counsel for the opposite party, as in this case, would, in my view, be the same as service of summons in a suit, though in form a counter-claim. In this case, only in the course of the counter-claim made by the petitioner, the possession of the respondent was actually threatened and the service of the written statement on the counsel, as in this case, would be sufficient, in my view, to have put the respondent on notice of his threat to possession and the need to take steps to meet such a threat. Further, in this case, though there is no endorsement as such regarding service of the written statement containing the counter-claim, on the counsel for the respondent before the trial court, yet, it is seen that on 17.12.1986, the respondent had filed a reply statement meeting the case set out in the written statement by way of a counter-claim. Even in regard to the reply statement filed by the respondent on 17.12.1986, no endorsement had been obtained from the counsel for the petitioner (defendant in the trial court). However, the reply statement filed on 17.12.1986, could not have been so filed unless, it be that a copy of the written Statement containing the counter-claim was also made available to the counsel for the respondent and the respondent after the service of the written statement filed by the petitioner on 1.9.1986, on the counsel for the respondent appearing in the trial court. That would be effective service of summons for purposes of Sec.9 of the Act. Otherwise, it is difficult to understand as to how the respondent could have filed the reply statement on 17.12.1986 without knowing the contents of the written statement containing the counter-claim regarding the relief of ejectment sought for by the petitioner against the respondent. What is further significant in this case is that the application claiming benefits under Sec.9. of the Act, had not been filed even within thirty days after the filing of the

reply statement on 17.12.1986. To accept the contentions of the learned counsel for the respondent, would be to hold that in cases like this, there could not be any time limit at all, for filing a petition claiming the benefits under Sec.9 of the Act. With reference to a counter-claim contained in a written statement, in the absence of any provisions in the Code of Civil Procedure for service of summons, it would follow that there is no period of limitation at all prescribed for filing an application, as the commencement of such period of limitation, would be thirty days from the date of service of summons, which cannot at all be effected. Though in *Thoyammal's case*, A.I.R. 1927 Mad. 113, it was held that service of summons should be personal, on the facts and circumstances prevailing in this case, the principle of that decision cannot be pressed into service by learned counsel for the respondent. On the facts of this case, it must be held that the earliest point of time when the respondent had knowledge of the threat held out in respect of his possession, was on 1.9.1986, when the written statement containing the counter-claim was made or atleast on 17.12.1986, when the respondent filed a reply statement. Computing the period of thirty days from either of the aforesaid dates, the application in I.A.No.4611 of 1987 filed on 25.2.1987 was barred by time. The civil revision petition is allowed consequently, the judgment of the lower appellate court is set aside and the order of the trial court will stand restored with costs.

B.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and S.M.Ali Mohammed, JJ.*

S.T.A No.6 of 1987 14th September, 1993.

Rangasamy Naidu ...Appellant
v.

Vccrappan and others ...Respondents.

Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963),

Sec.11(2)(s)(b) - Inam lands - Claim for ryoti patta - Enquiry into Nature of - Conditions precedent - Enquiry held without notice to inamdar and without giving opportunity of being heard - Effect - Inamdar having indirect knowledge of enquiry and grant of ryoti patta to some one else - If sufficient to deny right of notice to inamdar.

The appellant is an Inamdar. The Assistant Settlement Officer (Enquiries) III, Pudukottai held an enquiry and granted ryoti patta in favour of the first respondent. The appellant was not given any notice. He preferred an appeal to the Appellate Tribunal which rejected his appeal holding that there had been an order by the Settlement Officer in that behalf dated 21.12.1970 in which a reference to the patta issued in favour of 1st respondent was specifically made and the order passed by him on the present order dated 17.6.1983 mentioned about the village settlement records. In appeal to the High Court.

Held: The provision in order Sec.(2)(a) of Sec.11 of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act XXX of 1963 is for notice to specified persons. Besides the above, it is also prescribed order Sec.11(2)(b) of the Act that the Assistant Settlement Officer shall publish in the prescribed manner in the village the notice referred to above and after giving the parties who appear before him an opportunity to be heard and adduce their evidence and to give decision, if any. It goes without saying that any enquiry without saying that any enquiry without notice to a person who is entitled to such notice shall render the enquiry wholly without jurisdiction and illegally the condition precedent being the notice and opportunity of being heard and to adduce evidence. Enquiry under Sec.11(2) of the Act is, no doubt, a summary enquiry and as held by a Full Bench of this Court in *State of Tamil Nadu v. Ramalinga Samigal Madam* and affirmed by the Supreme Court in (1985)4 S.C.C. 10, the enquiry under Sec.11 of the Act is for revenue purpose, that is to say for fastening the liability upon the person in occupation of the land to pay the assessment or other dues and to facilitate the recovery of such revenue from him by the Government. Any adjudication as to right, interest or title, thus, is not involved in the enquiry under this provision by the Assistant Settlement Officer. But even a summary enquiry under Sec.11(2) of the Act will have a far-reaching consequence upon the right of

a person who has held the land as his private property and is entitled to hold such property and is denied the right to hold property only by an omission of the Assistant Settlement Officer in not giving notice to such person or making the order known to him in accordance with law. The effect of the enquiry being as drastic as the Supreme Court has indicated in *Vatticherukuru Village Panchayat v. Nori V. Deekshyithulu*, (1991)2 S.C.C. (Supp.) 228, it is necessary that every case is taken to recognise only that person who has the requisite qualification for the ryoti patta. This can be achieved by only adherence strictly to the rule of notice-affording an opportunity of being heard and an opportunity to lead evidence in support of its case to any party. A person aggrieved thus should not be denied the right of appeal merely on a plea of an indirect knowledge of any enquiry conducted by the Assistant Settlement Officer and grant of ryoti patta to someone else. The court is of the opinion, accordingly, that it will not be correct on the facts of this case to deny to the appellant herein the right of being heard and to adduce evidence, if any, before the Assistant Settlement Officer. [Paras. 5, 7]

Cases referred to:

State of Tamil Nadu v. Ramalinga Samigal Madam, (1985)4 S.C.C. 10. [Para. 7]

Vatticherukuru Village Panchayat v. Nori V. Deekshyithulu, (1991)2 S.C.C. (Supp.) 228. [Para. 7]

Syamala Rao v. Radhakanthaswami Varu, 1984 An.L.J. 286. [Para. 7]

Ilango, for Appellant.

Dhanyakumar, for Respondents.

The Judgment of the Court was delivered by *Mishra, J.* : The Assistant Settlement Officer (Enquiries) III, Pudukottai has granted ryoti patta in favour of the 1st respondent. The appeal before the Inam Abolition Tribunal (Sub Court), Pudukottai has also failed. The appellant herein has challenged the said order to issue ryoti patta in favour of the 1st respondent mainly on the ground that he, being the inamdar, was entitled to a notice and since no notice was given to him by the Assistant Settlement Officer, the proceeding before him was invalid as being violative of the principles of natural justice, and on merits that the claim of the 1st respondent is not covered by any of the provisions of the Tamil Nadu Minor Inams (Abolition & Conversion into Ryotwari) Act, 30 of 1963

(hereinafter referred to as the Act). The Appellate Tribunal has rejected the appeal on the ground that: (i) since the appellant was not a party to the proceedings before the Assistant Settlement Officer he has no right to appeal against the said order, and (ii) there has been an order by the Settlement Officer besides the order of the Assistant Settlement Officer in this behalf dated 21.12.1970 in which a reference as to the patta issued in favour of the 1st respondent was specifically made and the order passed by him on 17.6.1983 (Ex.P-15) mentioned about the village settlement records thus even if there could be condonation of the inordinate delay in filing the appeal until the knowledge to the appellant by the order of the Settlement Officer dated 17.6.1983 the appeal before the tribunal was hopelessly barred by limitation. The tribunal has also made a reference to the merits of the claim of the appellant and in this behalf made certain observations as to the genuineness of a document and the existence of any right in the appellant on the basis of such documents.

2. The hurdle as to limitation is sought to be overcome by the learned counsel for the appellant by bringing to our notice the fact that the Assistant Settlement Tahsildar has given no notice to the inamdar and thus had not cared to know whether there was any valid transfer of kudiwaram in favour of the 1st respondent, the fact that there has been no interference in the exercise of possession by the appellant until the 1st respondent came to interfere with the possession of the appellant on the basis of the alleged patta and that it is not possible to infer any knowledge of the grant of ryoti patta to the 1st respondent only on the basis of the order of the Tahsildar (Settlement Officer) dated 17.6.1983, Ex.P-15. According to the learned counsel for the appellant great injustice has been done to a person who has been cultivating the land throughout without any interruption when by grant of a patta in favour of the 1st respondent a basis for a claim of title to the property has been provided to the 1st respondent.

3. Learned counsel for the 1st respondent has emphasised, however, that this Court, in appeal, should decline to entertain any plea on the merits of the claim of the appellant for the reason of the inordinate delay in filing the appeal before the tribunal and also for the reason that the appellant has not been correct in asserting that he had no knowledge until the interference when it is

demonstrated by Ex.P-15 that the appellant was a party to the proceeding before the Settlement Officer and the Settlement Officer duly referred to the settlement records and the grant of patta by the Assistant Settlement Officer to the 1st respondent.

4. Determination of lands in respect of which any person is entitled to ryoti patta is made in accordance with the provisions in Sec.11 of the Act which provide for enquiry into the claims of any person for a patta under the Act in respect of any inam lands. Such enquiry, however, is permitted only after a notice in the prescribed manner to the inamdar, to the Tahsildar or Deputy Tahsildar of the Taluk or the Sub-Taluk in which the inam land is situated, as the case may be, and if the person in occupation of the land is not the inamdar, to the occupant, in case the inam has been granted for the benefit of a Hindu religious institution or for service therein, to the Commissioner appointed under the Tamil Nadu Hindu Religious and Charitable Endowments Act 1959, or to an officer specified by the said Commissioner in this behalf and if the inam is a wakf within the meaning of the Wakf Act 1954 to the Board of Wakfs constituted under that Act, or to an officer specified by the said Board in this behalf and to such other persons as may be specified in the rules made by the Government.

5. The above provision in Sub-sec.(2)(a) of Sec.11 of the Act is for notice to specified persons. Besides the above, it is also prescribed under Sec.11(2)(b) of the Act that the Assistant Settlement Officer shall publish in the prescribed manner in the village the notice referred to above and after giving the parties who appear before him an opportunity to be heard and to adduce their evidence and to give decision, if any. Sub-sec.(3) of Sec.11 of the Act contains a prescription that the decision of the Assistant Settlement Officer can be appealed against by any person aggrieved by his decision within three months and by the Government, if aggrieved, within one year before the appellate tribunal. The tribunal's power to extend three months time, however, is limited to a period of two months, thus if it is an appeal filed beyond a period of five months from the date of the decision of the Assistant Settlement Officer, the appeal is not maintainable.

6. A mechanical application of the above law thus will permit an appeal by a person aggrieved only

within three months time from the date of the order and if it is beyond three months, it is at the discretion of the tribunal to condone the delay. But the power of the tribunal to condone the delay is further limited by a prescription of a two months period only. An order wholly without jurisdiction, an order *void ab initio* a *non est* order of the Assistant Settlement Officer thus may become final if there is no appeal before the tribunal within three months or within two months thereafter, during which period the tribunal shall have the discretion to condone the delay. That, however, can never be the intention of a legislation because a valid adjudication by the Assistant Settlement Officer alone can stand and not an order which is invalid *ab initio*. It is in this context that general rules of making of an order are either incorporated by statutes or read as inherently present in such provisions that the limitation for the appeal shall start running from the date the order is communicated to the party concerned and if there is no such communication from the date the person concerned has come to know about the order. The rules in this behalf made vide G.O.Ms.No.345, Revenue, dated 10th February, 1965 as amended by G.O.Ms.No.2105, Revenue, dated 1st December, 1967, prescribes as follows:

"38. Manner of service and publication of notices and orders under the Act or the rules: Any notice or order issued or made under the Act or under these rules shall be served on the person concerned in the following manner, namely:

(a) by delivering or tendering the notice or order to the person concerned or his counsel or authorized agent or some adult member of his family; or

(b) by sending the notice or order to the person concerned by registered post acknowledgment due; or

(c) if none of the aforesaid modes of service is practicable, by affixing the notice or order in some conspicuous part of the last known place of residence or business of the person concerned or on some conspicuous part of the land to which the enquiry relates.

(2) Any notice or order which is intended for publication for general information shall, in addition to the special mode of publication prescribed in these rules, also be published by affixture in the village chavadi of the village in

which the minor inam is situate and if there is no village chavadi, in any conspicuous public place in the village and by announcing the fact of such publication by beat of tom-tom in the village. The village officer shall certify such date of publication and the said date shall be deemed to be the date of communication of the notice or order, as the case may be, to the parties concerned."

There is no material brought before us to show:

- (i) that there was any notice to the appellant of the enquiry under Sec.11(2) of the Act; or
- (ii) any communication of the order passed by the Assistant Settlement Officer."

There is also no material on the record to show that there has been such publication of the notice or the order from which it can be inferred that the petitioner had either notice of the enquiry by the Assistant Settlement Officer before he passed the order or he had the information of the order that the Assistant Settlement Officer had passed Ex.P-15 only contains an endorsement by the Settlement Officer of certain records showing the 1st respondent as the person who has been granted ryoti patta. It is difficult from that alone to infer that the petitioner had any information of the order of the Assistant Settlement Officer either on 17.6.1983, or on any date before 17.6.1983, or even after 17.6.1983 except that it came to the knowledge of the appellant on 14.12.1983. He applied for a certified copy of the order on 15.12.1983 and the order copy was issued to him on 3.1.1984. 7. It goes without saying that any enquiry without notice to a person, who is entitled to such notice, shall render the enquiry wholly without jurisdiction and illegal. The condition precedent being the notice and opportunity of being heard and to adduce evidence. Enquiry under Sec.11(2) of the act is no doubt a summary enquiry and as held by a Full Bench of this Court in *State of Tamil Nadu v. Ramalinga Samigal Madam* and affirmed by the Supreme Court in (1985)4 S.C.C. 10, the enquiry under Sec.11 of the Act is for revenue purposes, that is to say, for fastening the liability upon the person in occupation of the land to pay the assessment or other dues and to facilitate the recovery of such revenue from him by the Government. Any adjudication as to right, interest or title thus is not involved in the enquiry under this provision by the Assistant Settlement Officer. A judgment of the

Supreme Court in *Vatticherukuru Village Panchayat v. Nori V. Deekshithulu*, (1991) 2 S.C.C. (Supp.) 228 has, however, brought the whole scheme of the law again in doubt as in this judgment, it is observed:

"It was unfortunate that it was not brought to the notice of the court that the purpose of Estate Abolition Act was not solely for the purpose of collecting the revenue to the State. The act has its birth from a long drawn struggle carried on by the ryots in Madras Presidency for permanent ryotwari settlement of tenures and grant of permanent occupancy rights and the Indian National Congress espoused their rights and passed resolution at Avadi Session to make a legislation in that regard. The recovery of revenue was only secondary. In *Syamala Rao v. Radhakanthaswami Varu*, 1984 An.L.J. 286. A Division Bench of the Andhra Pradesh High Court to which one of us (K. Ramaswamy, J.) was a member considered the historical background, the purpose of the Act and the scheme envisaged therein *in extenso* and held that the preamble of the Estate Abolition Act was to repeal the permanent settlement, the acquisition of the rights of the landholders in the estates and introduction of the ryotwari settlement therein; under Sec.1(4) by issuance of the notification the pre-existing rights shall cease and determine; shall vest in the State free from all encumbrances and declared that all rights and interests created in particular over the State 'shall cease and determine as against the government' protected only dispossession of a person in possession of the ryotwari patta. Sec.11 envisaged enquiry into "the nature of the land" and whether "ryotwari land immediately before the notified dates" be properly included or ought to have been properly included in the holding of the ryoti. The enquiry under the Act was entrusted to the revenue authorities who have intimate knowledge of the nature of the lands and the entries in the revenue records of the holders, etc., Act created hierarchy of the tribunals, namely Assistant Settlement Officer, Settlement Officer; Director of Settlements and Board of Revenue; provided revisional powers to those authorities and ultimately the order is subject to the decision of the High Court under Art.226. In that view it was held that by necessary

implication the jurisdiction of the civil court was ousted, the decision of Settlement Authorities under Sec.11 was made final and no civil suit was maintainable. The legislature having made the Act to render economic justice to the ryots and excluded the dispute between landholders and the ryots covered under Secs.12 to 15 and the ryots *inter se* under Sec.56(1)(c), from the jurisdiction of the civil court, it would not be the legislative intention to expose the ryots to costly unequal civil litigation with the State of the dispute under Sec.11. It is not necessary in this case to broach further, but suffice to state that unfortunately this historical perspective and the real purpose and proper scope and operation of Estate Abolition Act was not focussed to the notice of the court".

The above, we sought only to emphasise that even a summary enquiry under Sec.11(2) of the Act will have a far-reaching consequence upon the right of a person who has held the land as his private property or is entitled to hold such property and is denied the right to hold property only by an omission of the Assistant Settlement Officer in not giving notice to such person or making the order known to him in accordance with law. The effect of the enquiry being as drastic as the Supreme Court has indicated, it is necessary that every care is taken to recognise only that person who has the requisite qualification for the ryoti patta. This can be achieved by only adherence strictly to the rule of notice, affording an opportunity of being heard and an opportunity to lead evidence in support of its case to any party. A person aggrieved thus should not be denied the right of appeal merely on a plea of an indirect knowledge of any enquiry conducted by the Assistant Settlement Officer and grant of ryoti patta to some one else. We are of the opinion, accordingly, that it will not be correct on the facts of this case to deny to the appellant herein the right of appeal before the tribunal and also the right of being heard and to adduce evidence, if any, before the Assistant Settlement Officer.

8. It is obvious that the appellant who has no notice of the proceedings before the Assistant Settlement Officer had no occasion to lead any evidence before him. There is some evidence, it is said, brought before the tribunal and the tribunal has only cursorily seen such documents to

comment as follows:

"Now the appellant has produced the patta, kist receipts and other documents. Ex.R-3 the patta book was issued to one Subbiah for some other land. The name of Subbiah and other particulars were struck down and the appellant's name was inserted. Hence, I find that Ex.R-3 is not a genuine document. Exs.R-4, R-7, R-8 and R-9 are the kist receipts for a patta No.247. The appellant has not produced the original patta No.247 to show that the same is related to the suit properties. He has filed two house tax receipts under Exs.R-5 and R-6 to show that he has paid the house taxes for the thatched house in Survey No.156/2 and 157/2. It is seen from Ex.P-15 that the Tahsildar has found that there are no houses owned by the appellant. The appellant has produced Ex.R-5 and R-6 show that he is in possession of the thatched house in Survey No.156/2 and 157/2. There are no other document connecting two documents Exs.R-5 and R-6. It is to be noted if the appellant is in possession of the property till today and there is no need for him to file an appeal against the order passed by the Assistant Settlement Officer in the year 1970. Taking advantage of some defects in the earlier documents the appellants have come forward with this appeal. Ex.P-14 is very clear that the first respondent has got title and possession to the suit property. There were some tenants who opposed the grant of patta to the first respondent. If the appellant and his predecessors were in possession of the suit property on the date of the enquiry, they would have agitated that the first respondent was not in the possession of the property. Considering the documents available in this case, I hold that the appellant has no title or possession of the petition mentioned lands".

The above can hardly satisfy the requirements of a right of hearing which the law has envisaged and the rules of evidence that each party must get opportunity to explain any doubts, inadequacies or inconsistencies in the evidence. Both the appellate as well as the original orders in the instant proceeding, for the reasons aforementioned are fit to be set aside. We accordingly set aside the orders aforementioned, remit the case back to the appropriate authority to proceed to hold enquiry afresh in accordance with law, after giving notice

to all parties concerned including the appellant herein and to pass order after giving full opportunity of being heard to the parties including the appellant herein. In the result, the appeal is allowed as above. No costs.

B.S. ----- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

T.M.A.Nos.7 and 8 of 1993 15th October, 1993.

Nalli Sambasivan and another ...Appellant
v.

The Deputy Registrar of Trade Marks
...Respondent.

(A) *Trade and Merchandise Marks Act (XLIII of 1958), Sec.21 - Period of three months from date of advertisements and a further period of one month - Computation of - Starting point for.*

Time begins to run from the date of despatch of the Journal containing the advertisement to the subscribers. [Para. 6]

(B) *Trade and Merchandise Marks Act (XLIII of 1958), Sec.109(2) - Appeal under - Expression 'shall be' - Meaning of.*

The use of the expression 'shall be' does not mean that either the appeal under Sec.96, Civil Procedure Code or appeal and under O.43, Civil Procedure Code read with Sec.104, Civil Procedure Code or the appeal under Sec.109(2) of the Trade and Merchandise Marks Act should necessarily be admitted automatically before ordering notice to the respondent. [Para. 9]

(C) *Practice and Procedure - First appeals - High Court if can dismiss without serving notice on respondent.*

There is no doubt that this Court could dismiss even a first appeal under Sec.96, Civil Procedure Code (or the appeals under O.41, Rule 11, Civil Procedure Code or Sec.109(2) of the Trade and Merchandise Marks Act after giving reasons but without serving notice on the respondent.

[Para 9]

(D) *Trade and Merchandise Marks Act (XLIII of 1958), Sec.109(2) - Appeals under - Numbered as T.M.As. instead of C.M.As. - Effect.*

Simply because instead of numbering the appeals as C.M.As. they were numbered as T.M.As., as character of the appeals has, in no way, been changed since they still remain only appeals under Sec.109(2) of the Trade and Merchandise Marks Act.

[Para. 10]

Cases referred to:

Pavunny Ouseph v. Registrar of Trade Marks, A.I.R. 1952 T.C. 77. [Paras. 3, 5]

Umakant v. Parashuram, A.I.R. 1973 S.C. 218: (1973) 1 S.C.C. 152. [Para. 9]

Appeals under Sec.109(2) of the Trade and Merchandise Marks Act, 1958, against the order of the Assistant Registrar of Trade Marks, Madras-6, dated 30.6.1993 and made in Interlocutory Petition filed on 28.4.1993 in opposition filed on 23.11.1992 in Application No.472754 on the file of the Deputy Registrar of Trade Marks, Madras-6.

T.R.Mani, Senior Counsel for *T.M.Hariharan and Aruna Ganesh*, for Appellant.

The Court made the following

ORDER: These two appeals are under Sec.109(2) of the Trade and Merchandise Marks Act, 1958, (hereinafter referred to as 'the Act'). The point involved in both the appeals is the same. In T.M.A.No.7 of 1993 the appellant is one Nalli Sambasivam and in T.M.A.No.8 of 1993 the appellant is one Nalli Duraisamy Saroja. There was Application No.472754 for registration of a particular trade mark and it was advertised in the Trade Marks Journal on 16.7.1992. Each of the appellants filed notice of opposition on 23.11.1992. As per Sec.21 of the Act, three months' time is granted "from the date of the advertisement..... of an application for registration for filing notice of opposition. No doubt, as per the very same Section, apart from the said three months, a further period not exceeding one month may also be granted by the Registrar under the Act on the application made to him in the prescribed manner. Since notice of opposition in the present case was filed only on 23.11.1992 and since according to the authority below, the abovesaid 4 months period expired on 16.11.1992 itself by order dated 30.6.1993 in the respective unnumbered interlocutory applications dated 28.4.1993 filed by each of the appellants, the notice of opposition in each

of the two cases was held to be out of time and so the said applications were rejected. In each the said interlocutory applications dated 28.4.1993, it is prayed. "Notice of opposition which is already lying with the Registrar of Trade Marks, Madras be taken on records and be proceeded with in accordance with the law". Aggrieved by the abovesaid order dated 30.6.1993, respective T.M.As. have been filed.

2. So, the only question in these appeals is whether the abovesaid notice of opposition filed on 23.11.1992 is in time. Sec.21 only grants three months "from the date of advertisement" and a further period of one month as stated above. Accordingly, Rule 51 also says that Notice of opposition should be given in the prescribed form with three months from the date of the advertisement. Then Rule 51(2) of the Act says thus:

"An application for an extension of the period within which a notice of opposition to the registration of a trade mark may be given, shall be made on Form TN44 accompanied by the prescribed fee. Such period of extension shall not exceed one month in the aggregate."

3. The learned counsel for the appellants Mr.T.R.Mani argues that the date from which the abovesaid period has to be computed, should begin from the date when any subscriber of the abovesaid journal containing the abovesaid advertisement receive has said journal earliest. But, the Authority below points out that a Division Bench of the Travancore-Cochin High Court in *Pavunny Ouseph v. Registrar of Trade Marks, A.I.R. 1952 T.C. 77* has interpreted the corresponding old Rule 30 and has held that the relevant date must be taken as the date of despatch of the journal to the subscribers.

4. As already indicated, Sec.21 refers the starting point for computing the abovesaid period, only as the "date of the advertisement" and the said expression "date of the advertisement" has been interpreted so far to mean the date of despatch of the abovesaid journal containing the advertisement. The relevant observations of the said Division Bench are as follows:

"The object of advertising that an application for the registration of a Trade Mark has been received by the Registrar is obviously to let the public know about it and to invite opposition to it, if any. That object will be served only when the journal is distributed among the subscribers or otherwise made available to the

public and not when it is printed or few copies or cuttings distributed among the subordinate offices of the Trade Marks Registry or among the applicants for registration. The relevant file called for at the instance of the appellant from the office of the Additional Registrar of Trade Marks, Trichur, shows that it has all along been the practice of the Trade Marks Registry to count the four months' time prescribed by Rule 30 from the date of despatch of the journal containing the advertisement to the subscribers. This practice commends itself to us as embodying a common sense interpretation of the rule prescribing the period of time within which opposition should be filed. There is, therefore, in our opinion, no merit whatever in the present complaint against the registrar's refusal to regard the opposition as out of time.

When the publication of the advertisement was only on or about 9.8.1949, the time for giving notice of opposition extended upto 8.12.1949 & a notice filed in November, 1949 can by no stretch of imagination be held to be not within time."

5. I may also add that in T.Narayanan's Law of Trade Marks and Passing off - Fourth Edition at page 76 I find the following passage, relying on *Pavunny Ouseph v. Registrar of Trade Marks, A.I.R. 1952 T.C. 77*:

"The period of three months referred to in Sec.21(1) should be counted from the date of despatch of the Journal containing the advertisement to the subscribers and not the date printed on the Journal."

At the footnote in the same page, I also find the Author saying as follows:

"This practice followed by the Trade Marks Registry was approved in *Pavunny Ouseph v. Registrar of Trade Marks, A.I.R. 1952 T.C. 77*.

6. So, it must be well known at least to all connected with the Trade Marks Registry that time begins to run from the abovesaid date of despatch. That apart, the reasons given by the Travancore High Court in the abovesaid decision are also quite sound and reasonable and I also concur with the said view and I am unable to accept the contention of the learned counsel.

7. Even accepting the argument of the learned counsel for the appellants that the date from which the abovesaid period has to be computed,

should begin from the date when any subscriber of the abovesaid journal receives a copy of the said journal at the earliest point of time, I find that this argument is not supported by any specific plea or proof in this regard. The material part of the abovesaid interlocutory application dated 28.4.1993 in each of the two cases only says as follows:

"That upon enquiry from the few other Trade Mark Attorneys, it has been revealed that the Trade Mark Journal No.1035 was either received by them on 23.7.1992 or 24.7.1992."

But, there is no averment in the said petition that the above referred to persons were the earliest receivers of the abovesaid journal containing the abovesaid advertisement. It only says that the above referred to persons received the abovesaid journal on 23.7.1992 or 24.7.1992. It does not say that the abovesaid persons who received the said journal on 23.7.1992 were the earliest persons to receive the said journal. Further, even the supporting affidavits filed by several persons only say when actually each of them received the said journal. Some of them say that they received on 23.7.1992 and some others say that they received it on 24.7.1992. Those affidavits also do not say that no other person received it earlier. So, it is clear that the abovesaid period of four months, even on the basis of the interpretation which the learned counsel wants to put, cannot be said to have begun only on 23.7.1992. Thus looking from any angle, I am unable to see any error in the respective impugned orders.

8. Just when I was about to conclude the dictation of the abovesaid order on 6.10.1993, the learned counsel for the appellant submitted for the first time that these appeals under Sec.109 of the Act should be automatically admitted since the right of appeal provided therein was just like a regular first appeal under Sec.96, C.P.C. I may also state here that on that day the abovesaid appeals were respectively numbered as C.M.A.Nos.1143 and 1144 of 1993 and they were posted for admission before me. When the abovesaid representation was made by the said counsel at the time when I was about to conclude the dictation of the abovesaid order, I was really surprised at the representation. Even earlier, such appeals under Sec.109 of the Act had come up before me for admission. That apart, if the abovesaid representation is correct, he should have stated so even at the very outset when the said civil miscellaneous appeals were

taken up for admission. But, he argued the said civil miscellaneous appeals, for admission for about 45 minutes. After hearing him fully, since I found that there was no error in the impugned orders of the Authorities below, I was dictating the said order. When I was about to conclude the dictation, the abovesaid representation was made.

9. Anyway, since I could not agree with that contention that the abovesaid appeals should be automatically admitted, I wanted him to substantiate his said contention, and so at his request, the appeals had to be adjourned to 8.10.1993. On 8.10.1993 I found that these appeals were not once again posted for admission, but only the stay petitions therein C.M.P.Nos.13852 and 13853 of 1993 were posted before me. No doubt, then, I also found that the abovesaid C.M.A. were renumbered as T.M.A.Nos.7 and 8 of 1993 respectively. When these stay petitions came up, I asked the counsel how the stay petitions alone were posted and not the main appeals for admission. Though the said counsel could not explain the position specifically, he pointed out that probably after the abovesaid civil miscellaneous appeals were renumbered as T.M.As., the Deputy Registrar of this Court, Mr.P.S.Balasubramaniam admitted them and ordered issue of notice to the respondents and that hence probably, the stay petitions alone had been posted. I was really puzzled and not knowing that was happening, I adjourned those stay petitions to 12.10.1993, so that I could make necessary verification from the Registry. Subsequently I have been told that since the appeals arise under Sec.109 of the Act, they should have been numbered as T.M.As. and not as C.M.As. But, however, even T.M.As. should have been posted for admission before court as per the practice of this Court, but that by some mistake, abovesaid the Deputy Registrar had himself ordered notice on the T.M.As. on 7.10.1993 and that hence by mistake, the stay petitions alone came up on 8.10.1993. I have been told further that since the mistake has been noticed subsequently, the T.M.As. would be posted for admission on the next day. Accordingly the abovesaid T.M.As. were posted for admission on 12.10.1993. Then the abovesaid counsel began to take me through several provisions of Code of Civil Procedure, like Secs.96, 100, 104, O.41, Rules 1, 3-A and 11, O.41-A, O.42, Rule 1 and O.43 and also Sec.109 of the Act and O.2 Rule 3(3)(ii) of Appellate Side Rules. However, on that date

(12.10.1993), he did not very much press the point that these appeals should be automatically admitted as he represented earlier on 6.10.1993. But, he made another submission based on O.1, Rule 3(3)(ii) of Appellate Side Rules. I may also state straightaway that both in Sec.96, C.P.C. which provides for regular first appeals and Sec.104 read with O.43, Rule 1, C.P.C. which provides for civil miscellaneous appeals against certain orders, the expression used is "appeal shall lie". Likewise, Sec.109(2) of the Act also uses the same expression "shall lie". I may also incidentally state that Sec.109(2) of the Act runs as follows:

"Save as otherwise expressly provided in Subsec.(1) or in any other provision of this Act, an appeal shall lie to the High Court with the prescribed period from any order or decision of the Registrar under this Act or the rules made thereunder".

But, it must be noted that the use of the expression "shall lie" does not mean that either the appeal under Sec.96, C.P.C. or the appeal under O.43, C.P.C. read with Sec.104, C.P.C. or the appeal under Sec.109(2) of the Act should necessarily be admitted automatically before ordering notice to the respondent.

In fact, with reference to both the abovesaid appeals under the Code of Civil Procedure, O.41, Rule 11(1) provides thus:

"The appellate court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader."

Further in *Umakant v. Parashuram*, A.I.R. 1973 S.C. 218: (1973)1 S.C.C. 152, also it was only observed thus:

"We felt that in the particular circumstances of this case it was not necessary to consider the larger question raised by Mr.Bal that in no circumstances can a High Court dismiss a first appeal summarily without giving reasons."

Thus, I find that the question whether the High Court could dismiss a first appeal summarily without giving reasons, alone has been left open. But, there is no doubt that this Court could dismiss even a first appeal under Sec.96 (or the appeals under O.41, Rule 11, C.P.C. or Sec.109(2) of the

Act) after giving reasons but without serving notice on the respondent. When I have given reasons for dismissing these appeals, I do not know how the learned counsel could say that I should automatically admit the appeal. If that is so, there is absolutely no necessity for posting such appeals before the court.

10. Now, I shall deal with the point urged by the learned counsel, relying on O.2, Rule 3(3)(ii) of Appellate Side Rules, which runs as follows:

"In all miscellaneous appeals other than appeals under O.43, Rule 1(u) of the Code, the Registrar may direct the issue of notice forthwith or post any such appeal before the court for orders". [*emphasis supplied*]

O.43, Rule 1(u), C.P.C. deals with appeals against remand orders and so it has no application to the present case. So, what the learned counsel submits is that when the Deputy Registrar, as delegate of the Registrar, had already exercised his option under the abovesaid rule and ordered issue of notice to the respondent on 7.10.1993 after these appeals were numbered as T.M.As. the appeals cannot be posted for admission before court thereafter. I am really very much surprised at this argument. The very same appeals came before the court for admission on 6.10.1993, though they were then numbered as C.M.As. But, later, the Registry having thought that they have to be numbered as T.M.As. and not as C.M.As., has numbered them as T.M.As. But, simply because instead of numbering the appeals as C.M.As., they were numbered as T.M.As., the character of the appeals has in no way been changed since they still remain only appeals under Sec.109(2) of the Act. If by some mistake, the Deputy Registrar, after numbering them as T.M.As., did not post them for admission again before the court, but straightaway issued orders to send notice to the respondents, that does not mean that when the said mistake is subsequently noted by the Registry and the appeals are posted again for admission, it cannot be argued that the appeals cannot come up for admission before the court.

11. Further, the matter also has to be investigated how actually the said Deputy Registrar passed the abovesaid order dated 7.10.1993 in these appeals to issue notice to the respondents. On the whole I may very mildly say that I am not happy with what has happened in the present case.

12. In the above circumstances, the above appeals

are not admitted, but dismissed.

B.S. ----- *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.2459 of 1987 26th August, 1993.

K.Marappan ...Petitioner
v.

Perumal and others ...Respondents.

Specific Relief Act (XLVII of 1963), Sec.16(C) - Suit on specific performance of agreement - Plaintiff stating that he was ready and willing to pay the sale price - Decree for specific performance passed on 17.8.1987 - Three months' time granted to deposit sale price - Extension of time on two occasions - Deposit not made - Application for further extension of time dismissed - Order if sustainable.

Though the petitioner would claim even in the notice issued in 1980 that he was prepared to pay the sale amount, till the date of the filing of the application he had not chosen to pay the amount in 1986. That itself would amount to denial of the equity and anxiety to negative equity to respondents. Though the court has got power to extend time in appropriate cases where justice requires it, at the same time, it cannot be construed that even in cases where the extension of time could result in gross prejudice to the other side, time should be granted indefinitely and repeatedly. [*Para. 5*]

Cases referred to:

Kalpana Saraswathi v. P.S.S.Somasundaram Chettiar, A.I.R. 1980 S.C. 512. [*Para. 5*]

Rama Bhathu v. Annaya Bhathu, A.I.R. 1926 Mad. 144. [*Para. 6*]

Mahommadalli Sahib v. Abdul Khader Saheb, 59 M.L.J. 351. [*Para. 7*]

Abdul Shaker v. Abdul Rahiman, A.I.R. 1923 Mad. 284. [*Para. 8*]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Namakkal, dated 28.11.1986

and made in I.A.No.696 of 1986 in O.S.No.102 of 1983.

K.Sampath, for Petitioner.

Mrs.Shyamala, for Respondent.

The Court made the following

ORDER: The revision petition is directed against the order made in I.A.No.696 of 1986 in O.S.No.102 of 1983 on the file of the Subordinate Judge, Salem.

2. The short facts are: The revision petitioner had filed the suit for specific performance of an agreement of sale and obtained a decree on 17.8.1987. The trial court had granted three months time for the deposit of the sale price. After extension of time, on two occasions, to deposit the sale price the petitioner herein filed E.A.No.696 of 1986 for another extension (third extension) of time by nine months. The same was resisted by the respondents. The court below, after hearing the parties has dismissed the said application. Aggrieved by that order the plaintiff has come forward with this revision petition.

3. Mr.K.Sampath, learned counsel appearing for the revision, would submit that the order of the court below is a non-speaking order; that the court had got power to extend time for more than one occasion; that the respondents have not filed any petition under Sec.26 of the Specific Relief Act praying for recession of the contract, and in view of the various rulings, liberally time should be granted for extension of time and therefore, the order of the court below is wrong. I have heard learned counsel for the respondent on the above aspects.

4. I have carefully considered the submissions made by the rival counsels. Certain relevant facts need be stated at the outset. In the suit filed on 27.4.1963, in paragraph 12 of the plaint, the plaintiff has stated that he is always ready and willing to pay the sale price and get the sale deed executed and is willing to deposit the sale price within the time granted by the court. After trial, the learned Subordinate Judge, rendered a judgment on 17.8.1984 granting three months time to the revision petitioner to deposit the sale price, which expired by 17.11.1984. In paragraph 10 of the judgment, the learned Subordinate Judge has stated as follows:

"....The plaintiff has called upon Kali Gounder and defendants 1 to 3 to execute the sale deed on receipt of balance of consideration. There

has been no latches on the part of the plaintiff. The plaintiff has been and is always willing to perform his part of the contract. He has issued notice calling upon the defendants to execute the sale deed."

The office copy of the notice issued by the plaintiff's counsel to Kali Gounder and defendants 1 to 3 is marked as Ex.A-3 dated 19.5.1980. From the above, it transpires that from 1980, the plaintiff has been saying that he is ready and willing to pay the sale amount. Even after the passing of the decree, in 1984, he has not chosen to deposit the sale price in court within the period of three months granted by the court. He had applied for extension of time on two occasions and obtained extensions. Even thereafter, the plaintiff had not chosen to deposit the sale price. Then for the third time, the plaintiff had filed I.A.No.696 of 1986 praying for nine months time from 17.6.1986 on the ground that the defendants had not yet vacated the tenants so as to give vacant possession, and clearance from the urban land tax authorities and income tax authorities were not obtained. The decree does not contemplate the deposit of the amount on completion of these two clearances by the defendants. Therefore, the reasons assigned by the plaintiff in the affidavit filed in support of the application in I.A.No.696 of 1986 cannot at all be sustained. In the circumstances, I am clear that the order of the court below refusing to give further extension of time, on the third occasion, is correct, though the order of the court below is very cryptic and does not set out the reasons in detail.

5. Mr.K.Sampath, learned counsel for the revision petitioner would rely upon *Kalpna Saraswathi v. P.S.S.Somasundaram Chettiar*, A.I.R. 1980 S.C. 512, in it it was laid,

"Specific performance is an equitable relief and he who seeks equity can be put on terms to ensure that equity is done to the opposite party even while granting the relief. The final end of law is justice and so the means to it too should be informed by equity. That is why he who seeks equity shall do equity."

The above principle goes against the very case of the petitioner. Here, though the petitioner would claim even in the notice issued in 1980, that he was prepared to pay the sale amount, till the date of the filing of the application he had not chosen to pay the amount in 1986. That itself would amount to denial of the equity and anxiety to negative equity

to respondents. Though the court has got power to extend time in appropriate cases where justice requires it, at the same time, it cannot be construed that even in cases where the extension of time could result in gross prejudice to the other side, time should be granted indefinitely and repeatedly.

6. Mr.K.Sampath, learned counsel for the revisional petitioner would further rely on *Rama Bhathu v. Annayya Bhathu*, A.I.R. 1926 Mad. 144, wherein it was held that the court ordering specific performance can extend the time to the plaintiff and the delay in such cases should be very leniently treated than in a case of limitation. No doubt in such cases, extension of time should be considered very liberally. In this case, actually it has been construed very liberally on more than one occasion. But this principle cannot be stretched to the extent of saying that time should be granted whenever it is sought for, that too indefinitely.

7. Mr.K.Sampath, learned counsel for the revision petitioner, would further rely on *Mahommadalli Sahib v. Abdul Khader Saheb*, 59 M.L.J. 351, wherein the Division Bench has held that the court had power to enlarge the time, and the power can be exercised on sufficient cause shown, even if the application is made after the date fixed by the decree. The learned counsel for the revision petitioner relies upon the following observation in the said decision which runs as follows:

".....It follows from this that the right to enforce the decree is not extinguished unless and until a final order is made rescinding the contract. And as the court has got the power to condone the default when the vendor applies for a recession of the contract it would be anomalous to hold that it has not that power when as such application has yet been made."

I am unable to construe from the above observation that wherever plaintiff seeks extension of time for the deposit of sale amount, in a case of specific performance of an agreement of sale, he should be given extension, even in a case where the reasons given by him are perverse and vexatious. Only in appropriate cases, time can be extended.

18. The learned counsel for the petitioner would further rely upon *Abdul Shaker v. Abdul Rahiman*, 44 M.L.J. 104; A.I.R. 1923 Mad. 284, in which it was said that:

"...It would seem to be absurd to hold that the mere fact that a date of completion is fixed in

the original decree puts an end to the action and that the control of the original court expires on the expiration of that date and thus substitute in effect for all the known remedies stated above the simple expedient of treating the action and the decree as deed for all purposes and leaving the vendor in undisturbed possession of property which is not his and may as in the present case be of a greater value than the contract purchase money, which perhaps by some accident, purchaser has failed to produce on the date fixed."

It is no doubt true that the court has got power to extend the time on more than one occasion, if sufficient causes are shown. In the instant case, I am clear that no sufficient cause was shown to extend the time for the third time and the court below has rightly rejected the application of the petitioner for extension of time.

9. In view of the above, I am clear that the order of the court below cannot be interfered with. Hence, the revision petition fails and is dismissed. No costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

Tr.C.M.P.No.17875 of 1993 24th December, 1993.

G.Lakshmi

...Petitioner

v.

S.Murali

...Respondent.

Civil Procedure Code (V of 1908), Sec.24 - Petition for divorce pending before the Principal Judge, Family Court - Transfer of, sought - Remarks of Principal Judge showing that he had taken grievance made by petitioner seriously and commented adversely about them - Petition, if liable to be transferred.

From the remarks of the learned Judge, it is obvious that the learned Judge has taken the grievance made by the petitioner before this Court, rather seriously and had commented adversely about the

same. He has been affected by the allegations levelled against him and it is evident from his report. In view of the above, the court is clear that the facts of this case fall squarely within the ratio of the Apex Court rulings in *Pushpa Devi Saraf v. Jai Narain Parasrampur*, A.I.R. 1992 S.C. 1133 and *Payal A.K.Jindal v. Ashok Kumar Jindal*, A.I.R. 1993 S.C.W. 3570. This case has to be transferred.

[Para. 15]

Cases referred to:

Pushpa Devi Saraf v. Jai Narain Parasrampur, A.I.R. 1992 S.C. 1133. [Para. 11]

A.K.Jindal v. Ashok Kumar Jindal, A.I.R. 1993 S.C.W. 3570. [Para. 12]

Swaminathan, In re., (1944) 1 M.L.J. 396: A.I.R. 1944 Mad. 450; 57 L.W. 318. [Para. 17]

Bombay Cotton Manufacturing Company v. R.S.Motilal Shrivastava, A.I.R. 1915 P.C. 1. [Para. 18]

P.Sankarareddi v. P.Mahalakshmi, A.I.R. 1922 P.C. 315. [Para. 18]

Sitalakshmi v. Venkatasubramaniam, A.I.R. 1930 P.C. 1170. [Para. 18]

Nandkishwar Bux Roy v. Gopal Bux Rai, A.I.R. 1940 P.C. 93. [Para. 18]

Tanguturu Sriramulu, In re., A.I.R. 1916 Mad. 763(1). [Para. 20]

B.M.T.Mathews v. P.M.Athanasius, A.I.R. 1979 S.C. 1099. [Para. 20]

C.V.Xavier v. J. and J. De Chane, A.I.R. 1972 Ker. 263. [Para. 20]

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to transfer the abovesaid O.P.No.819 of 1991 from the file of the Principal Family Court at Madras to any other Family Court in the District nearest to Madras City or to the Additional Family Court as and when the presiding officer taken charge.

Mrs.Radha Gopalan, for Petitioner.

S.Desikan, for Respondent.

The Court made the following

ORDER: The petition is under Secs.24 and 151 of the Code of Civil Procedure praying for transfer of O.P.No.819 of 1991 from the file of the Principal Family Court at Madras to any other Family Court near Madras City.

2. Short facts are: the respondent has filed O.P.No.819 of 1991 against the petitioner for divorce under Secs.13(1)(a) and 13(1)(iii) of the Hindu Marriage Act, 1955. The petitioner had resisted it. The trial had commenced and

examination of the witnesses was over. At that stage, this petition is filed for transfer.

3. The allegations in the affidavit in support of the application are briefly as follows: Certain things have taken place during the course of the trial. On occasions, the learned Judge prompted the husband/ respondent to tell that the petitioner is suffering from 'Mental disorder', the learned Judge had threatened her that he would spoil her career and forced her to settle the issue. The learned judge denied her the opportunity to explain the facts during the course of cross-examination by her husband. On 10.12.1993, when she requested time to submit her 'written arguments', the learned Judge threatened that 'she stands to lose the case if she does not submit the same by 16.12.1993' and posted the case on 14.12.1993. From the above, the petitioner is feeling that learned Judge has a bias in his view and as such, she is apprehensive that she may be prejudiced on account of such bias. Hence, the petition.

4. The respondent has filed a counter affidavit. The allegations in it are as follows: The motive for the application is to deprive him of the benefit of the decision by the learned trial judge who has the opportunity of observing the parties in the witness box, while adducing evidence. The trial opened on 7.6.1993. He has recorded evidence in about 50 pages and nearly 50 documents have been marked. It is false to say that the petitioner was not allowed to question or allowed to answer. The evidence was closed on 4.12.1993. The matter was posted for arguments to 10.12.1993. On 10.12.1993, the petitioner was absent in court. The learned Judge adjourned the matter to 14.12.1993. The petitioner's counsel wanted time till 16.12.1993. The petitioner cross-examined him at length. It is false to say that the learned Judge prompted him to say that the petitioner was suffering from 'mental disorder'. The learned Judge never threatened the petitioner that by his judgment, her career could be spoiled. The allegation that the Judge did not give time for arguments is false. The petitioner wants to take advantage of the retirement of the Judge so as to put him under disadvantage of the benefit of the learned judge who had observed the witnesses in the box and understood the progress of the case. The petitioner was not denied the opportunity to explain any of the matter at any time. The learned Judge closed the evidence on 4.12.1993 and posted only for written arguments

and nothing more is to be done by any of the parties. No ground has been made out for transfer of the case. There is no other Family Court in the State of Tamil Nadu and the matter could not be transferred at this stage to any other court. He is ready with his written arguments and he will be put to great hardship, if the proceedings are transferred at this stage. Hence, dismissal of the petition is prayed for.

5. The petitioner has filed a reply affidavit. The allegations in it are briefly as follows: She was constrained to file the petition for transfer only after the Presiding Officer of the Family Court threatened her on 10.12.1993. The successor Judge of the very same Family Court can decide the case, as the present learned Judge, on the basis of the evidence already available on record. The respondent is in a hurry to fix up the second marriage and he is anxious to get divorce at the earliest. Even on 14.12.1993, when a memo was filed regarding the stay of the proceedings, the memo was thrown on her face after her insisting on the Presiding Officer to record the same. The anxiety of the respondent to have the matter disposed of before the present learned Judge of the Family Court before he retires, itself fully supports her case.

6. The respondent has filed a re-joinder: The allegations in it are briefly as follows: The allegation that the learned Judge threatened the petitioner on 10.12.1993 is absolutely false and when the case was called, the petitioner was not present and her counsel alone was present and she prayed for extension of time and the learned Judge adjourned the matter to 14.12.1993. The allegation is made deliberately to protract the proceedings. Scandalous allegations have been made against the learned Judge to achieve their own end.

7. Regarding the allegations made against him, remarks were called for from the learned Judge of the Principal Family Court and he had submitted his remarks. His remarks are briefly as follows: On 10.12.1993, both parties agreed to submit the 'written arguments'. The respondent Lakshmi did not turn up on 10.12.1993. The advocate assisting Lakshmi wanted further time to submit the written arguments. It was posted to 14.12.1993. The petitioner Murali was ready on 10.12.1993 for submission of written arguments. The matter was posted to 14.12.1993 as the respondent had not appeared on 10.12.1993 to receive copy of the written arguments. Full evidence has been recorded running

over several pages. Due to heavy work of Family Court, special sittings for contested cases were held. The learned Principal Judge, Family Court, Madras is retiring on 31.12.1993 and from 1.1.1994 there would be no Judge for that court. After 1.1.94 this case is not likely to be taken up for months together and it may take about more than one year. Any individual would try to take advantage of a vacuum and Lakshmi tries to take fully advantage of the vacuum. It is totally false to say that he prompted her husband on occasions. On 10.12.1993, Lakshmi was absent. So, there is no occasion for her to request time to submit written arguments. The allegation that she was threatened on 10.12.1993 is totally false. The allegation that the memo was thrown out on the face of the party is made only to prejudice the mind of the Judge of the High Court, if possible. Unfounded and scandalous allegations have been made against the Judge of the Principal Family Court.

8. Mrs. Radha Gopalan, learned counsel appearing for the petitioner, would submit that in the affidavit filed by the petitioner, the instances which led her to believe that there was bias on the part of the learned Judges of the Family Court has been set out and that in the face of such apprehension, transfer may be ordered or at least further proceedings may be stayed for a fortnight and the successor Judge may dispose of the case.

9. Per contra, Mr. S. Desigan, learned counsel appearing for the respondent, would submit that the present trial Judge had recorded the evidence and had noted the demeanour of witnesses and he is in an advantageous position to assess the evidence recorded by him and that instances stated in the affidavit are false and no grounds are made out for transfer.

10. I have carefully considered the submissions made by rival counsels.

11. In *Pushpa Devi Saraf v. Jai Narain Parasrampuris*, A.I.R. 1992 S.C. 1133, the Apex Court had occasion to consider a transfer petition. The Apex Court had held that when a transfer petition is filed making allegations, the report if and when called for, should normally be confined to the allegations made about the impartiality or fairness of the Judge and not with respect to the correctness or otherwise of the orders passed by him. In that case in his report, the presiding officer not only denied the imputations made against him but also explained and justified the order passed

by him. The apex court had opined that a Presiding Officer of a court should not be put to give an explanation, barring exceptional circumstances. On the facts of that case, the Apex Court was of opinion that the allegations in the transfer petition are not sufficient and do not warrant an order of transfer. After holding so, the learned Judges of the apex court have held as follows:

"We however, feel that the learned Presiding Officer has been unduly affected by the allegations levelled against him, as would be evident from his report. In this view of the matter, we are inclined to think that in the interest of the learned Presiding Officer himself, the suit may be sent to another Court. We, accordingly, request the learned District Judge, Kanpur to transfer the said suit (Suit No.537 of 1984 on the file of VIIth Additional District Judge, as he may designate in this behalf".

12. In *Payal A.K.Jindal v. Ashok Kumar Jindal*, A.I.R. 1993 S.C.W. 3570, the wife sought transfer of the case in a suit for divorce. Her applications were dismissed by the Supreme Court. The Family Court, however, took seriously the grievances made by the wife before the Supreme Court and adversely commented about the same. In such circumstances, the Apex Court had directed transfer of the case. In paragraph 18, the Apex Court has observed as follows:

"The appellant had asked for transfer of her case from the principal Judge, Family Court, Pune, to some other Court and this Court gave liberty to the appellant to move the High Court for the said purpose we are satisfied that the reasons given by the appellant for such transfer and the apprehensions entertained by her are wholly unjustified. We are, however, of the view that the Principal Judge, Family Court, Pune, has taken the grievances made by the appellant before this Court rather seriously and has commented adversely about the same, with a view to do complete justice between the parties. We direct that this case be transferred from the file of Principal Judge, Family Court, Pune to the Principal Judge, Family Court, Bombay".

13. In this case, the remarks of the learned Principal Judge, Family Court were called for on the allegations made against him in the affidavit filed in support of the application and in the reply affidavit. The learned Principal Judge, Family Court

has submitted his remarks. The remarks alone run to nearly 15 pages. He has given the caption as follows:

"Background in which transfer petition has been filed in High Court after 10.12.93".

After giving in detail the respective contentions of the parties and the functioning of the Family Court and the special sittings held by the court, the learned Judge has stated as follows:

"As matters stand today, from 1.1.1994, there will be no Judge for the Principal Family Court, Madras. A vacuum is being created..."

So, after 1.1.1994 this case is not likely to be taken up for months together and it may take about more than one year. Thus a vacuum is created. The learned Judge also in his remarks stated as follows:

"Respondent/ Lakshmi having come to know of this administrative features after 1.1.1994 evidently wants to take full advantages of the same, in an effort to drag on and prolong the contested case. She has not filed the case and therefore she can only drag on and protract the case. Any individual would try to take advantage of a vacuum and Lakshmi tries to take full advantage of the vacuum".

In paragraph 4, the learned Judge had taken strong exception to the description of Principal Judge of Family Court in the affidavit and the reply by Lakshmi as the Presiding Officer in several places. In that para, he has stated as follows:

"When the law passed by Parliament and when Parliament has described the Judge of Principal Family Court as Principal Judge, to describe the Judge as Presiding Officer by a party is to denigrate and to degrade the post. The party's attempt to equate the Principal Judge of Principal Family Court as Presiding Officer is an attempt to treat the judiciary as executive. It exhibits the intention of the party to disobey law and not to comply with the provision of law. The party's determination not to describe the Judge in the manner in which the law passed by Parliament as described, shows that amount of respect and regard the party has for the post of the Principal Judge of Family Court".

In paragraph, 6, the learned Judge had referred the allegations made in paragraph 3 of the affidavit of the petitioner which relates to the instances of bias against the learned Judge, In it, the learned Judge has stated as follows:

"Such baseless allegations and on the face of it untenable allegations are made just to take full advantage of the vacuum that is being created from 1.1.1994 in the Principal Family Court, Madras. Otherwise, such a baseless allegation could not have been made".

14. The learned Judge had underlined this portion with green ink. Then, he had captioned paragraph 7 as follows:

"Baseless allegation No.2 in para 3 of the affidavit".

In it, he has stated as follows:

"The pity is a party has chosen to attack me with all sorts of baseless allegations and that shows that I am the most weakest individual possible. If I have the strength to threaten to anyone no party would choose to make frivolous, baseless and scandalous allegations against me".

When the learned Judge has stated as follows:

"Such baseless allegation is made to take advantage of the Vacuum after 1.1.1994 in the Principal Family Court".

This portion is written in blue ink and has been underlined by him. He had captioned the next paragraph as follows:

"Baseless allegations in paragraph 3 of the affidavit".

At the end of the paragraph, the learned Judge has stated as follows:

"This kind of baseless allegation is made just to take full advantage of the vacuum that is being created from 1.1.1994".

The learned Judge has underlined the portion in green ink. Then, he had captioned paragraph 9 as follows:

"Baseless allegation No.4 in paragraph 3 of the affidavit".

Then at the end of the paragraph, he has stated as follows:

"Such a baseless allegation is made just to take advantage of the Vacuum that would be created from 1.1.1994."

The learned Judge had underlined this portion.

15. From the remarks of the learned Judge, it is obvious that the learned Judge had taken the grievance made by the petitioner before this Court, rather seriously and had commented adversely about the same. He has been affected by the allegations levelled against him and it is evident from his report. In view of the above, I am clear that the

facts of this case fall squarely within the ratio of the Apex Court rulings which I have mentioned supra and hence, this case is to be transferred.

16. Regarding the allegations made in paragraph 3 of the affidavit filed by the petitioner, those three instances have been stoutly denied in the counter-affidavit filed by the respondent and has also been denied by the learned Judge of the Principal Court, in his remarks.

17. In *Swaminathan, In re.*, (1944)1 M.L.J. 396: A.I.R. 1944 Mad. 450: 57 L.W. 318, it was held that when a question of facts arises as to what happened in the lower court, the statement of the Presiding Judge is conclusive. With respect, I am in total agreement with the view of Justice Byers expressed in this case. The remarks of the learned Judge would clearly go to show that the instances cited in paragraph 3 of the affidavit filed by the petitioner are all not true. I am satisfied that the reasons given by the petitioner for such transfer and the apprehensions entertained by her are not justified.

18. Mr.S.Desigan, learned counsel would submit that it would be always better that the Judge who conducts the trial and who had occasion to see the witnesses in the witness box and watched their demeanour renders the judgment in the case because he can have a better appreciation of the evidence recorded. In this regard, he relied upon the decisions, in *Bombay Cotton Manufacturing Company v. R.S.Motilal Shivilal*, A.I.R. 1915 P.C. 1. In *P.Sankarareddi v. P.Mahalakshmi*, A.I.R. 1922 P.C. 315. In *Sitalakshmi v. Venkatasubramaniam*, A.I.R. 1930 P.C. 1170 and *Nandkishwar Bux Roy v. Gopal Bux Rai*, A.I.R. 1940 P.C. 93.

19. Mr.Desigan, learned counsel would further submit that the scheme of Hindu Marriage Act requires that the trial should be conducted expeditiously and judgment rendered early and in this regard, he relied upon the preamble to the Hindu Marriage Act as well as Sec.21-B of the said Act. Sec.21-B(1) of the Act reads as follows:

"The trial of a petition under this Act shall as far as is practicable consistently with the interests of justice in respect of the trial be continued from day to day until its conclusion unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded. [*emphasis supplied*]"

It is true that it would be better that the Judge who records the evidence renders the Judgment and it

is also true that an enquiry under the Hindu Marriage Act should be conducted expeditiously and disposed of early. But as has been indicated in Sec. 21-B of the Act, the speedy trial must be in consonance with the practical circumstances and in consonance with the interest of justice. Regarding the proposition that it would be better that the Judge who tries the case renders judgment also, it is circumscribed by other circumstances which have a vital bearing on this aspect of the case. Every case is to be viewed in the context of the peculiar facts and circumstances available in that case. In the instant case, for the reasons which I have indicated at the outset, unfortunately a transfer is warranted on the facts of the case.

20. Mr. S. Desigan, learned counsel would rely upon the decision in *In re. Tanguturu Sriramulu*, A.I.R. 1916 Mad. 763(1), in which a Division Bench of this Court had held that an expression of opinion by a Judge as to the character of the plaintiff or of his paper, is no ground for transfer, when that expression of opinion was elicited from that conduct of the plaintiff himself. He would also rely upon *B.M.T. Mathews v. P.M. Athanasius*, A.I.R. 1979 S.C. 1909. In *C.V. Xavier v. J. and J. De Chane*, A.I.R. 1972 Ker. 263, it was held that an attempt to take the case to another Bench when there was an apprehension that the Judges were expressing opinions seemingly adverse is nothing but to divert the course of Justice which should not be countenanced and should even be put down.

21. The above principles are well known and they are to be applied in cases which call for the application of these principles. For the reasons which I have stated in the beginning of this order, this O.P.No.819 of 1991 will have to be transferred. But inasmuch as the present learned Judge is retiring in a week, there will be no necessity to transfer it to another court and instead stay the case for a period of ten days from today. In case, no successor Judge is appointed early, parties are at liberty to move for transfer the case to some other competent Judge.

22. In the result, the petition is ordered as follows: All further proceedings in O.P.No.819 of 1991 on the file of the Principal Family Court, Madras shall stand stayed for a period of ten days. If successor Judge is not appointed early, the parties are at liberty to move this Court for appropriate directions.

B.S. ----- Petition ordered on terms.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan, J.

S.A.No.1601 of 1992 30th August, 1993.

V.Raju ...Appellant
v.
Angammal ...Respondent.

Tamil Nadu City Tenants Protection Act (III of 1922), Sec.11 - Denial of title by tenant in earlier suit - No notice under Sec.11 - Whether tenant entitled to benefits of the Act.

The Appellant having denied categorically the title of the plaintiff to the suit property is not entitled to claim the benefits of the City Tenants Protection Act and consequently there is no question of the suit being invalid for want of notice under Sec.11 of the Act. The question of denial of title disentitling the person concerned to the benefits of the Act has been considered in *Subborayan v. Devadoss Nadar*, (1991)2 L.W. 355, it has been held that when there is a denial of title the person who has denied the title of the landlord cannot claim the benefits of the enactment. [Para. 3] Once it is found by the court that the defendant is not a person who can claim the benefits of the Madras City Tenants' Protection Act as a 'Tenant' defined by the Act on the ground that he has denied the title of the landlord, the relationship of the landlord and the tenant having been surrendered by the conduct of the defendant even prior to the filing of the suit, the contention that notice should have been issued under Sec.11 of the Act is wholly unsustainable. [Para. 7]

Cases referred to:

Subborayan v. Devadoss Nadar, (1991)2 L.W. 355. [Para. 3]

Ranganathan Chettiar v. Mariappa Mudali, (1942)1 M.L.J. 92: A.I.R. 1942 Mad. 334: 55 L.W. 82: 1942 M.W.N. 97: 208 I.C. 81. [Paras. 5, 6]

Sri Agastheeswarar Prasanna Venkatesa Perumal Devasthanam v. M.Narasimhan, (1982)2 M.L.J. 70: A.I.R. 1983 Mad. 27: 1982 T.L.N.J. 61: (1982)95 L.W. 412. [Para. 6]

T.V. Balakrishnan, for Appellant.

Mrs. Parthasarathy, for Respondent.

The Court delivered the following

JUDGMENT: The only question argued by learned

counsel for the appellant is that the suit instituted by the respondent for eviction is not maintainable inasmuch as a notice under Sec.11 of the City Tenants Protection Act has not been given prior to the filing of the suit. The courts below have rejected the contention of the appellant holding that the appellant is not entitled to the benefits of the said Act in view of the specific denial of title in a prior proceeding, viz., O.S.No.323 of 1984. It is argued in this Court that the question whether a person is entitled to the benefits of the Act and whether the Act is applicable to a particular proceeding can be gone into only when there is a valid suit on the file and in the absence of a notice under Sec.11 of the Act, the terms of which are mandatory, there is no valid suit on the file of the court in which any question can be decided. Consequently, it is submitted that the suit in the present case ought to have been rejected *in limine* by the courts below as admittedly there was no notice under Sec.11 of the Act.

2. There was a notice prior to the filing of the suit but it is not one under Sec.11 of the Act, as according to the plaintiff, the defendant is not entitled to the benefits of the Act as he had already denied the title of the plaintiff in another proceeding O.S.No.323 of 1984. In the written statement, the defendant did not raise any specific plea that notice under Sec.11 of the Act ought to have been given. But, on the other hand, a vague plea is raised in paragraph 7 of the written statement that the notice issued by the plaintiff was not valid in law.

3. Again in paragraph 9, it is stated that there is no legal notice issued by the plaintiff according to law. Construing the said written statement as one raising the present question argued by learned counsel for the appellant, I have no hesitation to hold that the view taken by the courts below is correct in law. The appellant having denied categorically the title of the plaintiff to the suit property, is not entitled to claim the benefits of the City Tenants Protection Act and consequently, there is no question of the suit being invalid for want of notice under Sec.11 of the Act. I have considered the question of denial of title disentitling the person concerned to the benefits of the Act in *Subborayan v. Devadoss Nadar*, (1991) 2 L.W. 355. I have held that when there is a denial of title, the person who has denied the title of the landlord cannot claim the benefits of the enactment.

4. That view was accepted and followed by Abdul Hadi, J in his judgment in *The Idols of Sri Manundisani and Sri Perumal, Anandapuram, Varagoneri, Tiruchi, represented by their Hereditary Trustee, Vijayaraghavan v. Ayilammal Ammal*, S.A.No.75 of 1982 and C.R.P.No.272 of 1982 dated 30.6.1991. The learned Judge has held that in view of the denial of title, no notice under Sec.11 of the Act was necessary.

5. Learned counsel for the appellant places reliance on a judgment of the single Judge of this Court in *Ranganathan Chettiar v. Mariappa Mudali*, (1942) 1 M.L.J. 92; A.I.R. 1942 Mad. 334; 55 L.W. 82; 1942 M.W.N. 97; 208 I.C. 81. The plaintiffs were trustees of Sri Parthasarathy Temple, Triplicane. They filed the suit for ejectment of the tenants in possession of the land. One of the contentions raised was that the notice issued by the temple did not satisfy the requirement of Sec.11 of the Act and the suit was not maintainable. The court held that the tenants were entitled to the benefits of the Act and in the absence of valid notice under Sec.11, the suit was not maintainable. But, while dealing with the said aspect of the matter, the learned Judge observed that the plea raised by the plaintiffs that they could not issue a notice in accordance with Sec.11 of the Act as they were disputing the applicability of the Act was not acceptable. The learned Judge observed that such considerations can have little weight in the face of the clear language of Sec.11 of the Act which imposes the unqualified obligation upon the court not to entertain the suit in ejectment in the absence of compliance and the observation cannot be turned out of the context and interpreted independent of the facts of the case. It should be understood only in the context of the facts of the case. On the facts, the court having held that the persons in occupation were entitled to the benefits of the Act, naturally it was held that the absence of notice under Sec.11 invalidated the suit itself.

6. The said judgment was approved by a Division Bench of this Court in *Sri Agastheeswarar Prasanna Venkatesa Perumal Devasthanam v. M.Narasimhan*, (1982) 2 M.L.J. 70; A.I.R. 1983 Mad. 27; 1982 T.L.N.J. 61; (1982) 95 L.W. 412. In that case, the question was whether there was a waiver of a notice under Sec.11 of the Act by filing an application under Sec.9 of the Act by the tenants. The court held that before an application was

filed under Sec.9 of the Act, the tenants had in the written statement questioned the maintainability of the suit on the ground that there was no proper notice under Sec.11 of the Act. Consequently, the Bench held that there was no waiver of the notice under Sec.11 of the Act. While referring to the mandatory requirements of Sec.11 of a notice before the filing of the suit, the Bench had occasion to refer to the judgment in *Ranganathan Chettiar v. Mariappa Mudali*, (1942)1 M.L.J. 92: A.I.R. 1942 Mad. 334: 55 L.W. 82: 1942 M.W.N. 97: 208 I.C. 81. The facts of the case before the Bench were entirely different and the observations made by the Bench cannot be taken out of the context. Neither the ruling of the single Judge nor the ruling of the Bench referred to above will have any application in the present case.

7. Once it is found by the court that the defendant is not a person who can claim the benefits of the Madras City Tenants' Protection Act, as a 'tenant' defined by the Act, on the ground that he has denied the title of the landlord, the relationship of the landlord and the tenant having been surrendered by the conduct of the defendant even prior to the filing of the suit, the contention that notice should have been issued under Sec.11 of the Act is wholly unsustainable. Hence, the view taken by the courts below is proper and justified and there is no error of law whatever in the judgments of the courts below. The second appeal has no merit and it is dismissed with costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: *Mishra, J.*

W.P.No.4516 of 1984 13th December, 1993.

Perumal Pillai and another ...*Petitioners*
v.

The Union of India, The Union Territory of Pondicherry represented by the Chief Secretary, Government of Pondicherry and others

...*Respondents.*

Constitution of India (1950), Art.226 - Powers of Court under - If can be exercised to enforce circular issued by Government having no statutory force.

Two landowners filed a petition for the issue of a Writ of certiorari and quash a notification dated 3.1.1984 under Sec.4(1) of the Land Acquisition Act based on a Government Circular bearing No.LA/SE/79 Board of Revenue, Revenue Department, Pondicherry, dated 8.7.1979 wherein the State Government had stressed that fertile agricultural lands should not be acquired and if such acquisition was necessary, lands should be acquired from big landowners and not from Weaker section, the petitioner belonging to the weaker section.

Held: It will be difficult to entertain any plea based on a circular of the State Government which has for no statutory force and which circular obviously is not one that has given any right to any person affected by the land acquisition. The executive instructions which are issued in lieu of statutes are considered as binding and also extending certain rights and privileges the certain circumstances. But, all circulars issued by the Government do not fall in the category of such executive instructions. The circular aforementioned, it is concerned, is not sanctioned by any statute and it is also not an executive instruction issued in lieu of a statutory provision. It is only a circular for the guidance to the officers and agents of the Government and in proceeding to acquire lands, they are expected to observe the guidelines therein. The court does not find any merit in this Writ petition. It is accordingly, dismissed. [Para. 5]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the

High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the declaration under Sec.6 of the Act bearing G.O.Ms.No.108, dated 19.12.1983 on the file of the 2nd respondent and published in the Pondicherry Government Gazette No.1 dated 3.1.1984 pursuant to the Notification under Sec.4(1) of the Act bearing G.O.Ms.No.67, dated 23.8.1982 on the file of the 2nd respondent and published in the Pondicherry Government Gazette No.36, dated 7.9.1982 and to quash the same.

T.P.Manoharan, for Petitioners.

P.Krishnamurthy, Government Advocate (Pondicherry), for Respondents.

The Court made the following

ORDER: Two brothers have together moved this Court questioning the provisional notification under Sec.4(1) of the Land Acquisition Act (hereinafter referred to as 'the Act') and the declaration under Sec.6 thereof, relating to the acquisition of an extent of 26 acres out of a total extent of 3 hectares 42 acres, 40 meentiar (ca) in R.S.No.70/6. The petitioners responded and filed their objections in the enquiry under Sec.5-A of the Act. According to them, the land sought to be acquired is agricultural land and they are small farmers having a large family of eight members. The entire family depends only on the land for their livelihood as such the acquisition has been in the teeth of a Government Circular bearing No.LA/SE/79/B/Rev., Revenue Department, Pondicherry, dated 8.7.1979, wherein the State Government have stressed that fertile agricultural lands should not be enquired and if such acquisition is necessary lands should be acquired from big landlords and not from weaker section. They (petitioners) belong to the weaker section. There are lands belonging to rich and large land holdings belonging to others are available in the locality. There are also poramboke lands belonging to the Government available in the Village. Yet, this acquisition has been effected. Their objections, however, were not accepted in the enquiry and the declaration has followed.

2. It is stated in the affidavit filed in support of the writ petition that one Muthulakshmi's land in R.S.No.69/6 - T.S.No.L.2/30/10 was originally included in the acquisition and the respondents have released her land, but proceeded upon the petitioner's land.

3. A counter to the above has been filed in which

besides public purpose which is not in dispute, it is stated that in the enquiry under Sec.5-A of the Act, the first petitioner submitted his objection dated 7.10.1982 stating that the land about an extent of 1 hectare and 69 acres comprised in R.S.No.70/6 corresponding to T.S.No.29/4 in Ward 'L' Block No.2 belonging to him after partition effected between him and his brother, the second petitioner, has been subjected to acquisition. The second petitioner in his objection dated 6.10.1982 to the acquisition has stated that the land in question is an agricultural land, that there was no partition between himself and his brother in respect of the land in question and that his family is depending on the income derived therefrom.

4. There is no dispute before me as to the public purpose leading to the acquisition. There is also no contention that the enquiry under Sec.5-A of the Act has been vitiated for any reason. The petitioners have not pleaded that any condition precedent of the acquisition has not been complied with. The case of the petitioners is mainly based on the aforementioned Government circular that they are poor agriculturists and the land in question is the source of their livelihood and that there are other big landholders and poramboke lands in the village which would have been utilised by the Government for the public purpose concerned. They have also suggested that in the case of another landholder, the Government had shown concession on similar grounds, and in the case of the petitioners, however, the Government have discriminated.

5. It will be difficult to entertain any plea based on a circular of the State Government which has got no statutory force and which circular obviously is not one that has given any right to any person affected by the land acquisition. The executive instructions which are issued in lieu of statutes are considered as binding and also extending certain rights and privileges in certain circumstances. But, all circulars issued by the Government do not fall in the category of such executive instructions. The circular aforementioned, it is conceded, is not sanctioned by any statute and it is also not an executive instruction issued in lieu of a statutory provision. It is only a circular for the guidance to the officers and agents of the Government and in proceeding to acquire lands, they are expected to observe the guidelines therein. There is no information in any form on the record of this

proceeding that the other landholder whose lands have been exempted from the acquisition also possessed lands, if not equally to the extent of the land in possession of the petitioners, atleast nearer to the petitioners' possession and acquisition in her case had affected her interests only to the extent of that of the petitioners. It is difficult on these facts to notice any discrimination merely because the land of some other person affected by the acquisition has been exempted from the declaration. The extent of the land in possession of the petitioners is 3 hectares, 42 acres, 40 ca., out of which only 27 acres has been acquired. The substantial trunk of the land still remains in the hands of the petitioners. The extent acquired is negligible. The public purpose out of which this acquisition is served is to provide lands to landless. No further examination or consideration of the case, in my opinion, is necessary, when it is noticed that the petitioners themselves are not one in presenting their case in the sense that in his objection in course of enquiry under Sec.5-A of the Act, the first petitioner pleaded a partition with the second petitioner, but the second petitioner pleaded jointness and a large family of dependants of the petitioners. I do not find any merit in this writ petition. This writ petition is accordingly dismissed. On the facts and circumstances of the case, however, there shall be no order as to costs.

B.S. ----- Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Somasundaram, J.

W.P.No.379 of 1986 29th October, 1993.

Devi Karani Petitioner
v.
District Revenue Office-cum-Appellate Authority, Debt Relief Act, Mayiladuthurai and another
.....Respondents.

Tamil Nadu Debt Relief Act (XIII of 1980), Secs.4, 5 and 6 - Debt merged in decree of Court - Authorities under Act, if can issue certificate of discharge - Exercise of power.

The Tamil Nadu Debt Relief Act XIII of 1980 does not bypass the decrees already passed by the civil courts. There is no *non-obstante* clause in either of the Secs.4, 5 and 6 of the Act and in the absence of a *non-obstante* clause, only in a case where the debt is not merged in the decree, the Authorities under Act XIII of 1980 can exercise their power under Secs.5 and 6. Act XIII of 1980 does not contemplate that the authorities constituted under the said Act can sit in judgment over the decrees passed by the Civil Courts. In view of the settled position as laid down in *K.V.S.R.Subramaniam Chettiar v. The Revenue Divisional Officer*, 95 L.W. 466, it has to be held that when the preliminary and final decrees have already been passed by Civil Court and the matter was pending in execution stage, the 1st respondent by the impugned order cannot direct the issue of a certificate of discharge as it would have the effect of nullifying the decree granted by the competent civil court. [Para. 3]

Cases referred to:

R.K.R.Radhakrishnan Chettiar and Sons v. Tahsil-dar (Debt Relief) Kumbakonam, 1982 T.L.N.J. 66. [Para. 2]

Perumal v. Chinna Kuppanna Gounder, (1981)2 M.L.J. 1: A.I.R. 1981 Mad. 271: (1981)94 L.W. 317: 1981 T.L.N.J. 236. [Paras. 2, 3]

K.V.S.R.Subramaniam Chettiar v. The Revenue Divisional Officer, 95 L.W. 466. [Paras. 2, 3]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records, of the first respondent made in Ka.Ni.Me.Mu.17/83 AA2, dated 12.11.1985 and quash the same.

B.Kumar, for Petitioner.

M.Liaqat Ali, Government Advocate, for Respondent No.1.

P.Jayaraman, for Respondent No.2.

The Court made the following

ORDER: The 2nd respondent in this writ petition borrowed a sum of Rs.3,750 from the petitioner in 1955 and executed a registered mortgage deed in favour of the petitioner. The 2nd respondent did not repay the amount. Therefore, the petitioner

filed the suit O.S.No.136 of 1972 on the file of the District Munsif, Velangaiman for the sale of the hypotheca and realisation of the mortgage money. On 7.12.1972, a preliminary decree was passed and a final decree was passed on 12.12.1973. Thereafter the petitioner filed E.P.No.326 of 1974 to bring the mortgaged property for sale. Thereafter the Tamil Nadu Debt Relief Act (13 of 1980) hereinafter referred to as Act came into force. Taking advantage of the said enactment, the 2nd respondent filed an application before the concerned Special Tahsildar for a certificate of discharge of the mortgage debt on the ground that he is entitled to the benefits of Act 13 of 1980. The Special Tahsildar (Debt Relief), enquired into the same and passed an order dated 21.3.1983, holding that the 2nd respondent is not entitled to the benefits of the said Act. Thereafter, the 2nd respondent filed an appeal before to the appellate authority, the 1st respondent herein. The 1st respondent, by his order dated 12.11.1985, allowed the appeal filed by the 2nd respondent, holding that the 2nd respondent is entitled to the benefits of the Act and directed the Special Tahsildar to issue the certificate of discharge to the 2nd respondent. Aggrieved by the said order of the 1st respondent, the petitioner has filed the present writ petition to quash the order of the 1st respondent dated 12.11.1985.

2. The main ground urged by the learned counsel for the petitioner is that when the petitioner had obtained a decree from the civil court in O.S.No.136 of 1972 on the basis of the mortgage deed, it is not open to either the Special Tahsildar or the 1st respondent, the Appellate Authority, to go behind the said decree and nullify the same by granting a certificate of discharge of the decree debt. According to the learned counsel for the petitioner, neither Sec.4, nor Sec.5, nor Sec.6 of the Act contains a *non obstante* clause enabling the debtors to have a certificate of discharge even in cases where the debt has merged in a decree. In support of his contention, the learned counsel for the petitioner relied on the decisions in *R.K.R.Radhakrishnan Chettiar and Sons v. Tahsildar (Debt Relief) Kumbakonam*, 1982 T.L.N.J. 66, *Perumal v. Chinna Kuppanna Gounder*, (1981)2 M.L.J. 1: A.I.R. 1981 Mad. 271: (1981)94 L.W. 317: 1981 T.L.N.J. 236 and *K.V.S.R.Subramanian Chettiar v. The Revenue Divisional Officer*, 95 L.W. 466. There is merit in the contention of the learned

Counsel for the petitioner.

3. There is no dispute in the present case, that a preliminary decree was passed on 7.12.1972 the basis of the mortgage deed and final decree was passed on 12.12.1973. Admittedly the said decree was put in execution before the civil court in E.P.No.326 of 1974 when Act 13 of 1980 came into force. Notwithstanding the fact that the mortgage debt crystallised into a decree of the civil Court, the 1st respondent has invoked the provisions of the Act and directed the issue of certificate of discharge in favour of the 2nd respondent. By directing the issue of such certificate, he has nullified the decree passed by the civil court in O.S.No.136 of 1972. Act 13 of 1980 does not bypass the decrees already passed by the civil courts. As rightly contended by the learned counsel for the petitioner, there is no *non obstante* clause in either of the Secs.4, 5 and 6 of the Act and in the absence of a *non obstante* clause, only in a case where the debt is not merged in the decree, the Authorities under Act 13 of 1980 can exercise their power under Secs.5 and 6. Act 13 of 1980 does not contemplate that the Authorities constituted under the said Act, can sit in judgment over the decrees passed by the civil courts. In *K.V.S.R.Subramanian Chettiar v. The Revenue Divisional Officer*, 95 L.W. 466, a Division Bench of this Court, while holding that in a suit or proceeding initiated by a creditor in a civil court only the court has to decide the question as to whether the defendant in the suit or proceeding, is a debtor as defined in the Act, as a jurisdictional issue, observes thus:

"It is pointed out by the learned counsel for the petitioner that in cases where a creditor has filed a suit for the enforcement of a mortgage executed by a debtor, the debtor has to approach the civil court for adjudication of his claim for entitlement under the provisions of the Act and that he cannot approach the authorities constituted under the Act for such a decision. According to the learned counsel for the petitioner, Secs.5 and 6 of the Act can apply only to cases where a creditor has not approached the civil court by filing a suit to enforce his claim as against the debtor, as otherwise the authorities constituted under the Act will be usurping the functions of the civil court, which is not contemplated by the provisions of the Act. Sec.4 does not

specifically say that even in respect of matters pending before a civil court, the Tahsildar can entertain an application under Sec.6 of the Act. It is no doubt true that Sec.4(1)(b) of the Act says that no civil court shall entertain any suit or other proceedings against the debtor for the recovery of any amount of such debt and Sec.4(1)(c) says that all suits and other proceedings pending at the commencement of the Act against any debtor for the recovery of any such debt shall abate. However, the prohibition on the civil court to ascertain a suit and abatement of all existing suits and other proceedings will arise only if the debtor is found entitled to the benefits of the Act. Therefore, the civil court wherein suits or other proceedings are pending against the debtor has to come to a conclusion as to whether the debtor is entitled to the benefits of the act or not. Secs.5 and 6 of the Act do not use a *non-obstante* clause giving the Tahsildar a power to override the decision of the civil court as regards the question whether a party before the civil court is a person entitled to the benefits of the Act, and the Tahsildar, acting under Secs.5 and 6 of the Act cannot be expected to render a decision on the question as to whether the debtor is entitled to the benefits of the Act and call upon the civil court to abide by that decision. As pointed out by Ratnam, J., in *Perumal v. Chinna Kuppappa Gounder*, (1981)2 M.L.J. 1: A.I.R. 1981 Mad. 271; (1981)94 L.W. 317; 1981 T.L.N.J. 236, the Tahsildar acting under Sec.5 or Sec.6 cannot assume the functions of a civil court, which has to necessarily determine as a jurisdictional issue as to whether the party before it is a debtor entitled to the benefits of the Act, or for deciding the question of maintainability of the suit or for deciding the question of abatement referred to above. Admittedly, there is no express provision taking away the jurisdiction of the civil court to decide the question as to whether a particular person is entitled to the benefits of the Act or not. In a suit or proceeding initiated by a creditor in a civil court, the court has to decide the question as to whether the defendant in that suit or proceeding is a "debtor" as defined in the Act, as a jurisdictional issue and such jurisdictional issue has to be decided only by a court itself before pronouncing its decision on

the question of maintainability of the suit or proceeding or on the question of abatement. In this view of the matter, we have to hold in this present case that as creditor has already filed two suits for recovery of the mortgage amount and those suits are pending, the third respondent herein, who is the defendant in those suits, has to seek an adjudication before the civil court on the question as to whether he is entitled to the benefits of the Act and if the court comes to the conclusion that he is entitled to the benefits of the Act, then the court has to dispose of the suits in accordance with Sec.4 of the Act".

The ratio of the above decision directly applies to the facts of the present case. In view of the above settled position of law, it has to be held that when the preliminary and final decree have already been passed by civil court, and the matter was pending in execution stage, the 1st respondent by the impugned order, cannot direct the issue of a certificate of discharge, as it would have the effect of nullifying the decree granted by the competent civil court. Therefore, the order challenged in the writ petition is illegal and it is liable to be quashed.

4. In the result, the writ petition is allowed and the order challenged in the writ petition is quashed. There is no order as to costs.

B.S. ---- Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Mishra, J.

W.P.Nos.1686 to 1697, 1899 to 1902 of 1984 and 2866 to 2869 of 1987 25th June, 1993.

P.K.Azccz Vaidyar and others ...Petitioners
v.

The Commissioner, Coonoor Municipality and others ...Respondents.

Tamil Nadu District Municipalities Act (V of 1920), Sec. 260(2)(a) and (b) - Municipality constructing market stalls - Use of such stalls permitted and fees claimed - Basis of fixation of fees - Fees if can be equated to fair rent from tenant by landlord - Realisation towards recompensation of cost of construction - If can be termed just fee.

The Municipality has a dual role in such matters, one of the statutory authority and the other of the owner of the building. Its powers as a statutory authority extend to realise rent from the owners of the buildings and from the tenants who are in occupation of the buildings by way of tax and levy fee if any there is any trade or business or any other act involved at any place within its local limits for which it has been empowered to impose a fee. It is difficult to accept that what may be reasonable for fixation of a fair rent for a building to be realised from a tenant by a landlord where the relationship of lessor and lessee is created will be fair where there is no right of a lessee available but only its use is permitted and for which user fee is claimed. It is necessary for the Municipality in fixing rates for stall-holders to have a definite and clear basis for the determination and fixation of the fee meaning there should always be a rationale behind the fixation of the fee, otherwise it will be arbitrary and discriminatory. It is possible to take into account the location of the stall and the size and look of the stall but it cannot be a just fee if it is realised from the traders to recompensate the cost of construction of the building. [Paras. 5 & 7]

Cases referred to:

Coimbatore Municipality v. Subbiah, (1980) 1 M.L.J. 51. [Paras. 5, 8]

Arumugha Kone v. Palayamkottai Municipal Council, (1974) 1 M.L.J. 258. [Para. 6]

Baldev Singh v. State of Himachal Pradesh, A.I.R. 1987 S.C. 1239. [Para. 7]

Kamaljeet Singh and others v. Municipal Board, Pilkhwa, A.I.R. 1987 S.C. 56. [Para. 8]

Petitions under Art. 226 of the Constitution of India praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* and *mandamus* calling for the records of the first respondent made in his proceedings No. Na.Ka.A.4/7214/82, dated 2.1.1984 and to quash the same and forbear the respondents their men or agents or servants from in any manner interfering with the possession of the petitioner of Stall No. 10,

in Single Stall, Stall No. 6 etc.

A.S. Kailasam, for Petitioners.

C. Chinnaswami, for Respondents.

The Court made the following

ORDER: The petitions aforementioned are directed against the proceedings of the respondents, calling upon the petitioners and the other merchants to pay at Rs. 15 per diem in respect of single stalls and at the rate of Rs. 30 per diem in respect of double stalls of a municipal market in the town of Coonoor District, the Nilgiris. According to the petitioners, they were holding on lease either single stall or double stall out of the number of stalls owned by the respondents at Coonoor and paying rent of Rs. 1.70 to Rs. 2.00 per day for a single stall and Rs. 3.40 to Rs. 5.00 for a double stall. The stalls, however, were sought to be reconstructed and accordingly the petitioners vacated their respective stalls to enable the respondents to demolish the old buildings. The old buildings were demolished accordingly, according to the petitioners on the firm understanding that the respondents would give the stalls back to the concerned persons who were occupying them as soon as the reconstruction was over. After the reconstruction was completed, however, the respondents wanted to auction the stalls. Treating this as a violation of the undertaking seven merchants together filed a suit in O.S. No. 17 of 1983 of the District Munsif Court, Coonoor and prayed for a permanent injunction restraining the respondents from in any manner allotting or auctioning the stalls by public auction to any third persons. In the said suit, it is said an understanding was reached between the plaintiffs therein on the one hand and the respondents herein on the other hand, under which the respondents gave a firm undertaking that the stalls would be allotted to the same persons, who were occupying the stalls originally before reconstruction. The respondents, it appears, however proposed to reinduct in the stalls the petitioners and others who were therefrom before on a new rent per day fixed by them at Rs. 15 per day for single stall and Rs. 30 per day for double stall. Calling the rate fixed per day arbitrary and against the rules for fixation of rent or for a licence fee, the petitioners have moved this Court seeking a writ of *certiorari* to quash the proceedings under which the new rate of rent has been fixed and/or licence fee by the respondents.

2. In a common counter-affidavit, the respondents

have said that 28 new stalls have been constructed under Integrated Urban Development Programme Scheme with the Central Governments assistance by way of loan, which is repayable within 25 years along with interest at 5 1/2% per annum which is subsequently revised to 6 1/2% per annum. The construction work has taken up by the Public Works Department and executed with an estimated cost of Rs.8.95 lakhs. The buildings were completed and handed over to the Municipality on 1.8.1983. The respondents admitted in the counter-affidavit that some of the merchants went to the court of the District Munsif, Coonoor and obtained interim injunction, but it is said, "the suit was dismissed on 30.11.1983 by the Hon'ble District Munsif's Court as the suit was not pressed by the petitioners, in view of the memo of settlement filed by both parties and as resolved by the council in its resolution No.237/83 dated 12.11.1983 to allot the stalls to the petitioners at the rate of daily fee of Rs.30 and Rs.60 for single and double stalls respectively subject to the conditions to pay six months deposit and subject to the approval of the rates so fixed by the Director of Municipal Administration, Madras". It is said further in the counter-affidavit that the Municipal Council in its resolution No.237 dated 12.11.1983 resolved to allot the new stalls to the previous stall holders on daily licence fee of Rs.30 and Rs.60 for each of the single and double stalls respectively subject to the approval by the Director of Municipal Administration, Madras and on payment of six months deposit in advance and to pay the daily licence fee promptly. Subsequently, the Director of Municipal Administration was addressed in this respondent's Office Roc.No.7214/81-A4, dated 5.12.1983 for allotting the said stalls to the old stall holders at Rs.30 per single stall per day dispensing with the public auction, It is thus said, 'after the dismissal of the said suit on 30.11.1983 all the vendors decided not to pay any tax or fees with effect from 15.12.1983 until the stalls are handed over to them with a reasonable rent since the daily fee fixed at Rs.30 per single stall per day was considered to be on the high side. The Commissioner and the Special Officer discussed the problem with the stall holders on 17.12.1983. The vendors demanded to hand over the stall with lesser rent without collecting any amount from them, but the Commissioner would not agree to consider the request before the receipt of the orders from the Director of Municipal

Administration and also as it was not found possible to hand over the stalls without remitting the six months deposit. On the representation made by the vendors, the District Collector convened a meeting with Municipal Officials stall holders, local M.L.A. etc., and after a prolonged discussion, the District Collector obtained permission from the Director of Municipal Administration to settle the matter. The District Collector after examining carefully all the aspects of total expenditure for the construction of the above stalls, repayment of annual instalment of principal with interest to be repayable within 25 years maintenance, establishments and the prevailing circumstances for the actual plinth area of the individual stalls taking into account of the neighbouring stalls auctioned recently and arriving to a conclusion as suggested to reduce the daily fee of Rs.30 to Rs.15 per single stall per day. The District Collector also requested the Municipal Commissioner to obtain the Council Resolution and to hand over the stalls immediately with an undertaking that the stall holders should pay Rs.15 per single stall per day promptly and pay six months deposit as per conditions; after taking assurance from the vendors for the withdrawal of the token fast and band on the same day. Accordingly on the suggestions and decision arrived at by the District Collector, the Commissioner placed the entire discussion before the Council and the Council resolved to hand over the stalls accepting the rate of daily fee of Rs.15 for single stall and Rs.30 for double stall per day as suggested by the Collector, subject to the approval of the Director of Municipal Administration, Madras in its resolution No.295/83 dated 27.12.1983. Consequently the Municipal Commissioner has issued orders allotting the stalls in his proceedings A4/7214/82 dated 2.1.1984 to the petitioners. Accordingly the said stalls were taken over by the individuals on 9.1.1984 giving an undertaking in writing and accepting to remit the daily licence fee then and there and to remit the six months deposit of Rs.2,700 for a single stall and of Rs.5,400 for double stall within 15 days in one instalment'. It is alleged in the counter-affidavit that the stall holders failed to pay the daily fees promptly and also defaulted in payment of the deposit aforementioned. As the conditions stipulated in the office proceedings No.7214/81 dated 2.1.1984 were violated and also the assurance given by the vendors to pay the six months deposit

within 15 days also failed and the stall holders defaulted in payment of daily fee, action was taken to lock up the stalls on 2.2.1984 evening with the assistance of the police and the stalls were locked and sealed for the failure of non-payment of six months deposit amount and also daily fee promptly from the date of occupation, i.e. from 9.1.1984 to 2.2.1984 with a view to realising the dues. All the stall holders have represented the matter to the District Collector again on the next day. The District Collector after discussing with the Municipal authorities advised the stall holders to remit Rs.500 immediately and to remit the daily fees promptly without any further default and to pay the balance of six months; deposit within thirty days. On the advice and suggestions made by the District Collector, the stall holders have remitted Rs.500 on 4.2.1984 and took over possession of the shops again on the same day i.e. 4.2.1984. After taking possession of the above stalls the vendors instead of clearing the arrears of daily fees and the six

months deposit, however, according to the respondents, the petitioners have approached this Court to evade payment and to make the Municipality suffer with financial constraints. There is a calculation in the counter-affidavit how the daily fee has been fixed in these words:

'Under the I.U.D.P. Schemes under Phase III, 52 new shops have been constructed by the Coonoor Municipality (single stall 18 numbers and double stalls 34 numbers). When the stall holders have been requested to take over possession on a daily fee of Rs.11.25 (45 sq.ft.) and Rs.26.25 (105 sq.ft.) fixed at the rate of Rs.0.25 paise per sq.ft., by the Director of Municipal Administration, Madras, they refused to take possession of the said stalls saying that the fee fixed is arbitrary. Hence, the said 52 stalls were auctioned on 28.1.1987 in public auction and the details of the bid amount are submitted here below:

<i>No.of stalls</i>	<i>Size</i>	<i>Minimum daily fee bidded</i>	<i>Maximum daily fee bidded</i>
18 (single)	45 sq.ft.,	Rs.20.00	Rs.33.50
34 (double)	105 sq.ft.,	Rs.37.85	Rs.63.75
The measurement of the 28 shops covered in this case is as follows:			
<i>No.of shops</i>	<i>Size</i>	<i>Daily fee fixed to which petition is opposing</i>	
14 (single)	71 sq.ft.,	Rs.15.00	
7 (double)	124.5 sq.ft.,	Rs.30.00	

3. Both the petitioners and the respondents have accepted that the new stalls have been constructed with the financial assistance of the Central Government under Integrated Urban Development Programme Scheme which is meant exclusively for remunerative enterprises to modernise the market buildings. The respondents have given, however, the total expenditure for the construction of the 28 stalls as Rs.6,15,178 whereas the petitioners have said that the amount spent on the construction was Rs.5,65,000 only. The dispute between the parties, it is conceded, is not fully covered by the proceedings, in O.S.No.17 of 1983 of the Court of the District Munsif, Coonoor, which proceeding ended with a memo of settlement filed by both parties. The said settlement created, however, an obligation upon the respondents to reinduct the petitioners in the stalls. The petitioners have at some places in their affidavit described the daily rate sought to be realised

from them as rent and called themselves as lessees of the stalls, but the respondents have called the daily rate of Rs.15 and Rs.30 respectively for the single and double stall as daily fee for the stalls.

4. The Tamil Nadu District Municipalities Act, 1920 (V of 1920) has specific provisions in Secs.250 to 261 of and for Public Markets', that is to say all markets which are acquired, constructed, repaired or maintained out of the municipal fund. Sec.260 gives to the Municipal Council power to provide places for use as public markets and provides in Sub-sec.(2) thereof that the Council may in any public market levy any one or more of the fees at such rates as are enumerated therein and may place the collection of such fees under the management of such persons as may appear to it proper or may farm out such fees for any period not exceeding three years at a time and on such terms and subject to such conditions as it may

deem fit. Five kinds of fees are mentioned, one being fees for the use of shops, stalls, pens or stands in such markets.

5. A Full Bench of this Court in the case of *Coimbatore Municipality v. Subbiah*, (1980)1 M.L.J. 51, by a majority of 2:1 has said 'that the Municipality being a statutory body must follow a rational basis in fixing the fee for the various stalls in a public market'. The Full Bench confirmed the judgment of the court in S.A.No.1259 of 1968, in which the doctrine of *quid pro quo* as an essential attribute of a fee was noticed and a reference was made to an earlier judgment in W.P.No.913 of 1970 and other analogous cases of 1970, in which a learned single Judge of this Court considered the difference between 'tax' and 'licence fee' and observed, 'the impost in the instant case is not a tax; but certainly it is not fee which is governed by the doctrine of *quid pro quo*; but it is a compulsory exaction sanctioned by statute and being annexed with the right of ownership of property the owner of the public market has the right to vary it by increasing or diminishing it after notice and after such fixation, recover the same from the stall-holders'. The Full Bench also took notice of the observations that the various problems confronting a Municipality are not rigid and cannot be iron-jacketed. They are flexible, varied and many. In order to subserve the interests of the municipal fund and particularly the public health of the municipality and to gain a safe and reasonable return for its investment on the construction, establishment and maintenance of the public market, the municipality is entitled to review the situation and in the absence of any maximum prescribed in the statute, it has the right to increase it. But the most important aspect that has been adverted to by the Full Bench and which has been the corner stone of all judgments on this subject, which are referred to in the judgment of the Full Bench, is that restriction which equity will bring to bear upon the exercise of such power is that an opportunity should be given to the person affected before the increase is effected, that increase of the licence fee should not be arbitrary and unjust or illegal otherwise. It is, however, essential to bear in mind, as indicated above, that the Municipality has a dual role in such matters, one of the statutory authority and other of the owner of the building. Its powers as a statutory authority extend to realise rent from the owners of the buildings and/from the tenants who

are in occupation of the buildings by way of tax and levy fee if there is any trade or business or any other act involved at any place within its local limits for which it has been empowered to impose a fee. It is difficult to accept that what may be reasonable for fixation of a fair rent for a building to be realised from a tenant by the landlord where the relationship of lessor and lessee is created will be fair where there is no right of a lessee available but only its use is permitted and for which user fee is claimed.

6. This Court in the case of *Arumugha Kone v. Palayamkottai Municipal Council*, (1974)1 M.L.J. 258, has taken the view that 'the fees referred to in Sec.260(2)(b) of the Act means only fees for the occupation of the particular stall situate in the market of which the Municipal Council is the owner and therefore there can be no question of *quid pro quo* in the sense of the said fees being commensurate with the services rendered by the Municipal Council either to the stall-holders or to the markets as a whole'. In this judgment it is also indicated that the fees contemplated by Sec.260(2)(a) and (b) of the Act can include an element of return to the Municipal Council on the investment, which it has made in acquiring or constructing the market in question. In that event, there is absolutely nothing in the Act to put a limit on the said element of return. What should be the proper rent payable in respect of the lease of the stalls in the market or the fees payable in respect of a licence granted by the Municipal Council for the use of stalls will have necessarily to be variable and flexible depending upon the demand for such place in the particular locality at a particular time. The instant problem, however, is of a dispute of a reconstruction of stalls resulting in more than 300/400% increase in the rate of fee per day based entirely upon the alleged investment in the reconstruction without it appears taking into account the market potential and the trade return of the vendors who have been doing the same business before demolition of the building and reconstruction and who are involved in a dispute as to the reasonableness of the rate of fee per day claimed by the respondents.

7. The Municipality is a local self Government, which fulfils the democratic aspirations of the people residing within its limits. It is they who govern the Council and it is they who determine how to distribute the activities of the Municipality

and how to share the burden of the Municipality. Those who enter Municipalities as Administrators or Commissioners for the reason of the supersession of a municipality or otherwise to assist the municipal administration are expected to remember this aspect of the law which has been stated so candidly by the Supreme Court in one of its judgments in the case of *Baldev Singh v. State of Himachal Pradesh and others*, A.I.R. 1987 S.C. 1239, in these words:

'Ours is a democratic polity. At every level, from the villages up to the national level, democratic institutions have been introduced. The villages are under Gram Panchayats, urban areas under Municipalities and Corporations, districts are under parishads; for the State there is a Legislature and for the entire country, we have the Parliament. People residing within Gram Panchayats have their electoral rights to exercise and in exercise of such rights, they have elected their representatives. Citizens of India have a right to decide, what should be the nature of their society in which they live-agrarian, semi-urban or urban. Admittedly, the way of life varies, depending upon where one lives.'

8. Since ordinary distinction which is kept in mind in understanding as to whether a particular levy is a tax or a fee is diluted in respect of a statutory provision like one in Sec.260(2)(a) and (b) of the Act, with which we are concerned, it is necessary to note that in respect of taxes too a certain amount of liberty is given to impose compensatory taxes. While considering in what way a compensatory tax can be justified, the Supreme Court in the case of *Kamaljeet Singh and others v. Municipal Board, Pilkhwa and others*, A.I.R. 1987 S.C. 56 has said 'The toll tax in question however cannot be treated to be a compensatory tax for the use of trading facilities. The Municipal Board provides no facilities whatever to the owners of vehicles like stage carriages making use of National Highway No.24. The township of Pilkhwa is off the National Highway and is quite at some distance. It is connected by a road and a part of the National Highway has been included within the municipal limits. Merely because stage carriage operators like the appellant ply their stage carriages on permits issued on the inter-State route Delhi Garhumukteshwar which falls on the National Highway and stop their buses for the facility of passengers going to

and coming from Pilkhwa, or that the Municipal Board has set up two electric poles at the toll barriers for facility of collection of the toll tax, does not justify the imposition of a toll tax. Usually, the consideration for a toll is some amenity, service, benefit or advantage which the person entitled to the toll undertakes to provide for the public in general or the persons liable to pay the toll. The National Highway is being maintained by the Government and the approach road built by the Public Works Department. There is a nallah constructed by the Municipal Board for flow of the sewage water from the town of Pilkhwa, but that does not entitle the Board to levy a toll tax on stage carriage operators like the appellants compensatory tax. Even assuming that the Municipal Board has to incur expenditure on maintenance of the connecting road and the nallah, but they are facilities provided for the residents of the town for which it recovers various taxes. Furthermore, maintenance of roads, bridges, etc., are statutory duties of the Municipal Board under Sec.7 of the Act. The levy of the toll tax by the Municipal Board must therefore be struck down as *ultra vires*'. We get some ideas how the problem of this kind can be approached from the minority judgment of the Full Bench in the case of *Coimbatore Municipality v. Subbiah*, (1980)1 M.L.J. 51, wherein it is said, 'The proper way to understand the scope of the power would be to construe the provision, not in isolation, but in association with the other provisions and in the context of the general scheme of the enactment. In this one can pose a question. Is the Municipality only a property owning authority or is a responsible local authority which has also to take into account its obligations towards the people who have created it. If this aspect is not taken into account, and it is left entirely at the discretion of the Municipality to demand any amount of fee in the sense that it should go by the highest bid and to the person who gives the highest offer, then it will cease to be a service for the benefit of the residents and shall become a sort of a trading activity of the local authority and unguided and unabridged this power under Sec.260(2)(a)(b) of the Act will be violative of Art.14 of the Constitution. In the majority judgment also it is indicated that difference in the rates of levy of fee should not be on the basis of class of trade since it would *prima facie* violate Art.14 of the Constitution and it is said in that decision that the Municipality

once it chooses to let out its stalls in a public market to enable the seller therein to bring together the persons interested in the articles vended by him for purposes of purchase etc., cannot make further inroads into the absolute right of the occupant to adopt an avocation or trade of his choice. The majority judgment of the Full Bench has also pointed out that may be the turnover of a commission agent is more than that of a retailer but that would not enter into the computation of the licence fee because it is an irrelevant consideration. The majority has said and we are of the opinion that though the nature of the trade carried on in the stalls may be taken as a basis for fixing the fee having regard to the extent of the stall, the extent of the trade carried on in the stall cannot be held to be a rational basis for fixing the fees. Thus, what I have been able to gather thus far it is indeed necessary for the Municipality in fixing rates for stall-holders to have a definite and clear basis for the determination and fixation of the fee meaning there should always be a rationale behind the fixation of the fee otherwise it will be arbitrary and discriminatory. It is possible to take into account the location of the stall and the size and look of the stall, but it cannot be a just fee if it is realised from the traders to recompensate the cost of construction of the building. Since, I have taken the above view, I have no hesitation in interfering with the proceedings of the Council and to direct the respondents to redetermine the rate of fee keeping in view the rationale and after affording an opportunity of being heard to the petitioners so as to comply with the requirements of the principles of natural justice. In the result, the Writ petitions are allowed and the impugned proceedings No.Na.ka.A.4/7214/81, dated 2.1.1984 are quashed. The respondents are directed to issue notice to the petitioners calling upon them to show cause why the rate of fee, which the respondents propose, should not be realised from them and thereafter to decide as to what may be the reasonable and proper rate of fee that should be realised from the petitioners as well as the other merchants in the stalls of the public market. Until such determination, any fee realised from the petitioners shall be subject to adjustment or refund as the case may be. No costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Raju and AR.Lakshmanan, JJ.*

W.P.Nos.14713 of 1991, 1953, 2526, 4209, 4432, 5149, 5171, 5275, 5386, 5624, 13366, 14673, 16823, 17284 and 19498 of 1992, 283, 284, 285, 286, 2521, 3824, 3825, 3826, 3827, 7038, 15337, 15338, 20474 and 21494 of 1993 17th February, 1994.

Dr.C.S.Subramanian

...Petitioner

v.

Kumarasamy and another

...Respondents.

(A) Consumer Protection Act (LXVIII of 1986), Secs.2(1)(o) and 2(1)(d) - 'Service' and 'Consumer' - Meaning of - Services rendered by medical practitioner or hospital to patients by way of diagnosis and treatment - If 'service' within Sec.2(1)(o) - Patient if 'consumer' within Sec.2(1)(d) - If can be subjected to claims under the Act in respect of such services - Para-medical services rendered by medical practitioner or hospital if come within the purview of the Act.

The services rendered to a patient by a Medical practitioner or an hospital by way of diagnosis and treatment, both medicinal and surgical, would not come within the definition of 'service' under Sec.2(1)(o) of the Consumer Protection Act and a patient or his representatives-in-interest will not fall within the definition of 'consumer' in Sec.2(1)(d) and consequently, they cannot be subjected to claims, in respect of such services relating to diagnosis and treatment, both medicinal and surgical, before the District Forum or State and National Commissions constituted under the Consumer Protection Act. The words 'consumer' and 'service' defined under Sec.2(1)(d) and (o) respectively should be construed to comprehend consumer or services of commercial and trade oriented nature only in the context of an unfair trade or restrictive trade practices and not otherwise. [Para. 52] However, medical practitioners and hospitals undertaking exclusively or in addition to services of diagnosis and treatment, para-medical services of all kinds and categories cannot claim similar immunity to the extent of such para-medical services undertaken to be rendered. Rendering of para-medical services, though may also involve to certain extent professional skill and talent would fall within the definition of 'service' and those who

avail of such services would answer the definition of 'consumer' under the provisions of the Act.

[Para. 52]

Even assuming for the purposes of argument, that a patient undergoing treatment or availing the services of a medical practitioner or hospital, in respect of diagnosis and treatment would answer the description of 'consumer' and services rendered to him 'service' for the purpose of the Act, it would be obvious that the services rendered by way of diagnosis and treatment other than paramedical services, would fall within the exclusionary clause 'contract of personal service' in Sec.2(1)(o) of the Act and, therefore, would be outside the purview of the Consumer Protection Act.

[Para. 52]

Though the object of providing a cheap and speedy remedy may have a lofty and laudable motive that by itself cannot justify a construction of the provisions of the Act in a manner to subject medical practitioners and also the hospitals providing and undertaking treatment of a patient to the type and character of Forums created under the Act with summary jurisdiction. A concession in the court-fee payable or stipulation of a reasonable period for the conclusion of the proceedings may be a desirable need, but the remedy thought of cannot be more dangerous and disastrous than the disease itself. It is high time for the legislature to clarify the position specifically without leaving room for any doubt in such a vital and important area of enforcement of the provisions of the Act, with not only far reaching importance but drastic and serious consequences.

[Para. 53]

(B) Tort - Negligence - Medical practitioners and hospitals - Degree of care and skill required in diagnosis and treatment of patients - Liability for negligence, when arises - Standard of proof required.

Obiter: It is by now well settled that there is no absolute or total immunity to a Medical Practitioner from liability for the negligence which may be determined by the rules of Tort, Contract or equity. Breach of duty on the part of a medical practitioner may arise on account of breach of the implied contractual duty to exercise reasonable skill and care and breach of duty of care owed by a medical practitioner to his patient whether or not there is any contract between them. The test as to whether there has been negligence or not, in a situation which involves the use of some special skill or competence, is the exercise of ordinary

skill of an ordinary competent man exercising and professing to have that special skill. The test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care.

[Para. 26]

Medicine is an inexact science and it is unlikely that a responsible doctor would intend to give an assurance to achieve a particular result. Not every one of mere error of judgment can be castigated as negligence in legal sense but, it is only such errors which a reasonably competent professional man, acting with ordinary care, might commit.

[Para. 27]

The authorities who run a hospital, be they local authorities, government or any other corporation are in law under the self same duty as the humblest doctor and since they must use reasonable care and skill to cure a patient of his ailment and are bound to act through staff they employ, they are just as liable for the negligence as is any one else who employs others to do his duties for him. That is also because even if they are not servants, they are to be treated as agents with the only exception in the case of such staff selected and employed by the patient himself. There is very little difference between the obligations undertaken by a medical practitioner in private practice and those imposed on his colleagues and counterparts working in the hospitals run and administered either by the Government or local authorities or philanthropic bodies. All medical practitioners thus owe a duty to their patients to exercise reasonable care in carrying out their professional skills of diagnosis, advice, treatment and surgery.

[Para. 27]

Medicine has not yet reached a stage, and may be it never will, when the adoption of a particular procedure, either medicinal or surgical will produce a certain positive result. Having regard to all these peculiar situations in the field of medical treatment and the further fact that a claim for compensation against a medical practitioner not only involves mere financial loss but the very professional reputation and future career would be under stake, accompanied by his professional incompetency, allegations of negligence against a medical practitioner should be considered as a very serious one and the standard of proof of fault also should be of a high degree of probabilities.

[Para. 28]

Cases referred to:

- Roe v. Minister of Health and another*, (1954) 2 Q.B. 66: (1954) 2 All.E.R. 131. [Paras. 2, 3, 44]
- J.N.Strivastava v. Ram Biharilal*, A.I.R. 1982 M.P. 132. [Para. 3]
- Chattand v. Bell*, 18. D.L.R. _____. [Para. 3]
- M/s.Cosmopolitan Hospital and another v. Smt.Vasantha P.Nair and others*, (1992) 1 C.P.R. 820. [Paras. 18, 32, 42]
- Tulasi Enterprises v. Andhra Pradesh State Consumer Commission, Hyderabad*, A.I.R. 1991 A.P. 326. [Paras. 18, 32]
- Dr.A.S.Chandra and others v. Union of India and others*, (1992) 1 A.L.T. 713. [Paras. 18, 32]
- Dr.A.Indira Narayanan v. The Government of India*, (1994) 1 M.L.J. 24. [Paras. 18, 32]
- Kiran Bedi and Jinder Singh v. Committee of Inquiry*, A.I.R. 1989 S.C. 714. [Para. 29]
- Delhi Transport Corporation v. D.T.C.Mazdoor Congress*, A.I.R. 1991 S.C. 101: 1991 Lab.I.C. 91: (1990) 3 J.T. 725. [Para. 29]
- Francis Coralie v. Union Territory of Delhi*, A.I.R. 1981 S.C. 746: 1981 Cr.L.J. 306: (1981) 1 S.C.C. 608: 1981 S.C.C. (Cr.) 212: (1981) 2 S.C.J. 18: 1981 M.L.J. (Cr.) 331: (1981) 2 S.C.R. 516. [Para. 29]
- State of West Bengal v. Anwar Ali*, A.I.R. 1952 S.C. 75: 1952 S.C.J. 55: 1952 S.C.R. 284: 1952 M.W.N. 460: 1952 M.W.N. (Cr.) 124: 53 Cr.L.J. 510. [Para. 29]
- In re. The Special Courts Bill, 1978*, A.I.R. 1979 S.C. 478: (1979) 2 S.C.R. 476. [Paras. 29, 31]
- Swadeshi Cotton Mills v. Union of India*, A.I.R. 1981 S.C. 818: (1981) 1 S.C.C. 664: 51 C.C. 210: 58 F.J.R. 190: (1981) 2 S.C.R. 533. [Para. 30]
- Charan Lal Sahu v. Union of India*, A.I.R. 1990 S.C. 1480. [Para. 30]
- S.P.Sampath Kumar v. Union of India*, A.I.R. 1987 S.C. 386. [Para. 30]
- Collector of Customs v. Sampathu Chetty*, A.I.R. 1962 S.C. 316: (1962) 1 S.C.J. 68: 1962 M.L.J. (Cr.) 1: (1962) 1 M.L.J. (S.C.) 43: (1962) 1 An.W.R. (S.C.) 43: (1962) 1 Cr.L.J. 364: (1962) 3 S.C.R. 786. [Para. 31]
- Sivagamunatha and Sons v. I.T.Officer*, A.I.R. 1956 Mad. 1: I.L.R. (1956) Mad. 415: (1955) 2 M.L.J. 477: (1955) 28 I.T.R. 601: (1955) 68 L.W. 812. [Para. 31]
- Jolly George Varghese and another v. The Bank of Cochin*, (1980) 2 S.C.C. 360. [Para. 31]
- State of Madras v. B.Reddiar*, A.I.R. 1973 Mad. 14. [Para. 31]
- Raipur Municipality v. State of M.P.*, A.I.R. 1970 S.C. 1923. [Para. 31]
- Dadaji v. Sukhdeo*, A.I.R. 1980 S.C. 150. [Para. 31]
- South Gujarat Roofing Tiles v. State of Gujarat*, A.I.R. 1977 S.C. 90: (1977) 1 S.C.R. 878. [Para. 31]
- M/s.Mahalakshmi Oil Mills v. State of A.P.*, A.I.R. 1989 S.C. 335. [Para. 31]
- State of Karnataka v. Ranganatha Reddy*, A.I.R. 1978 S.C. 215: (1977) 4 S.C.C. 471. [Para. 31]
- Messrs.Dwarka Prasad v. State of U.P.*, A.I.R. 1954 S.C. 224: 1954 S.C.J. 238: 1954 S.C.R. 803. [Para. 31]
- Air India v. Nargesh Meerza*, A.I.R. 1981 S.C. 1829: 1981 Lab.I.C. 1313: (1981) 4 S.C.C. 335: (1981) 2 Lab.L.J. 314. [Para. 31]
- Express Newspaper Limited v. Union of India*, A.I.R. 1958 S.C. 578: 1958 S.C.J. 1113. [Para. 31]
- M/s.Diplomat Engineers v. Byford Leasing Limited*, (1991) 2 C.P.R. 53. [Para. 31]
- M/s.Special Machines v. Punjab National Bank and others*, (1991) 1 C.P.R. 52. [Para. 31]
- Subhashchandra N.Pandya v. Shailesh, J. Shah and others*, (1991) 2 C.P.R. 537. [Para. 31]
- Y.Meenakshi v. Dr.H.Nandeesh*, (1991) 2 C.P.J. 533. [Para. 31]
- State of Uttar Pradesh v. Chhotey Lal Pandey* (1990) 4 S.C.C. 697. [Para. 32]
- Mahindra and Mahindra Limited v. Union of India*, 1979 C.C. 419. [Para. 32]
- Regional Director, E.S.I.C. v. High Land Coffee Works of P.F.X. Saldanha and Sons*, A.I.R. 1992 S.C. 129. [Para. 32]
- N.T.Corporation Limited v. Sitaram Mills Limited*, A.I.R. 1986 S.C. 1234: (1986) 2 Com.L.J. 261: (1986) 2 S.C.J. 139: 1986 S.C.C. (Supp.) 117. [Para. 32]
- Lucknow Development Authority v. M.K.Gupta*, (1994) 1 S.C.C. 243. [Paras. 32, 40]
- M/s.Special Machines v. Punjab National Bank and others*, (1991) 1 C.P.R. 52. [Para. 38]
- Abdul Sukur v. State of Orissa*, (1991) 2 C.P.J. 202. [Para. 38]
- Dilworth v. Commissioner of Stamps*, 1899 A.C. 99. [Para. 40]
- Regional Director, Employees' State Insurance Corporation v. High Land Coffee Works of P.F.X.Saldanha and Sons*, (1991) 3 S.C.C. 617. [Para. 40]
- C.I.T. v. Taj Mahal Hotel, Secunderabad*, (1971) 3 S.C.C. 550. [Para. 40]
- State of Bombay v. Hospital Mazdoor Sabha*, A.I.R. 1960 S.C. 610: (1960) 2 S.C.R. 866: 1960 S.C.J. 679:

(1960)1 Lab.L.J. 251. [Para. 40]

Consumer Unity and Trust Society, Jaipur v. State of Rajasthan and others, (1991)1 C.P.R. 241. [Para. 45]

Reserve Bank of India v. Peerless General Finance and Investment Company Limited and others, (1987)1 S.C.C. 424. [Para. 50]

K.Parasaran, Senior Advocate, *Habibullah Badsha*, Senior Advocate, *R.Gandhi*, Senior Advocate, *Mrs.Nalini Chidambaram*, Senior Advocate, *Chinnaswami*, Senior Advocate, *M.Veluswamy*, *V.Prakash*, *K.Chandru*, *Kabir*, *Srirani Panchu* and *Miss Nappinnai*, for Petitioners.

S.Veeraraghavan, Additional Central Government Standing Counsel and *Mrs.Meera Gupta*, Additional Central Government Standing Counsel, for Respondents.

The Order of the Court was made by

Raju, J.: The above writ petitions involve for determination certain common and identical issues currently in controversy in the Medical circles and consumer litigation relating to the applicability or otherwise of the provisions of the Consumer Protection Act, 1986 (Central Act 68 of 1986), hereinafter referred to as 'the Act, to facilities made available by Hospitals providing medical care and members of medical profession treating a patient, in the realm of diagnosis and treatment.

2. A brief reference to the stage and circumstances of the case which led to the filing of the above writ petitions individually would be necessary to appreciate the nature of the grievance sought to be vindicated by the parties on either side. W.P.No.1953 of 1992 as the amended prayer stands, has been filed by two Medical Practitioners (husband and wife) for a writ of *prohibition*, prohibiting the respondents from exercising their jurisdiction against the Medical Practitioners on the basis of the complaint filed by the fourth respondent in C.P.O.No.244 of 1991, on the file of the third respondent District Consumer Redressal Forum. The fourth respondent claims to have approached the petitioners for treatment for stomach pain, that an operation was performed on him, that on account of giving I.V. drips and injections on the right hand continuously for 3 days, three fingers of the right hand have got to be amputated and skin grafting who also necessitated due to the alleged negligence and careless treatment by the petitioners and, therefore, staked a claim for being

compensated in a sum of Rs.99,500. The plea of the petitioners in this writ petition is that Sec.2(1)(o) of the Act cannot be claimed to include the services rendered by a private Medical Practitioner, that a Medical Practitioner cannot be condemned for negligence in view of the decision reported in *Roe v. Minister of Health and another*, (1954)2 Q.B. 66: (1954)2 All.E.R. 131, that no Medical Practitioner can be an insurer for effecting a cure and if at all the only remedy of a person aggrieved on account of alleged negligence is the remedy under the General Laws.

3. W.P.No.5386 of 1992 was filed by a Medical Practitioner for a writ of *declaration*, declaring that clause 2(1)(o) of the Act will not include the services of a Medical Practitioner and as such not amenable to the jurisdiction of the Consumer Protection Forum and clauses (b) and (c) of Sec.10, clause (b) of Sec.16 and clause (b) of Sec.20 of the Act are invalid. The petitioner who claims to possess M.S. D.L.O., F.A.C.S. and a practising E.N.T. Surgeon of 27 years standing treated the third respondent on being referred to him by a private hospital and after diagnosing his ailment performed an operation under general anaesthesia, that the third respondent was duly discharged and though asked by the petitioner to come for review the third respondent did not turn up and that the petitioner cannot be attributed with any negligence at all in the performance of the operation. The third respondent filed O.P.No.48 of 1992 before the second respondent claiming a sum of Rs.1,28,000 as compensation for the alleged lack of care while doing the first operation to remove the foreign body granuloma said to be resulting in the second operation and sufferings and expenditure. The plea of the petitioner is that mistaken diagnosis is not negligence, that Doctor/ Surgeon cannot be held guilty of negligence in the absence of strict proof, that the proceedings before the Forum are summary in nature, that the constitution of the Forum is bad, that having regard to the decisions reported in *J.N.Strivastava v. Ram Biharilal*. A.I.R. 1982 M.P. 132, *Chattand v. Bell*, 18. D.L.R. and *Roe v. Ministry of Health*, (1954)2 Q.B. 66: (1954)2 All.E.R. 131, the job of the doctors should be approached from the standpoint of the professional, that no Medical Practitioner is an insurer for effecting a cure nor should courts condemn an honest exercise of judgment even though the other practitioner or specialist

disagrees with the professional diagnosis or treatment, that if at all the claims have got to be agitated before ordinary courts and that the provisions of the Act under challenge are violative of Arts.14, 19(1)(g) and 21 of the Constitution of India.

4. W.P.Nos.3824 and 3825 of 1993 have been filed by one and the same Medical Practitioner (a) for a writ of *prohibition*, prohibiting the National Consumer Disputes Redressal Commission, New Delhi, from proceeding with O.P.No.16 of 1993 filed by the third respondent against the petitioner and the private hospital concerned, claiming jointly and severally compensation to the tune of Rs.20 lakhs; and (b) for a writ of *declaration*, declaring that clause 2(1)(o) of the Act will not include the services of medical practitioner and as such petitioner not amenable to the jurisdiction of the Consumer Protection Forum and clauses (b) and (c) of Sec.10 and clause (b) of Sec.16, clause (b) of Sec.20 of the Act are invalid. The grievance of the claimant before the forum is that the petitioner performed the surgery Laminectomy L4 - L5 and Foraminotomy L4 - L5 and due to alleged deficiencies in the services rendered by the petitioner and the hospital the third respondent was put to physical and mental agony apart from monetary loss. The petitioner who claims to be a Professor of Neurosurgery, Madras Medical College and Neuro Surgeon, General Hospital with a standing of 21 years is a consultant at the Hospital in question and would contend that there was no negligence on his part in performing his job and that the services rendered by a private Doctor/ Surgeon will not fall within Sec.2(1)(o) of the Act. In other respects, the petitioner has raised all and every one of the plea raised by the petitioner in W.P.No.5386 of 1992.

5. W.P.No.15337 of 1993 has been filed by a private hospital owned and run by a Medical Practitioner and W.P.No.15338 of 1993 has been filed by the said doctor in his individual capacity, praying for writs of *prohibition*, prohibiting the State Consumer Disputes Redressal Commission from proceeding with O.P.No.295 of 1993 filed by the second respondent claiming a compensation of Rs.9 lakhs for the death of the son of the second respondent. The Medical Practitioner claims to be a leading E.N.T. specialist attracting patients not only in this country, but also from outside India and that the second respondent brought

his son Master Harish Reddy to have treatment for continuous left ear discharge of five years duration and hearing defect in the left ear. A left mastoidectomy and tympano plasty operation was said to have been performed and in the course of operation, the patient appears to have developed cardiac problems. While contending that clause 2(1)(o) of the Act would not be attracted to the case of services rendered by a Medical Practitioner to a patient coming for treatment it is claiming that the Forum has no jurisdiction to entertain or proceed with the claim petition. It is also contended that the favourable treatment meted out to Government Doctors by excluding them from the purview of the Act would be in violation of Art.14 resulting in invidious discrimination between Government Doctors and Private Doctors. It is also claimed that eminent Doctors often have to undertake risky operations in the interests of patients themselves and a constant fear of threat of a litigation under the Act is likely to serve as a disincentive and thereby affect public interest only. According to this petitioner, though the Parliament has chosen to include housing construction while promulgating Ordinance 24 of 1993, notwithstanding the serious doubts raised about the inclusion of medical profession under the Act, there was no effort to specifically include them and therefore it should be considered that the intention of Parliament was not to include the same as part of the definition under Sec.2(1)(o) of the Act. While claiming that the Forum cannot be said to be the Body competent to decide about the professional standards and the exigencies of a situation in the course of treatment of a patient, it is stated that the inclusion of medical profession within the purview of the Act would be against public interest, arbitrary and violative of Art.14 of the Constitution of India. It is also the claim of the petitioner that the Medical Council of India is the Forum competent to decide the question of short-falls in the standard of treatment of a patient by a Doctor and that the availability of two Forums for the same grievance is violative of Art.14 of the Constitution of India. Reliance is also placed on Sec.24-A introduced by the ordinance 24 of 1993 to claim that the complaint filed in May, 1993 after a delay of nearly two years ought to have been dismissed.

6. W.P.No.4209 of 1992 has been filed by a Medical Practitioner at Tirunelveli for a writ of

declaration, declaring that clause (o) of Sec.2(1) of the Act does not include the service rendered by a Medical Practitioner and consequently Medical Practitioners are not amenable before the Consumer Protection Forum. The fourth respondent is said to have filed before the third respondent, a claim under the Act claiming compensation of Rs.95,000 for the alleged permanent disability of the left hand. He claims to be a Dermatologist and a retired Professor in the said discipline. In W.P.No.16823 of 1992, a Medical Practitioner at Madras and another have filed the above writ petition for a writ of *declaration*, declaring that the provisions of the Consumer Protection Act, particularly Secs.10, 13(3), 13(4), 13(5), 16(1)(b) to 20(1)(b) and 27 as unconstitutional and consequently forbear the fourth respondent-Forum from proceeding further with O.P.No.396 of 1992 filed by the respondents 1 to 3, claiming a compensation of Rs.79,750 on account of the alleged callous, indifferent and negligent treatment said to have been given by the first petitioner. W.P.No.2526 of 1992 has been filed by a Doctor practising at Mannargudi for a writ of *prohibition*, prohibiting respondents 2 and 3 from proceeding with the order passed in C.D.O.P.No.91 of 1991 on the file of the second respondent and A.P.No.227 of 1991 on the file of the third respondent. The second respondent District Forum has awarded a compensation of Rs.10,500 under Sec.14(1)(a) and an imprisonment of one year rigorous imprisonment in default of payment thereof for the alleged negligence in the treatment given by the writ petitioner resulting in the death of the wife of the complainant. W.P.No.19498 of 1992 has been filed by a private Hospital at Nungambakkam and a Medical Practitioner for a writ of *declaration*, declaring that the definition of service in Sec.2(1)(o) will not include services rendered by a Medical Practitioner and as such the petitioners are not amenable to the jurisdiction of the Consumer Forum. It is seen that O.P.No.281 of 1992 has been filed against the writ petitioners claiming a compensation of Rs.15,841.80 on various accounts for alleged negligence in the treatment given to the third respondent herein. W.P.No.14713 of 1991 has been filed by a Medical Practitioner at Chidambaram for a writ of certiorari to call for the records relating to the complaint in O.P.No.25 of 1991 dated 29.7.1991 on the file of the District Forum at Thanjavur, made by the first respondent

claiming a damage of Rs.99,500 for the alleged negligent treatment accorded to the first respondent. In W.P.No.13366 of 1992 the petitioner, a Medical Practitioner at Arakkonam has filed the said writ petition for a writ of declaration that the services of the Medical Practitioner are not subject to the forums under the Act. The third respondent appears to have filed O.P.No.247 of 1992 claiming a compensation of Rs.7 lakhs due to the death of his wife on account of the alleged negligence in the treatment accorded to his wife.

7. W.P.No.4432 of 1992 has been filed by a Medical Practitioner at Anna Nagar, Madras-40, for a writ of *declaration* as in W.P.No.13366 of 1992 and it is seen that respondents 4 and 5 have filed O.P.No.229 of 1991 before the Madras District Forum claiming a compensation of Rs.95,000 for the alleged negligent treatment said to have been given to the wife of the fifth respondent resulting in her untimely death. W.P.No.5275 of 1992 has been filed by a Medical Practitioner at Periyakulam, Madurai District, for a writ of *declaration*, in the teeth of a claim filed by the fourth respondent before the District Forum claiming a compensation of Rs.73,000 for the alleged negligence in the treatment accorded to her by the writ petitioner. W.P.No.14673 of 1992 has been filed by a Medical Practitioner at Madurai in the wake of a complaint made by the third respondent against the petitioner and two others claiming a compensation of Rs.95,000 for the alleged negligent treatment said to have been accorded to the complainant's son while treating his ailment in C.P.A.O.P.No.161 of 1992 before the Madurai District Forum. W.P.No.17284 of 1992 has been filed by a Medical Practitioner at Erode, praying for a writ of *prohibition*, prohibiting the respondents from proceeding with O.P.No.319 of 1992 filed before the State Forum by the third respondent claiming by way of damages a sum of Rs.5 lakhs on account of the death of his son due to the alleged negligent treatment accorded to his son. W.P.No.2521 of 1993 has been filed by a private Mission Hospital at Madurai and a Medical Practitioner in the teeth of a petition filed by respondents 3 and 4, claiming a compensation of Rs.5,27,612 for the death of their daughter due to the alleged negligent medical treatment given to her by the petitioners. W.P.No.5624 of 1992 has been filed by a private Hospital at Theni, for a writ of *prohibition*, prohibiting the first respondent from proceeding with

the trial of C.P.A.C.P. No.256 of 1991 on the file of the District Forum at Madurai, claiming a compensation of Rs.95,000 for the alleged negligent and defective sterilisation performed on the second respondent. The grievance of the complainant is that against total immunity from pregnancy she got conceived again.

8. W.P.No.20474 of 1993 has been filed by a Chief Cardio Vascular and Thoracic Surgeon at Madras and three other Medical Practitioners for a writ of declaration, declaring that clause 2(1)(o) of the Consumer Protection Act, 1986 will not include the services of a Medical Practitioner and they are not amenable to the jurisdiction of the Forums under the Act and clauses (b) and (c) of Sec.10, clause (b) of Sec.16 and clause (b) of Sec.20 are invalid. The petitioners have come to this Court in view of O.P.No.206 of 1993 filed by the fourth respondent herein before the National Commission claiming a compensation of Rs.20,00,100 for the death of his minor son due to the alleged negligence in the treatment and operation of his son. W.P.No.7038 of 1993 has been filed by a Medical Practitioner at Udumalpet, Coimbatore District, for a writ of *declaration*, declaring that the provisions of Sec.19(1)(b) and (c), 13(3)(4) and (5), Sec.14(1)(d), Sec.16(1)(d), Sec.20(1)(d) and Sec.27 of the Consumer Protection Act, 1986 are unconstitutional and unenforceable in the context of the filing of O.P.No.227 of 1993 by respondents 3 and 4 before the second respondent District Forum claiming a compensation of Rs.95,000 for the alleged deficiency in service rendered by the petitioner resulting in the termination of the pregnancy relating to a healthy male child, against the petitioner and another.

9. W.P.No.21494 of 1993 has been filed by the medical institution represented by its Proprietor who is a medical practitioner himself for a writ of *prohibition*, prohibiting the respondents, the Government of India, the State and the District Consumer Forum in the City of Madras from entertaining under the Consumer Protection Act any complaint against the Doctors. It is seen that the husband of a patient who was treated in the petitioner/institution has filed O.P.No.29 of 1993 before the State Forum, claiming a compensation of Rs.10 lakhs on account of the death of the patient who was herself a Doctor in Government Service in Andhra Pradesh due to the alleged negligent treatment said to have been accorded to

the patient. The petitioner claims apart from his proficiency and expertise in the field that the Forums constituted under the Act at best have only a statutory status and cannot be considered to have constitutional authority to transgress the constitutional and valuable fundamental rights of the petitioners. It is also claimed that a quasi-judicial body appointed by the Executive wing of the Government cannot claim to have jurisdiction to abridge the constitutional rights. Sec.2(1)(g) and (o) of the Act are said to be violative of Art.14 of the Constitution of India. It is also contended that only a strictly judicial process and a body that it is properly and fairly constituted alone could if at all be vested with the ominous power to tarnish the image, name and skill of the petitioner and the forums under the Act cannot be allowed to do such things.

10. W.P.No.283 of 1993 has been filed for a writ of *declaration* and W.P.No.284 of 1993 has been filed for a writ of *prohibition* by one and the same Medical Practitioner at Madras and W.P.Nos.285 and 286 of 1993 have been filed by another Medical Practitioner, Madras for the same reliefs in the teeth of the claim made in O.P.Nos.280 and 374 of 1992 respectively. The claim in O.P.No.280 of 1992 has been filed against the petitioners in W.P.Nos.283 and 284 of 1993, claiming a compensation of Rs.71,26,000 on account of the death of a patient, treated by the petitioner/ Doctor, who happened to be the husband of the fourth respondent and the father of respondents 5 and 6 due to the alleged deficiency and negligence in treatment given to the deceased. The complaint in O.P.No.374 of 1992 has been filed against the petitioner in W.P.No.285 and 286 of 1993 claiming a compensation of Rs.2,70,000 on various accounts on the ground of the alleged deficiency and negligent treatment meted out to the fourth respondent in this writ petition.

11. W.P.Nos.3826 and 3827 of 1993 have been filed for a writ of *declaration* and for a writ of prohibition, prohibiting the State Consumers Forum from proceeding with O.P.No.439 of 1992 filed by respondents 3 to 7 claiming a compensation of Rs.2,00,000 and the refund of Rs.35,000 due to the alleged defective services rendered negligently while treating the father of respondents 4 to 7 and the husband of respondent No.3 resulting in the death of the patient. W.P.No.5149 of 1993 has been filed by Kasthuribai Hospital,

Gandhigram for a writ of *certiorarified mandamus* to call for and quash the order dated 26.12.1991 in O.P.No.33 of 1991 and consequently forbear the District Forum at Sivaganga from proceeding with the O.P. filed by the third respondent claiming a compensation of Rs.86,000 on account of the deficiency and defective sterilisation effected as a consequence of which the third respondent had given birth to a male child. In the said order dated 26.12.1991, the District Forum has overruled the preliminary objection raised rejecting the plea of lack of territorial jurisdiction.

12. W.P.No.5171 of 1992 was filed by a body registered as the Family Planning Association of India, Dindigul Branch for a writ of *certiorarified mandamus* to call for and quash the proceedings of the second respondent relating to the interim order dated 26.2.1992 in C.D.98 of 1991 and to forbear from proceeding further with the said C.D. filed by the third respondent before the District Forum at Dindigul, claiming a compensation of Rs.25,000 on account of the alleged defective sterilisation process performed on the third respondent. The petitioners in both these writ petitions claim that they performed the sterilisation operations in furtherance of the implementation of the programme of the Government of India for Family Planning and they have not received any consideration from them by charging any fee for the Family Planning operations. In other respects, it is contended that the provisions of the Act have no relevance or application to the cases of the nature in question.

13. Shri K.Parasaran, the learned Senior Counsel, spearheaded the attack on behalf of the petitioners. The learned Senior counsel contended that on a proper interpretation of the provisions of the Act in the light of the objects and reasons as also the scheme underlying the provisions therein, it could not be legitimately held that the services of a Medical Practitioner or those rendered in a hospital are comprehended within the scope of the Act or that the Medical Practitioner or the hospitals could be held to be amenable to the jurisdiction of the various Consumer Disputes Redressal Forums created under the Act. It is also the contention of the learned senior counsel that a patient who undergoes treatment under a medical Practitioner or in a hospital providing medical treatment cannot be considered to be a consumer or the treatment given to a patient, service within

the meaning of the Act and that the provisions of Sec.2(1)(c), (f) (g) and (o) of the Act have got to be understood and construed in the context of unfair trade practice only. In substance, the claim is that professional services of the nature rendered by a Medical Practitioner or for that matter a hospital is outside the purview of the Act and the Forums constituted thereunder. The competency of the Forums constituted to decide complaints involving substantial money claims and the professional career and reputation of a Medical Practitioner is challenged on the ground (a) that the constituent members are neither qualified nor eligible or possessed of the required calibre to decide such complicated and technical issues of high standards; (b) the absence of specific norms or guidelines in the matter of selection and appointment of the members of the Forum; (c) the summary nature of the proceedings to be conducted and the constraints based upon duration of time and the nature of the evidence that could be led before such forums; (d) the manner of adjudication of the issues according to the opinion of the majority of the members constituting the Forum, and the lack of judicial experience and judicious approach and conscience in the members other than its President, and consequently as being violative of Art.14 of the Constitution of India. The provisions in Sec.13(3) of the Act to the extent it attempts to exclude the principles of natural justice are said to be violative of Art.14 of the Constitution of India. Sec.27 of the Act is equally said to be violative of Arts.14, 19(1)(g) and 21 of the Constitution of India, insofar as it confers sweeping, unguided, arbitrary powers of imposing fine or sentence of imprisonment. The further contention on behalf of the petitioners is that though the Act purports to include 'service of any description' it really aims at ordinary and obvious things and the same becomes amply clear from the debates on the Bill before both Houses of Parliament also.

14. Mr.Habibullah Badsha, learned senior counsel appearing for some of the writ petitioners contended that the treatment given by a Doctor who is a medical practitioner would not come within the purview of 'service' as defined under Sec.2(1)(o) of the Act and if it is considered to comprehend medical practitioner also, then Sec.2(1)(o) of the Act should be declared unconstitutional and invalid. It is the further contention of the learned senior counsel that, at any rate, it

would stand excluded as amounting to service under a contract of personal service and falling within the exclusion clause in Sec.2(1)(o) of the Act. The provisions relating to the constitution of the Forums at District, State and National Levels are said to be arbitrary, unreasonable and *ultra vires* Art.14 of the Constitution of India for want of proper or sufficient guidelines, and Sec.27 of the Act without any sufficient procedure or guidelines is said to suffer the same vice and consequently the Forums under the Act cannot be held to possess the power to punish for offences.

15. Mr.R.Gandhi, learned senior counsel appearing for some of the petitioners contended, apart from adopting the submissions of the other learned counsel, that the constitution of the Forum with a majority of non-judicial personnel or personnel without legal training to adjudicate upon disputes of substantial nature involving serious rights of parties to life and liberty constitutes violation of the provisions of Arts.14 and 21 and also the Directive Principles of State Policy of the Constitution of India. It is also contended that proper procedure established by law is a right secured under Art.21 to any one whose liberty and life are deprived and that arbitrariness is writ large on the face of the procedure prescribed in Sec.13 of the Act and that therefore it should be declared that a medical practitioner cannot be made answerable for any claims under the Act before the Forums constituted under the Act.

16. Mrs.Nalini Chidambaram, learned senior counsel appearing for the petitioner in W.P.Nos.15337 and 15338 of 1993 contended that a patient *vis-a-vis* a medical practitioner is not a consumer within the meaning of Sec.2(1)(d)(ii) of the Act and that the treatment accorded by a Doctor will not amount to service within the meaning of Sec.2(1)(o) of the Act. Argued the learned counsel further that the constitution of the forum and its procedure would go to sufficiently indicate that it was not the intention of the legislature to put professional persons to test or trial before the forums constituted under the Act. It is also contended that it would be against public interest to bring medical practitioners within the purview of the Act since the decisions relating to the nature of treatment, the drugs to be administered, the operations to be performed, etc., should be within the discretion of the professional himself and such decisions should not be left for others to be

decided failing which the Doctors would be driven to the necessity of defensive treatment involving unnecessary expenditure, time and tension to the patients concerned and it would not be in the interests of either the patient, or the Doctor or the profession as a whole. The exclusion of Government Doctors or Medical Practitioners in Government Hospitals and such institutions would constitute hostile discrimination and violative of Art.14 of the Constitution of India. Finally, it was contended that in spite of the public controversy as also conflicting claims before various forums openly going on in the country, the fact that the State which has occasion to clarify the position has not done so even while promulgating Ordinance No.24 of 1993 should be a pointer to the fact that the object of the State was not to subject the Medical Practitioners to the jurisdiction of the Forums constituted under the Act.

17. Mr.M.Veluswami, learned counsel for the petitioner in W.P.Nos.5149 and 5171 of 1992 contended that respective petitioners are service oriented institutions carrying on the objectives of the Central Government in implementing the Family Planning Schemes and that necessary incentives under the scheme are given to the patient as well as the promoters like the petitioners only by the Central Government. Argued the learned counsel further, since the petitioners have rendered only free service, in furtherance of a contract of personal service and no charge or fee were collected from the patient for the treatment or operation performed the petitioners would at any rate be outside the purview of Sec.2(1)(o) of the Act. Mr.C.Ramakrishnan, learned senior counsel appearing for the petitioner in W.P.No.21494 of 1993 contended that the provisions of the Act and the rules made thereunder, if applied to a Medical Practitioner, and if construed to cover a Medical Practitioner treating a patient it would have the effect of overriding the Fundamental Rights secured to a Doctor under Arts.14, 19(1)(g) and 21 of the Constitution of India. It is the submission of the learned counsel that the Fundamental rights of petitioners secured under the Constitution of India cannot be taken away or truncated or abridged except by another recognised constitutional functionary and that too except in accordance with the valid procedure established by law and the provisions of the Act constitute serious inroad into the fundamental rights of the petitioners to

carry on his profession. The learned senior counsel further contended on the basis of his encounters and experience in the conduct of the case before the State Forum in this case, that suitable safeguards and devices should be thought of and incorporated to ensure a better atmosphere so that better justice could be rendered. The grievance in this regard varies from the uniform views or consensus always said to be expressed by these forums, entertaining for trial mechanically or automatically even cases where the required *prima facie* case was conspicuously absent about the deficiency or negligence in the services rendered and the need for screening complaints, ill-treatment of witnesses, who are professionals, want of opportunity to the opposite parties to take preliminary objections and the need to render decision on the lack of *prima facie* case on the very pleadings not warranting further trial on merits, proper prescription of the form of trial on par with the one prevailing in ordinary courts, summary procedure to defend also lending proof of lack of judicially acceptable standards and norms in the conduct of cases and so on. That apart, all the learned counsel uniformly espoused a grievance about the nature and extent of liability to which a Medical Practitioner can be subjected to on the alleged ground of negligence or deficiency in the treatment of a patient and the resultant discriminatory treatment in the matter of trial and disposal of a claim or complaint merely depending upon the choice of the claimant, since Sec.3 declares that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

18. *Per contra* Mr.S.Veeraraghavan, Additional Central Government Standing Counsel, contended that the decision of the National Forum reported in *M/s.Cosmopolitan Hospital and another v. Smt.Vasantha P.Nair and others*, (1992)1 C.P.R. 820, the decisions in *Dr.(Mrs.) Omana Eapen and others v. Consumer Disputes Redressal Commission for Kerala State and others*, O.P.No.10911 of 1991 dated 6.10.1993, of the Kerala High Court, *Tulasi Enterprises v. Andhra Pradesh State Consumer Commission, Hyderabad*, A.I.R. 1991 A.P. 326 and *Dr.A.S.Chandra and others v. Union of India and others*, (1992)1 A.L.T. 713 and the decision of a learned single Judge of this Court since reported in *Dr.A.Indira Narayanan v. The Government of India*, (1994)1 M.L.J. 24 squarely answer

all the issues raised on behalf of the petitioners, against them and that he would adopt the ratio of those decisions as submissions on his behalf. Placing reliance upon an article published in *A.I.R. 1993 Journal 181*, the learned counsel contended that being a socio economic welfare legislation, the provisions require to be liberally construed having regard to the speedy justice aimed as the goal without much expenditure for litigation in the shape of heavy court fee on the claim.

19. Mr.V.Prakash, learned counsel for the petitioner, submitted that the enactment in question does not directly affect the practice of the medical profession, that the medical practitioners have no right to be negligent in the discharge of their duties and consequently the alleged violation of Art.19(1)(g) has no merit. As for the grievance made about the constitution of the Forum, the learned counsel submitted that the provision of two tiers of appeal sufficiently takes care of the position and serves as sufficient safeguard. It was also contended by the learned counsel that the different aspects under two different enactments cannot be compared to plead a case of discrimination for purposes of Art.14 of the Constitution of India, that the procedure laid down in Sec.13(1) and (2) sufficiently conforms to the requirements of principles of natural justice, that vexatious claims that may be filed could be sufficiently dealt with under Sec.26 of the Act, that the duty to give reasons and the provision of appeal or scope for judicial review under Arts.226 and 227 of the Constitution of India serves as sufficient safeguard against any arbitrariness or unreasonableness and that no one party to a proceeding has any right to a prolonged trial and it could not be said that after the enactment in question the professionals have been hit hard or their position stood worsened. For all the reasons, the learned counsel contends that the exclusion of the medical practitioners from the purview of the Act would otherwise lead to infringement of the rights of citizen/patients secured under Art.21 of the Constitution of India.

20. Mr.K.Chandru, learned counsel for the complainant/ respondent in W.P.No.13366 of 1992, etc., contended that the Act was necessitated to provide expeditious and speedy remedies, that judicial power are not the exclusive privilege of the courts only and different forums can be created for different purposes to adjudicate disputes

of special categories or types, that there is nothing wrong or illegal in the manner of constitution of the Forums and the method of their functioning and the procedure laid down to regulate such proceedings, that the remedies made available by way of appeal, revision and judicial review are sufficient safeguards in themselves and that no exception could be taken to the various provisions in the Act which according to the learned counsel are akin to the Monopolists and Restrictive Trade Practices Commission Act, 1969. While contending that the inclusive definition of service takes into its fold the Medical Practitioner and services rendered to a patient, the learned counsel also stated that the same cannot be treated as contract of personal service and that the accountability of even professionals like medical practitioners is not only desirable but was well known even during the olden days as indicated in Artha Sastra of Kautilya. On the above, it is contended that the Act in question is a revolutionary move in an attempt to rewrite traditional concepts and the same ought not to be frozen even at the threshold and consequently there are no merits in the contentions raised on behalf of the petitioners.

21. Mr. Kabir, learned counsel for the second respondent in W.P.No.5624 of 1992 contended that the procedure envisaged under Sec.13 of the Act is judicial in nature, that the rule of *audi alteram partem* has its own exceptions and deviations and post-decisional hearing has also been recognised to be a proper safeguard, that the several decisions so far rendered by some of the Forums would show that they are being dealt with objectively and on sound and proper lines and basis and there is no justification in the apprehensions and fears of possible abuse expressed by the learned counsel on behalf of the petitioners. Apart from relying upon the inclusive nature definition of service under the Act, the learned counsel also endeavoured to impress upon the need for a liberal construction keeping in view the fact that it is a welfare oriented beneficial legislation. Submissions have also been made regarding the standard of duty and care expected of medical practitioners in the treatment of patients.

22. Mr. Chinnaswami, learned senior counsel, contended that courts must always presume in favour of the constitutionality of the statutes, that the provisions of Sec.13 sufficiently satisfies the requirements of principles of natural justice and

that in any event, the procedure laid down therein must be considered to be the procedure established by law and, therefore, there is no scope for further scrutiny of its constitutional validity as such *vis-a-vis* Art.21 of the Constitution of India.

23. Mr. Sriram Panchu, learned counsel for the fourth respondent in W.P.No.285 of 1993, contended that the legislation in question being a beneficial oriented one, aims at removing the difficulties faced by common litigants in the form of high litigation expenses and procedural wrangles so as to enable them to have earlier access to and also to secure quick justice and that no exception could be taken to the speedy disposal contemplated under the Act. It is also the submission of the learned counsel that the definition of service is very wide and all comprehensive and that the decision of the National Forum on this aspect squarely governs this case against the petitioners. Further, it is claimed that the provisions of Sec.13 itself paves way for observing an elaborate procedure and that as a matter of fact, the Forums are adopting the normal procedures of courts and that the internal checks in the form of appeals and judicial review under Arts.226 and 227 of the Constitution of India ensures fairness and that it is a matter of record that the Forums do not bustle matters to finalise the proceedings within 90 days. Argued the learned counsel further that carelessness and sheer negligence is on the increase and therefore members of public need effective and expeditious remedies. While contending that non-judicial persons appointed as members are possessing knowledge of life and experience in matters of public life relating to people and society and that the valuable experiment that is being carried under the Act deserve to be appreciated and approved. Finally, it was contended that medical profession had no self regulations for disciplining themselves and no one can claim reputation to be a fundamental right and strict enforcement of the provisions would help the medical practitioners to act with great care and caution resulting in the saving of more lives of citizen. As for the plea based on the possibility of increase in defensive type of medicine, on account of the Act, it is contended that as a legal concept defensive medicine does not make sense and that by itself could not protect a doctor from a claim in negligence by carrying out an unnecessary test or procedure.

24. Miss Nappinnai, learned counsel for the fourth respondent in W.P.No.4432 of 1992, contended that modernisation of the judicial procedures and Forums are the needs of the hour and that there is every justification to liberally construe the provisions of the Act so as to cover the Medical Practitioners and failing which the very object of the legislation would stand defeated.

25. The learned counsel for the petitioners, in the course of their reply, contended that a welfare legislation must hold the scales of balance evenly and not to the disadvantage of one side and that there is absolutely no safeguard for the medical practitioners who are often obliged to handle risky situations over which there could be no effective human control. The difference between contract for service or contract of service is said to be of no significance for the problem under consideration. It was also submitted that giving up of cases where risk is involved would only have an adverse impact on the welfare of a patient and the scope for developments and innovations will stand completely retarded.

26. We are not obliged in these cases to embark upon an enquiry into or authoritatively or exhaustively decide as to nature and categories of lapses or cases of negligence or deficiency in the performance of a Medical practitioner which renders him liable for the payment of compensation or damages to the patient concerned or his representatives. But at the same time, it becomes necessary to advert to the statement of law on the subject, generally, to appreciate the grievances expressed by the learned counsel appearing for the parties on either side, in vindicating their respective cause both for and against the need or desirability of subjecting the medical practitioners and their professional ventures to the jurisdiction of the Forums created under the Consumer Protection Act, 1986. It is by now well settled that there is no absolute or total immunity to a Medical practitioner from liability for his negligence which may be determined by the rules of Tort, Contract or Equity. Breach of duty on the part of a medical practitioner may arise on account of breach of the implied contractual duty to exercise reasonable skill and care and breach of duty of care owed by a medical practitioner to his patient whether or not there is any contract between them. The test as to whether there has been negligence or not, in a situation which involves the use of some special skill or

competence, is the exercise of the ordinary skill of an ordinary competent man exercising and professing to have that special skill. The true test for establishing negligence in diagnosis or treatment medicinal or surgical on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care. Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable and proper degree of care and skill but not that he will use the highest possible degree of skill or ensure cure or success of the venture. Instead, one can be presumed to have undertaken to bring a fair, reasonable and competent degree of skill along. Imposing of liability on hospitals and doctors for everything that happens to go wrong was held to mean doing disservice even to the community at large, and that the conditions in which hospitals and doctors have to work cannot be completely lost sight of. The profession of Medicine, perhaps is a field where results are not expected to be or could be guaranteed since a great deal of medical treatment, even if administered with all due skill and care involves some degree of risk and on occasions the medical treatment involves making a choice between competing risks. It would be all the more so in the case of a surgeon performing an operation which involves multifarious difficulties presented by the particular circumstances of case, the condition of the patient and the whole set of problems arising out of the risk to which he is being exposed, difficulties of the surgeons choice between risks and the paramount need of his discretion being unfettered if he thinks it right to take one risk to avoid another.

27. Medicine is an inexact science and it is unlikely that a responsible Doctor would intend to give an assurance to achieve a particular result. Not every one of mere error of judgment can be castigated as negligence in legal sense but, it is only such errors which a reasonable competent professional man, acting with ordinary care, might commit. Errors in treatment can take a multitude of forms and for variety of reasons such as accidental medical injuries which are a consequence of the progress of the disease under treatment, diagnostic error which could only have been avoided by hindsight, unavoidable complication however carefully and competently the procedure was carried out, infections arising under circumstances which made

them difficult to avoid, complications of drug therapy carried out in accordance with the instructions of the drug manufacturer. The authorities who run a hospital, be they local authorities, government or any other corporation are in law under the self same duty as the humblest doctor and since they must use reasonable care and skill to cure a patient of his ailment and are bound to act through staff they employ they are just as liable for the negligence as is any one else who employs others to do his duties for him. That is also because even if they are not servants, they are to be treated as agents with the only exception in the case of such staff selected and employed by the patient himself. There is very little difference between the obligations undertaken by a medical practitioner in private practice and those imposed on his colleagues and counterparts working in the Hospitals run and administered either by the Government or local authorities or philanthropic bodies. All medical practitioners thus owe a duty to their patients to exercise reasonable care in carrying out their professional skills of diagnosis, advice, treatment or surgery.

28. Courts also cannot speculate upon medical matters or come to conclusions or diagnoses which are not supported by some expert evidence on the basis of which courts must also be in a position to understand the position before arriving at a conclusion on the question of liability of a medical practitioner for damages for negligence. The expert evidence also has an explanatory or didactic functions of explaining the technical issues as fully as possible in a language comprehensible to laymen viz., the nature of patients' original condition, the manner of diagnosis and the nature of treatment given, the consequences of the treatment and how those consequences flowed from the treatment given. Further, the court should also have the assistance in deciding whether the acts or omission of the defendant really constituted negligence by explaining the current state of knowledge at the time when the patient was treated, the approved practice or different schools of thought currently in vogue and the experience and skill usually displayed by the medical practitioner with the particular specialisation of the defendant, though ultimately it is for courts only to decide on the totality of the evidence, the issue before court being a mixed question of fact and law. That is because, at times the treatment may involve also

diagnosing of a relatively uncommon case of patient or a disease and that no exception could be taken to the action of the Medical Practitioner, the method of cure adopted is found acceptable by a widely respected body of professionals. That apara medicine has not also yet reached a stage and maybe it never will, when the adoption of a particular procedure either medicinal or surgical will produce a certain positive result. Having regard to these peculiar situations in the field of medical treatment and the further fact that a claim for compensation against a medical practitioner not only involves mere financial loss but the very professional reputation and future career would be under stake accompanied by his professional incompetency, allegations of negligence against a Medical practitioner should be considered as a very serious one and the standard of proof of fault also should be of a high degree of probabilities.

29. The learned counsel appearing on either side adverted to volume of case law, but we do not consider it necessary to refer to those decisions, and in our view, it would suffice to refer to only such of those decisions which are directly in point. On behalf of the petitioners, the decisions reported in *Kiran Bedi and Jinder Singh v. Committee of Inquiry*, A.I.R. 1989 S.C. 714 and *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, A.I.R. 1991 S.C. 101; 1991 Lab.I.C. 91; (1990) 3 J.T. 725 were cited to highlight the submission that the right to life, a basic human right assured under Art.21 of the Constitution of India comprehends something more than mere animal existence i.e., the dignity of the individual and it does not only mean physical existence, but includes basic human dignity and personal reputation. It was also emphasised in the decision reported in *Francis Coralie v. Union Territory of Delhi*, A.I.R. 1981 S.C. 746; 1981 Cr.L.J. 306; (1981) 1 S.C.C. 608; 1981 S.C.C. (Cr.) 212; (1981) 2 S.C.J. 18; 1981 M.L.J. (Cr.) 331; (1981) 2 S.C.R. 516, that it is for the Courts to decide in exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure which is reasonable, fair and just. The decision reported in *State of West Bengal v. Anwar Ali*, A.I.R. 1952 S.C. 75; 1952 S.C.J. 55; 1952 S.C.R. 284; 1952 M.W.N. 460; 1952 M.W.N. (Cr.) 124; 53 Cr.L.J. 510 was relied upon in support of the submission that in the absence of a valid classification of claims or

cases the mere object of speedier trial of cases or claims by itself would provide no basis of valid classification justifying differential treatment. Special emphasis was laid on para 93 of the decision which is as hereunder:

"93. Tested in the light of these considerations, I am of opinion that the whole of the West Bengal Special Courts Act of 1950 offends the provisions of Art.14 and is therefore bad. When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim. It matters not to me, nor indeed to them and their families and their friends, whether this be done in good faith, whether it be done for the convenience of government, whether the process can be scientifically classified and labelled or whether it is an experiment in speedier trials made for the good of society at large. It matters not how lofty and laudable the motives are. The question with which I charge myself is, can fair-minded, reasonable, unbiased and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad."

Strong reliance was also made upon the decision reported in *In re. The Special Courts Bill, 1978*, A.I.R. 1979 S.C. 478: (1979)2 S.C.R. 476. In the said decision, the Apex Court considered exhaustively case laws on the subject pertaining to the power of the Legislature to create and provide for special forums for entertaining an adjudication of a special or special classes of claims or cases. It was also held that the question as to whether such a provision violates the guarantee of equality secured in Art.14 of the Constitution of India is as

important as the question of legislative competency to enact such a provision. While emphasising the need that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and the said differentia must have a rational relation to the object sought to be achieved by the Act. The following principles were also highlighted in the said decision:

"Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. Abuse of power given by law does occur; but the validity of the law cannot be contested because of such an apprehension. Discretionary power is not necessarily a discriminatory power.

Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.

Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Art.14 must be determined in each case as it arises, for no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

A rule of procedure laid down by law comes as much within the purview of Art.14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination."

30. While advertent to the aspect of exclusion of the principles of natural justice, special emphasis has been made relying on the decisions reported in *Swadeshi Cotton Mills v. Union of India*, A.I.R. 1981 S.C. 818: (1981)1 S.C.C. 664: 51 C.C. 210: 58 F.J.R. 190: (1981)2 S.C.R. 533 and *Charan Lal*

Sahu v. Union of India, A.I.R. 1990 S.C. 1480. While declaring the position that the Courts must make every effort to salvage the cardinal rule of *audi alteram partem* and ensure reasonable opportunity to a person aggrieved, principles of natural justice were held to be not the creation of Art.14 of the Constitution of India, but Art.14 was really their constitutional guardian and whenever a legislation expressly or by necessary implication excludes their applications, it requires close scrutiny of the Court. In *S.P.Sampath Kumar v. Union of India*, A.I.R. 1987 S.C. 386, the Apex Court while holding that judicial review is a fundamental aspect of the basic structure of our Constitution, it was held that a Tribunal or a Forum newly constituted to deal with a category of cases to the exclusion of the ordinary courts must preserve the independence of the judiciary and should not give over weightage to the role of non-judicial members constituting such forum.

31. In the decisions reported in *Collector of Customs v. Sampathu Chetty*, A.I.R. 1962 S.C. 316: (1962)1 S.C.J. 68: 1962 M.L.J. (CrL) 1: (1962)1 M.L.J. (S.C.)43: (1962)1 An.W.R. (S.C.) 43: (1962)1 CrL.J. 364: (1962)3 S.C.R. 786, it was held by the Apex Court that a statute which is otherwise invalid as being unreasonable or discriminatory cannot be saved by its being administered or applied reasonably and that the constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. Relying upon the decisions reported in *Sivagaminatha and Sons v. I.T.Officer*, A.I.R.1956 Mad. 1: I.L.R. (1956) Mad. 415: (1955)2 M.L.J. 477: (1955)28 I.T.R. 601: (1955)68 L.W. 812 and *Jolly George Varghese and another v. Tha Bank of Cochin*, (1980)2 S.C.C. 360, it was contended that the provisions of Sec.27 of the Act has a consequence of creating a penal offence and in so far as the said provision provides for the punishment of imprisonment extending to three years with or without penalty it is violative of Art.21 of the Constitution of India. The decision reported in *State of Madras v. B.Reddiar*, A.I.R. 1973 Mad. 14 is relied upon to contend that in view of the declaration contained in Sec.3 of the Act that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, the decisions of the forum under the Act cannot be held to be final and a suit against the same cannot be said to

be barred even on the principles of *res judicata*. The decisions reported in *Raipur Municipality v. State of M.P.*, A.I.R.1970 S.C. 1923, *Dadaji v. Susukideobabu*, A.I.R. 1980 S.C. 150, *South Gujarat Roofing Tiles v. State of Gujarat*, A.I.R. 1977 S.C. 90: (1977)1 S.C.R. 878, *M/s.Mahalakshmi Oil Mills v. State of A.P.*, A.I.R. 1989 S.C. 335 and *State of Karnataka v. Ranganatha Reddy*, A.I.R. 1978 S.C. 215: (1977)4 S.C.C. 471 were relied upon to justify a restricted construction of the definition contained in Sec.2(1)(o) of the Act. Reliance has also been placed on the decisions reported in *Messrs.Dwarka Prasad v. State of U.P.*, A.I.R. 1954 S.C. 224: 1954 S.C.J. 238: 1954 S.C.R. 803 and *Air India v. Nargesh Meerza*, A.I.R. 1981 S.C. 1829: 1981 Lab.I.C. 1313: (1981)4 S.C.C. 335: (1981)2 Lab.L.J. 314 to substantiate the claim that the absence of guidelines in the matter of appointing the members of the various forums constituted under the Act renders those provisions arbitrary, unreasonable and violative of Art.14 of the Constitution of India. The decisions reported in *M/s.Diplomat Engineers v. Byford Leasing Limited*, (1991)2 C.P.R. 53, *M/s.Special Machines v. Punjab National Bank and others*, (1991)1 C.P.R. 52 were referred to, to substantiate the claim that the various forums constituted under the Act have summary jurisdiction and in cases where complicated issues are raised they have expressed their disinclination to decide such issues. The decision reported in *Subhashchandra N.Pandya v. Shailesh, J. Shah and others*, (1991)2 C.P.R. 537 and *Y.Meenakshi v.Dr.H.Nandeesh*, (1991)2 C.P.J. 533, were relied upon to show that the treatment by a medical practitioner would constitute contract of personal service and consequently stood excluded from the definition of Sec.2(1)(o) of the Act.

32. The learned counsel appearing for the respondents relied upon the decisions reported in *M/s.Cosmopolitan Hospital and another v. Smt.Vasantha P.Nair*, (1992)1 C.P.R. 820 and *Tulasi Enterprises v. A.P.State Consumer Commission, Hyderabad*, A.I.R. 1991 A.P. 326, *Dr.A.S.Chandra and others v. Union of India*, (1992)1 A.L.T. 713 and W.P.No.4950 of 1992 dated 28.7.1993, *Dr.A.Indira Narayanan v. Government of India*, (1994)1 M.L.J. 24 in support of the plea that the definition of service in Sec.2(1)(o) of the Act must be liberally and widely construed so as to take within its fold the medical practitioner and a hospital, undertaking treatment of a patient. Further

reliance was placed on the decisions reported in *State of Uttar Pradesh v. Chhotey Lal Pandey* (1990)4 S.C.C. 697, *Mahindra and Mahindra Limited v. Union of India*, 1979 C.C. 419, *Regional Director, E.S.I.C. v. High Land Coffee Works of P.F.X. Saldanha and Sons*, A.I.R. 1992 S.C. 129 and *N.T. Corporation Limited v. Sitaram Mills Limited*, A.I.R. 1986 S.C. 1234; (1986)2 Com.L.J. 261; (1986)2 S.C.J. 139; 1986 S.C.C. (Supp.) 117 and *Lucknow Development Authority v. M.K.Gupta*, (1994)1 S.C.C. 243 to support the stand for a liberal interpretation being given to the inclusive definition contained in Sec.2(1)(o) of the Act keeping in view the beneficial nature and the welfare object of the legislation.

33. The status, the nature of powers and method of enquiry and manner of adjudication by the redressal forums created under the Act may be usefully adverted to before embarking upon a consideration of the various issues in these cases since much was said about the inadequacy of the procedure to effectively adjudicate on the complicated issues that may arise in the claims made before these redressal forums against the medical practitioners and the Hospitals. Secs.10, 16 and 20 of the Act deal with the composition of the District Forum, State Commission and National Commission respectively. While a District Forum shall have a person who is or has been or is qualified to be District Judge as its President, the State Commission shall have a person who is or has been a Judge of a High Court as its President and the National Commission shall have a person who is or has been a Judge of the Supreme Court as its President. The District Forum and State Commission shall have two other members besides the President and the National Commission shall have four other members besides the President. The President of the State Commission shall be appointed after consultation with the Chief Justice of the High Court and the appointment of the President of the National Commission shall be made after consultation with the Chief Justice of India. So far as the other members to be appointed to the three forums are concerned, they shall be persons of ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman. The members other than the Presiding

Officers of these bodies shall be appointed by the State Government concerned and that of the National Commission by the Central Government in Consultation with a Committee consisting of the authorities specified in the relevant provisions therefor and the President of the District Forum also shall be so appointed by the State Government. The District Forum and State Commission shall after the amendments introduced in 1993 have jurisdiction to entertain complaints where the value of the goods or services and the compensation if any, claimed does not exceed Rupees Five Lakhs and Twenty Lakhs respectively and any such claims exceeding Rupees Twenty Lakhs shall be dealt with by the National Commission.

34. The three Forums shall not admit a complaint unless filed within one year from the date on which the cause of action has arisen and power has been conferred upon them for condoning the delay for reasons to be recorded if the complainant satisfies that he had sufficient cause for not filing the complaint within such period. The State Commission and the National Commission have both original and Appellate Jurisdictions as against the District Forum which has only original jurisdiction, being an authority at the grass root level, in the hierarchy. Whereas the procedure prescribed in Secs.12 to 14 of the Act shall apply to the District Forum and State Commission, the National Commission shall have the powers of a civil court as specified in Sub-secs.(4) to (6) of Sec.15 and the power to issue an order to the opposite party directing him/her to do any one or more of the things referred to in clauses (a) to (i) of Sub-sec.(1) of Sec.14 and such procedure as may be prescribed by the Central Government. Sec.12 of the Act provides for a complaint being filed before a District Forum in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided, by the consumer concerned, or any recognised association whether the consumer concerned is a member of such association or not or one or more consumers where they are numerous in number having same interest with the permission of the Forum on behalf of or for the benefit of all consumers so interested and the Central Government or the State Government.

35. Sec.13 of the Act which deals with the procedure to be followed on receipt of a complaint

stipulates that if it relates to any goods, shall refer a copy of the complaint to the opposite party directing him to give his version of the case within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum, and if the opposite party denies or disputes the allegations contained in the complaints or omits or fails to take any action to represent his case within the time granted by the Forum, it shall proceed to "settle" the consumer dispute in the manner provided in the other provisions in Sec.13. Where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the Forum shall obtain a sample of the goods from the complainant and refer the same to the appropriate laboratory with a direction to make analysis or test as may be necessary to find out whether the goods suffer any defect alleged or any other defect and to report the findings thereon to the Forum within 45 days or such extended period. Provision is also made to collect the required money to meet the expenses for the test from the complainant, to be remitted to the laboratory and on receipt of the report from the laboratory, if any of the parties disputes the correctness of the findings in the report to require them to submit in writing his objections and to give reasonable opportunity of "being heard" as to the correctness or otherwise of the report to the complainant as well as the opposite party as to the correctness of the report as also the objection made and issue an order under Sec.14 to the opposite party if the Forum is satisfied of the defects specified are proved, directing the opposite party to do one or more of the things specified therein.

36. Wherever the complaint received relates to goods in respect of which the procedure under Sub-sec.(1) of Sec.13 of the Act cannot be followed or if the complaint relates to any services, the forum shall refer a copy of the complaint to the opposite party directing him to give his version of the case within 30 days or such extended period not exceeded 15 days and on receipt of the copy of the complaint, the opposite party denies or disputes the allegations in the complaint or omits or fails to take notion to represent his case within the time given, the forum shall proceed to settle the said disputes on the basis of evidence brought to its notice by the complainant and the opposite party. Sub-Sec.(3) of Sec.13 mandates that no

proceedings complying with the procedure laid down in Sub-secs.(1) and (2) shall be called in question in any court on the ground that the principles of natural justice have not been complied with. In substance, Sub-sec.(3) of Sec.13 purports to lay down that so much of compliance with as much of the procedure prescribed under Sub-secs.(1) and (2) would constitute sufficient compliance with the principles of natural justice. The District Forum was conferred with the same powers as are vested in the civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of some of the illustrated matters, namely, (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath; (ii) the discovery and production of any document or other material object producible as evidence; (iii) the reception of evidence on merits; (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source; (v) issuing of any commission for the examination of any witness; and any other matter which may be prescribed. The proceedings before the District Forum were deemed to be judicial proceedings within the meaning of Secs.193 and 228 of Indian Penal Code and the District Forum was deemed to be a civil court for the purposes of Sec.195 and Chapter XXVI of the Code of Criminal Procedure, 1973. Wherever the complainants are more than one or numerous having the same interest the provisions of O.1, Rule 8 of the Code of Civil Procedure was made applicable subject to every modification of references to the suit or decree as complaint or order of the District Forum.

37. Sec.14 of the Act provides that if after the conduct of the proceedings under Sec.13 of the Act, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complainant about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following, namely: (a) to remove defect pointed out by the appropriate laboratory from the goods in question; (b) to replace the goods with new goods of similar description which shall be free from any defect; (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant; (d) to pay such amount as

may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party; (e) to remove the defects or deficiencies in the services in question; (f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them; (g) not to offer the hazardous goods for sale; (h) to withdraw the hazardous goods from being offered for sale; (i) to provide for adequate costs to parties. The State Commission as also the National Commission were confirmed with such powers were made applicable to them respectively under Secs.18 and 2 of the Act. So far as the District Forum is concerned, the proceedings before it shall be conducted by the President of the District Forum and at least one member thereof sitting together and every order made by the District Forum shall be signed by its President and the member or members who conducted the proceeding. The decision of the majority was declared to be the order of the District Forum and in case where the President and one member conducted the proceedings, but differed the matter has to be referred to the third member and again the decision of the majority will be the order of the Forum. As already noticed, the State Commission and National Commission have been conferred with appellate powers against the orders of the Forum immediately below and the order of the National Commission was rendered subject to an appeal to the Supreme Court. Every order of the District Forum, State Commission or National Commission as ordained to be final, if no appeal has been preferred against such order under the provisions of the Act. Sec.26 has been introduced in the present form in 1993 enabling the District Forum, State Commission and the National Commission, as the case may be, to dismiss a complaint instituted before them for reasons to be recorded in writing if it is found to be frivolous or vexatious and also make an order directing the complainant to pay costs to the opposite party not exceeding ten thousand rupees as may be specified in the order. The provisions of Sec.27 provide where a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, such person shall be punishable with imprisonment for a term which shall not be less than one

month, but which may extend to three years, or with fine which shall not be less than two thousand rupees, but which may extend to ten thousand rupees, or with both. Power has also been given to these bodies to impose a lesser punishment than the minimum on being satisfied that the circumstances of the case so required.

38. The nature, character and extent of powers of the Disputes Redressal Forums constituted under the Act came in for consideration before the National Forum as also before some of the State Forums and it would be useful to refer to them before proceeding further in the matter. In the decision reported in *M/s. Special Machines v. Punjab National Bank and others*, (1991)1 C.P.R. 52, the National Forum was concerned with the question as to the procedure for disposal of complaint and as to when the forums can decline to entertain the complaint and enter into an allegation of the disputes. The National Forum has observed thus in this regard:

"The procedure for disposal of complaints under the Act has been laid down in Sec.13 of the Act, the provisions of which are made applicable to proceedings before the National Commission by Rule 14(2) of the Consumer Protection Rules, 1987. Sub-secs.(2) and (3) of Sec.13 of the Act show beyond doubt that the statute does not contemplate the determination of complicated issues of fact involving taking of elaborate oral evidence and adducing of voluminous documentary evidence and a detailed scrutiny and assessment of such evidence. It is no doubt true that the forums constituted under the Act are vested with the power to examine witnesses on oath and to order discovery and production of documents. But such power is to be exercised in cases where the issues involved are simple such as the defective quality of any goods purchased or any shortcoming or inadequacy in the quality, nature and manner of performance of the service which the respondent has contracted to perform for consideration. Even in such cases, if it appears to the concerned Forum under the Act that the issues raised cannot be determined without taking elaborate oral and documentary evidence it is open to it to decline to exercise jurisdiction and refer the party to his ordinary remedy by way of suit."

The said position came to be subsequently clarified by the National Commission in the decision reported in *Abdul Sukur v. State of Orissa*, (1991) 2 C.P.J. 202, that the mere fact that a consumer's complaint required examination, cross-examination of witnesses cannot by itself be a valid ground for refusing the adjudication of the dispute under the Act and that the Forums are to decide cases filed before them after taking such oral and documentary evidence as the circumstances of any given case may require.

39. The various issues raised in these writ petitions have to be considered and decided in the backdrop of the nature of the claims, the rights of parties and the nature, character and extent of the jurisdiction or the authority conferred under the provisions of the Act upon the District Forum, State Commission and National Commission respectively as indicated supra. The substantial issue raised and the challenge to the jurisdiction of the Redressal Forums constituted under the Act in entertaining and settling the disputes raised in a complaint against a medical practitioner or a hospital for that matter, is based on the meaning of the word 'service' as defined in Sec.2(1)(o) of the Act. The definition of the word 'service' is as hereunder:

"(c) 'service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both housing construction entertainment, amusement or the purveying of new or other information, but does not include the rendering of any service free of charge or under a contract of personal service."

The construction to be placed on this would depend upon the definitions of the words 'consumer' in Sec.2(1)(d), 'defect' in Sec.2(1)(f), and 'deficiency' in Sec.2(1)(g) as also the words 'restrictive trade practice' in Sec.2(1)(nn) and the words 'unfair trade practice' in Sec.2(1)(r). The definition clauses relating to the words referred to above are as hereunder:

(d) "Consumer" means any person who,—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such

goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the service for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

Explanation: For the purposes of sub-clause

(i) "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;"

"(f) 'defect' means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law under any contract express or implied as is claimed by the trader in any manner whatsoever in relation to any goods."

"(g) 'deficiency' means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any services;"

"(nn) 'restrictive trade practice' means any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as a condition precedent for buying, hiring or availing of other goods or services;"

"(r) 'unfair trade practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely;

(1) the practice of making any statement, whether orally or in writing or by visible representation which,--

(i) falsely represents that the goods are of a particular standard quality, quantity, grade, composition, style or model;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristic accessories, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof; provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence.

(viii) makes to the public a representation in a form that purports to be--

(i) a warranty or guarantee of a product or of any goods or services; or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if such purported warranty or guarantee or promise materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant markets unless it is clearly specified to be the

price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

(x) gives false or misleading facts disparaging the goods, services, or trade of another person,
Explanation: For the purpose of clause (1), a statement that is--

(a) expressed on an article offered or displayed for sale, or on its wrapper or container; or

(b) expressed on anything attached to, inserted in, or accompanying an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or

(c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

(2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, an in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation: For the purposes of clause (2), "bargaining price" means--

(a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or

(b) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;

(3) permits,

(a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;

(b) the conduct of any contest, lottery, game or chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of

any product or any business interest;

(4) permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;

(5) permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services."

The petitioners also contend that a patient who is treated by a Medical Practitioner or in a hospital providing medical care cannot be considered to be a consumer for the reason that he cannot be considered to hire or avail of any services for a consideration paid or promised or partly paid and partly promised, or under any system of deferred payment. Great endeavour has been made by the learned counsel appearing on either side to impress upon the manner of construction to be placed on the vital words referred to above. As against the plea on behalf of the petitioners that those words have to be construed in the context as well as the objects and reasons of the legislation as such, the learned counsel for the respondents contended that being a social welfare legislation with an inclusive and wide language used, a liberal interpretation has to be made all these words to really give effect to the object of the Act to provide a cheap and speedy remedy as against the time consuming and expensive process of civil litigation. Though as indicated earlier voluminous are the case laws on this aspect, it becomes wholly unnecessary for us to advert to all those decisions which are of general interest and relevance rendered in the context of different provisions and enactments in the teeth of a direct decision of the apex Court rendered in the context of the very Act with which we are concerned.

40. The Supreme Court in the decision reported in *Lucknow Development Authority v. M.K. Gupta*, (1994) 1 S.C.C. 243, was considering the issue as to whether housing construction work undertaken

by the statutory authority like the appellant before the Supreme Court could be said to be rendering service and the allottee of a house constructed by the appellant could be said to be a consumer availing of the services made available by the appellant. The issue came to be considered in that decision in respect of a cause arising for the period prior to 1993 on the provisions of the Act as it stood unamended prior to the Consumer Protection (Amendment) Ordinance, 1993 replaced by the Central Act 50 of 1993. Before going into the question of jurisdiction of the District Forum or State or National Commission to entertain a complaint of the nature therein, the learned Judges thought fit to ascertain the purpose of the Act, the objective it seeks to achieve and the nature of social purpose it seeks to promote since it shall facilitate in comprehending the issue involved and assessed in construing various provisions of the Act effectively. In that context, the Court observed as hereunder:

"To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are

degenerating into storchoses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot. A scrutiny of various definitions such as 'consumer', 'service', 'trader', 'unfair trade practice' indicates that legislature has attempted to widen the reach of the Act. Each of these definitions are in two parts, one, explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep, then its ambit is widened to such things which otherwise would have been beyond its natural import. Manner of construing an inclusive clause and its widening effect has been explained in *Dilworth v. Commissioner of Stamps, 1899 A.C. 99* as under: "include" is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural, import, but also those things which the definition clause declares that they shall include."

It has been approved by this Court in *Regional Director, Employees' State Insurance Corporation v. High Land Coffee Works of P.F.X.Saldanha and Sons, (1991) 3 S.C.C. 617, C.I.T. v. Taj Mahal Hotel, Secunderabad, (1971) 3 S.C.C. 550* and *State of Bombay v. Hospital Mazdoor Sabha, A.I.R. 1960 S.C. 610; (1960) 2 S.C.R. 866; 1960 S.C.J. 679; (1960) 1 Lab.L.J. 251*. The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to the attempted objective of the enactment."

41. While proceeding further with the right of the complainant under the Act to approach the Commission or the Forum for unfair trade practice or defect in supply of goods or deficiency in service, the definition of the word 'consumer' was adverted to and considered to be of a comprehensive expression dealing with goods as well as with services. As for the aim of the Act was concerned, it was again reiterated as hereunder:

"The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services. The common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss."

While repelling the plea that the applicability of the Act has been confined to movable goods only and holding that deficiency in service rendered was also comprehended. Their Lordships proceeded to analyse the meaning to be ascribed to the word 'service' and opined as hereunder:

"What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc., The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment. Clause (o) of the definition section defines it as under:

"service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, processing, supply of electrical or other energy, board

or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionaryally means 'one or some or all'. In Black's Law Dictionary it is explained thus word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute". The use of the word 'any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all. The other word 'potential' is again very wide. In Oxford Dictionary it is defined as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined as "existing in possibility but not in act, Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future instalments or payments on a contract or engagement already made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in

private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility."

42. The Supreme Court while deciding the *Lucknow Development Authority's case*, (1994) 1 S.C.C. 243, was considering an appeal filed under Sec.23 of the Act and was also not concerned with the numerous aspects posed before us for our consideration in exercise of the powers of Judicial Review under the Constitution but were merely dealing with the appeal as an appellate authority under the very statute obliged to exercise powers subject to the enactment itself *de hors* constitutional challenges or any consideration with reference to the legality, propriety and constitutional validity of the provisions themselves. That was the position of the National Commission also when it decided the case reported in *M/s. Cosmopolitan Hospital and another v. Smt. Vasantha P. Nair*, (1992) 1 C.P.R. 820 and the consideration in the said decision was confined with mere interpretation of a provision by an adjudicatory authority created under very Act shorn of any cry of unconstitutionality or grievances of violation of the provisions of the Constitution of India or rights secured to a citizen in adopting or placing a particular construction on the statutory provisions contained in the Act. Unlike the exercise and efforts undertaken in those series of cases this Court is obliged to critically analyse and test the competing and conflicting claims made on the touchstone of the Constitution of India and safeguards enshrined and secured under this sacred document to a citizen. Even in the decision in the *Lucknow Development Authority's case*, (1994) 1 S.C.C. 243, the learned Judges of the Supreme Court have emphasised the need to construe the general words in the context in which they have been used as also the subject and aim or object of the enactment itself. In highlighting the aims of the Act to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services care has been

taken to point out also that the common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. Even apart from the wide construction placed upon the word 'service', Their Lordships had also undertaken a consideration of the further issue as to whether the housing construction or building activity carried on by the Private or Statutory Body was 'service' within the meaning of the Act.

43. The preamble makes it clear that the Act was to 'provide for the protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers disputes. Therefore, the extent and nature of protection scheme and devised under the Act would also become vitally relevant to assess width and range of services that could reasonably be held to be comprehended for protection under the provisions of the Act. The protection envisaged of the interests of consumers is by providing for the establishment of consumer councils and other authorities for settlement of consumers disputes. The Act postulates the establishment of Central Consumer Protection Council and State Consumer Protection Council and the objects of both these councils are one and the same viz., the rights to be protected against marketing of goods and services which are hazardous to life and property; the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services as the case may be so as to protect the consumer against unfair trade practices, the right to be assured wherever possible access to a variety of goods and services at competitive prices; the right to be heard and to be assured that consumers' interest will receive due consideration at appropriate forums; the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers and the right to consumer education. The avowed objects of the constitution of such councils could, in our view, hardly be said to have any relevance or relation to the professional services of a medical practitioner or a hospital undertaking medical care of a patient. Similarly, the summary nature of exercise of powers and jurisdiction of the District Forum, the State and National Commission and the type of orders and the nature

of relief that could be ordered by the redressal forums under Sec.14 of the Act do not in our view, support the plea to encompass the professional services of a medical practitioner or a hospital undertaking medical care of a patient within the meaning of services for the purposes and under the provisions of the Act. To reiterate once again, we are of the view that what is comprehended for protection under the Act is the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services, the common characteristics of both essentially being that they are supplied at a price to cover the costs and general profit or income for the seller of the goods or provider of services, in order to curb restrictive and unfair trade practices.

44. Even that apart, we are of the view that the ordinary and general meaning of grammatical and etymological purport alone of the definition of "service" cannot be favoured in the context and set up of the words employed in the definition clause taken together with the avowed object of the legislation. The peculiar pattern of the definition of "service" in Sec.2(1)(o) of the Act with an admixture of words general in import, followed by illustrative and exclusionary words should be so construed as to allow the general words used take colour from the conglomeration of other particular words used so as to confine them to the context and set up of the words taken together. Such reading and interpretation alone would ensure to the constitutional validity of the statutory provisions contained in the Act under consideration. The various kinds of services illustrated in the definition would also only lend support and credit to the construction that the concept of services comprehended under the Act have to be confined to services which are capable of yielding definite, positive and intended results unlike the professional services of a medical practitioner who has to operate in spheres where success or failure depends upon factors beyond the professional's control and even where the critical factors are within the professional's control still he cannot guarantee a definite result or success. As observed by Lord Denning L.J., in *Roe v. Ministry of Health*, (1954) 2 Q.B. 66; (1954) 2 All.E.R. 131, "Medical Science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks.

We cannot take benefits without taking the risks. Every advance in technique is also attended by risks. Doctors like the rest of us have to learn by experience, and experience often teaches in a hard way..... In all these cases you will find that the three questions, duty, causation, and remoteness run continually into one another." As noticed earlier, the claim against a professional cannot be said to be one involving money only but it involves serious consequences adversely affecting his professional reputation and future career. It is in this context and background also that the question as to whether the legislature could have intended or could be reasonably attributed with the intention of comprehending a medical practitioner or a hospital within the meaning of the 'service' under the Act so as to subject them to the Disputes redressal or settlement jurisdiction of the District Forum, the State and National Commission with summary jurisdiction to dispose of the complaints and claims made before them by granting any one or more of the reliefs indicated in Sec.14(1) of the Act. The only reasonable answer could be only in the negative.

45. We are also of the view that apart from the nature of the Disputes Redressal Forums constituted under the Act and the manner of settlement of disputes and the procedure laid down to be observed themselves being indicative of the construction to be placed upon the word 'service' and 'consumer' for the purposes of the Act, the anomalies inherent and involved in accepting the plea of the respondents to subject the claims against the petitioners to the jurisdiction of the Disputes Redressal Forums under the Act cannot be lost sight of. We would do well to refer to the views expressed by the National Commission itself in this respect though made in the context of considering a claim against doctors working in a Government Hospital and the Authorities of a Government Hospital in the decision reported in *Consumer Unity and Trust Society, Jaipur v. State of Rajasthan and others*, (1991) 1 C.P.R. 241, which in our view are apposite and would apply to claims against all medical practitioners and hospital authorities under the Act irrespective of the fact where they offer their professional services and who runs and administers the hospitals concerned, with equal force. While quoting the observations and opinion of the National Commission, we are alive to the position that the said decision was

rendered taking into account the definition of the word 'consumer' as it stood prior to its amendment in 1993. We quote here the observations of the National Commission in the case referred to supra:

"There are, in most government hospitals separate "paying wards" where affluent patients seek admission, as contrasted with the "general ward" where a poor patient is treated. Can we say that a patient in a "paying ward" in a Government hospital is a "consumer," within the meaning of the Act, but not an ordinary patient admitted to a general ward? That would be patently iniquitous.

14. The above considerations are weighty, and need to be kept in mind while considering the scope of the terms "consumer" and "hire for a consideration" in the Consumer Protection Act. And yet, we have to be cognizant of the implications and consequences of such a wide and flexible interpretation of the terms "consumer" and "hire for a consideration". Our discussion started with the premise that in a welfare State, it is the responsibility of the Governments to provide adequate medical health care and other facilities to all citizens. Such, indeed, has been the endeavour of all Governments to provide adequate medical health care and other facilities to all citizens. Such, indeed, has been the endeavour of all Governments, at the Centre and in the States ever since the inception of a planned programme of development. *It is possible indeed it is likely, that by opening up the definition of the term "consumer" to all users of Government hospitals, we may invite a flood of irresponsible litigation, especially since the forum of the National Commission as well as the State Commission and the District Forum is available free of cost to all complainants. In attempting to be fair to a few, we may thereby create a situation of which the attention of the hospital authorities, of the concerned Government would be diverted by a spate of possibly spurious and avoidable litigation. In the result, while some deserving people may benefit through access to a cheap and quick redressal of their grievances, there could be an unwelcome change in the approach of doctors and hospital authorities to the treatment of patients, and as a result there is likely to be a general deterioration of medical facilities and services in*

Government hospitals. It is an admitted fact that the resources available to the State are limited; and that within these resources, the State is endeavouring to do its best to provide reasonable services to the people. *If there are occasional lacunae, the remedy is not in demoralizing those providing the requisite services not in diverting their attention from the provision of such services to a spate of irresponsible litigation which could easily result from the wider and more flexible interpretation of the terms "consumer" and "hire for a consideration" in the Consumer Protection Act. This type of interpretation would, in the event, become counter productive and would defeat the very purpose of the legislation.*

We are also mindful of the fact that in case of demonstrable "negligence", recourse is always possible to a civil suit in an ordinary court of law. It is not as if a patient would be totally deprived from seeking justice.

15. *In considering any economic or social legislation, we need to attach primary importance not to the letter of the law but to the spirit behind it, to attempt to interpret the intention of the legislature. It is in this wider context that we are inclined to accept the stricter (and legal) definition of the terms "consumer" and "hire for a consideration" in the Consumer Protection Act. We must endeavour to ensure the legislation does the greatest good to the greatest number, which we accept as the obvious intention of Parliament. [Italics supplied].*

It is for this reason that we are unable to uphold the argument advanced by Shri Vaidyanathan that the expression "free of charge" occurring in Sec.2(1)(o) which defines "service" should be understood to mean free of "obligation".

16. The short point remains: how do we treat the contributors to the CGHS and those who occupy beds in "paying wards" in Government hospitals. In our opinion, the contribution to the CGHS should be taken to be in lieu of free treatment in the diverse dispensaries, as well as the free provision of medicines from these dispensaries. Where cases are referred by the dispensaries to a Government hospital, the facilities are provided by a Welfare State free of charge, same as to 'outpatients' and others admitted to these hospitals. In regard to "paying

wards", we feel that these payments are specifically related to special rooms/beds for which the separate charge is made; the medical facilities available in a Government hospital are common to all patients, inclusive of those in the pay wards, without discrimination.

In the light of what we have stated above, the conclusion is inevitable that persons who avail themselves of the facility of medical treatment in Government hospitals are not "consumers" and the said facility offered in Government hospitals cannot be regarded as service "hired" for "consideration". Hence, no complaint under the Act can be preferred either by any such person or by a consumer association on his behalf. The view taken by the State Commission, Rajasthan upholding the preliminary objection raised by the opposite party before it is, therefore, perfectly in accordance with law and it has only to be affirmed. We accordingly dismiss this appeal.

17. We would, at this juncture, like to emphasize two points. First, in the light of the two possible interpretations of the scope of the Act which we have indicated in the foregoing, *We feel that while we continue to be governed by the interpretation we have accepted, this is a matter where the Parliament, if it so wishes, can review the matter and amend the Act suitably so that there is no ambiguity between the intent of the law and its interpretation. It is, therefore, open to the Government to enact any classificatory amendments to the extant legislation. In the absence of any such legislation, the only possible interpretation would be the one finally adopted by us, in the light of the varied considerations outlined earlier.* [Italics supplied]

46. The weighty reasons and strong sentiments echoed by the eminent and erudite learned Judge (V.Balakrishna Eradi, J.,) would, in our view, continue to apply with equal force even after the amendment introduced to the word 'consumer' in Sec.2(1)(d) of the Act. The mere absence of the words 'avails of' in Sec.2(1)(d) of the Act alone if it is to be considered as an impediment for permitting a citizen from availing of the remedies under the Act against government hospitals and services rendered therein or by and large, generally no consideration is paid for the services rendered to a patient in such places, we fail to see what real or substantial change has been brought about by

the mere addition of the words 'avails of' in Sec.2(1)(d) of the Act when the definition of 'service' in Sec.2(1)(o) remained unaltered and still continues to exclude the rendering of any service free of charge. If the avowed object is to provide cheap, speedy and efficacious remedies to a class of persons who also were victims or sufferers of any defect or deficiency in the medical services hired or availed of by such persons we fail to see any relevance or rational or justification in denying the same treatment or opportunity to those who had such treatment without paying or actually paying for it, either in a hospital maintained or administered by a Government or local authority or a charitable organisation, brushing aside the so called Social Welfare character of the legislation. On principle and in the context of ordinary law, there could be no difference whatsoever in the matter of duties and responsibilities owed to a patient whose medical care or treatment has been undertaken, depending upon the fact that such services were for payment of consideration or gratuitous or by the Government hospitals or doctors or private medical practitioners or Hospitals. If the position has to be otherwise, it would be vulnerable for the vice of hostile discrimination to exclude from the purview of the Act, *de hors* its avowed and proclaimed object, a category or class alone on the mere pretext of a patient being treated not for consideration paid by him but gratuitously, or in a government hospital whether for payment or otherwise as has been contended by some of the learned counsel for the petitioners. Such consideration shall have no relevance or nexus to the so called proclaimed object of the legislation to provide cheap and speedy remedies.

47. The challenge to the constitution of the District Forum and State and National Commission as well as the procedure prescribed for the disposal of the complaints preferred before these forums may not to be taken up for consideration. The learned counsel for the petitioners urged these aspects with two fold objective viz., that the constitution of these Forums as also the procedure to be followed by them is unconstitutional and violative of Arts.14, 19(1)(g) and 21 of the Constitution of India and that at any rate the infirmities involved as also the summary nature of the Disposal contemplated before these Forums would go to show that complicated and serious and sub-

stantial or intricate questions of law and facts involved in adjudicating the claims which may be made against medical practitioners and hospitals could not have been comprehended for inclusion in the definition of 'consumer' and 'service' in the Act with the object of curbing restrictive and unfair trade practices on the whole. Basically the claims which could form the subject matter of the complaint against the medical practitioners and Hospitals pertain to the field of law of contracts or Torts and being claims of civil nature and invariably to be agitated before and adjudicated by the ordinary civil courts in the country under the substantive laws governing such rights as also the law of limitation and procedure laid down in the Code of Civil Procedure, 1908. Even after the coming into force of the Act, the jurisdiction, authority and competency of the ordinary civil courts to entertain such claims or cases are neither excluded nor ousted. Sec.3 of the Act declares the position that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. In other words, the ordinary civil courts will continue to have the jurisdiction to decide such cases and the Forums under the Act are constituted only in addition thereto and not in lieu thereof. Disputes Redressal Forums under the Act are not courts in the ordinary concept and meaning but merely Redressal Forums constituted to "settle" the disputes raised and pass orders of the kind specified in Sec.14 of the Act. In substance, they are neither courts nor Forums with any exclusive jurisdiction over such claims or disputes or any special class of disputes. Though in the hierarchy of their creation themselves provisions for appeals have been provided with a further right of appeal from the National Commission only to the Supreme Court of India and Administrative control vested in like manner among the three Disputes Redressal Forums, they cannot claim to be law unto themselves but are subject to the jurisdiction of the High Courts under Arts.226 and 227 of the Constitution of India. The law which constituted them does not have the effect of taking them outside the purview of those provisions of the Constitution of India, leave alone the question of the legality, propriety and constitutional validity of such a provision, if so made. The choice between Forums under the Act or the ordinary civil court is thus made the exclusive privilege or right only of the

complainant who alone initiates the proceedings and the rights of the opposite party to have himself defended under the protective or regular and ordinary civil procedure enshrined in the Code of Civil Procedure, 1908 or in the alternative only the summary procedure envisaged under the Act for disposal of claims depends at the sweet will and pleasure of the complainant who chooses the Forum without any norms or guidelines or criteria therefor to institute his claim and the opposite party left with no hand or say in the matter. Even if there be any serious or complicated issues of fact or substantial or important or intricate or novel or vital questions of law are involved for determination the opposite party is helpless unless the Disputes Redressal Forums themselves consider it appropriate or necessary in their view to direct the claimant to have recourse to the ordinary civil courts. The Act, as such, does not cast any obligation on these Disputes Redressal Forums to act in such a manner or lay down any guidelines or norms as to when they should necessarily direct or refer a particular claim to the ordinary civil courts. No other Authority or the ordinary civil courts have also been specifically conferred with any such powers to intervene in the matter at the instance of the opposite party unless there is any scope for interference on such grounds or at that initial stage of the proceedings itself by the High Court in exercise of its powers under Arts. 226 and 227 of the Constitution of India and the possibility may be next to nothing in this regard except where the constitutional validity of any provisions of the Act or Rules or any patent procedural infirmity or perversity of approach is demonstrated.

48. There can be no serious controversy or dispute over the fact that the procedure laid down under the Code of Civil Procedure, 1908 for the disposal of the same claim when moved before the ordinary civil courts substantially and drastically differ from the summary nature of the jurisdiction or the procedure conferred and stipulated under the Act when moved for the very claim before the Disputes Redressal Forums. The existence of substantial difference in the procedure cannot be easily overlooked or brushed aside. It is by now well settled that a rule of procedure laid down by law comes as much within the purview of Arts. 14 and 21 as any rule of substantive law and that it is necessary that all litigants who are similarly situated are able to avail themselves of the same

procedural rights for relief and for defence with like protection and without discrimination. That apart, the procedure prescribed in any case shall also be just and fair and neither arbitrary nor oppressive. Though it is open to the legislature to classify persons or things for differential treatment, the classification must not be arbitrary, but must be rational and reasonable and founded on intelligible differentia and that differentia must have a rational relation to the object sought to be achieved by the Act. Likewise, while the law can make and set apart the classes according to the needs and exigencies of the Society the object of a speedy trial cannot be itself be the basis of a classification though the same be the ultimate aim and mere bonafides of the object is no effective answer to the plea of discrimination or arbitrariness. So far as the cases before us are concerned, though consumer complaints are created as a class to be dealt with under the Act, they in no way differ from ordinary claims for similar relief and there is no well defined classification as such for exclusive consideration so as to justify a claim for differential treatment. The provisions of Sec. 3 make the Regular procedure exist side by side in force leaving indiscriminately to the choice of the complainant alone the Forum and the attendant procedure completely ignoring from consideration the opposite party to the complaint and his legitimate rights of defence or grievances otherwise available before the ordinary courts. Administration of justice has a social dimension and one side of the cause alone or one party to a claim along cannot be chosen for favoured treatment. The law enacted in the form of the Consumer Protection Act, 1986 by itself does not ensure uniform or universal application to all the class or category of consumer redressal of grievances or complaints, invariably. The grievance of infringement of Arts. 14 and 21 of the Constitution of India cannot be either underestimated or brushed aside, particularly in the context of the seriousness of the claims and the far reaching consequences the adjudications may ultimately have on the reputation as also the future professional career of the medical practitioner or Hospital is concerned.

49. The need for speedy and cheap remedy alone, in our view, cannot be a valid basis, *per se*, for differential treatment involving serious consequences. Administration of Justice ought not to be allowed to be debased by sacrificing quality to

informality and rapidity and economy and mere generosity of such intentions alone cannot be a consolation for the deteriorating quality a standard of the legal services. Cheapness and informality carried to extreme lengths, as in the present, would end in negative and counter productive results and therefore the fundamentals of justice are indispensable. Quack dispensation of justice ought not to be allowed to hold sway in the name of quick justice. The constitution of the tribunals also the expression of their decisions in the manner envisaged under the Act justify the criticism levelled on behalf of the petitioners and the apprehensions about the possible unrealistic functioning and ultimately leading to the futility of purpose of these institutions. Even a cursory analysis of the provisions relating to the composition of the Redressal Forums, ignoring the particular or actual composition in an individual case which may vary from time to time, except the President who is a legally trained person being an existing or past Judge or Judicial Officer, the others could be any one which in the opinion of the Government concerned, possess ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration and not necessarily obtained any degree or diploma in such fields or attained such academic achievements as qualifications or any training for a particular period. They are too general and nebulous prescriptions which could not effectively ensure the appointment of really qualified persons. The disposal of redressal complaints raising disputes pertaining to sale of goods or hiring or availing of services of a commercial nature or trade oriented aspects by a consumer for consideration may be possible with the mode and manner of procedure laid down under Secs. 12 and 13 of the Act to settle disputes and pass orders of the kind visualised under Sec. 14. Though, power to judge is not now confined to ordinary Courts, and the modern concept of quasi-judicial bodies and administrative tribunals or special courts have come to occupy the field and stay, that does not prevent an examination of their competency to deal with all or any of the matters entrusted to them or the arbitrariness or reasonableness or fairness of the procedure to be observed before them. If they are found to be substantively and

qualitatively different from the ordinary civil courts but yet entrusted with the determination of the same or similar complicated claims involving drastic or far reaching consequences, this Court exercising powers under Art. 226 of the Constitution of India can always strike down such entrustment of power or so read down the provisions as to exclude such power from those Special Forums so as to ensure the Administration of justice a reality and not merely a myth. The defects or deficiencies in the goods sold or services rendered of commercial trade oriented nature can be easily found out with reference to their standard, quality or grade, if necessary, after sending the goods for the analysis and report of the laboratory, if any, even by the category of persons who may be appointed as members with the qualification envisaged under the provisions of the Act. But intricate, subtle, substantial questions of law on the peculiar facts and circumstances of an alleged negligence or defect or deficiency of service rendered by a Medical Practitioner or a hospital, with serious and far reaching consequences on the reputation and future career of the professionals cannot in our view be effectively dealt with by the Disputes Redressal Forums constituted under the Act. The Act declares that the opinion of the majority shall be the order of these Forums and there is every likelihood of the President having no decisive voice if the other members join together and the decision by those other members could hardly be said to be that of a body within an independent or judicial bent of mind and judicious approach. Legally trained mind or judicial approach and the required expertise and knowledge would be totally lacking in a consideration made and adjudication rendered under such a situation. It is one thing to have such persons as counsellors to assist these Forums or associate them with the decision making process if need be but totally different to allow them to decide on their own such complicated and intricate questions of vital facts or questions of law of great importance and serious repercussions and consequences upon individual rights monetary as well as non-monetary one. The appointment of retired Judges was itself at times considered to be not conducive to the maintenance of the independence of the institutions and to give a free hand to non-judicial members the right to adjudicate issues according to their whims and fancy would in our view constitute serious

inroad into the Administration of justice. The plea on behalf of the petitioners that the absence of a special provision for a member of the medical profession in the adjudicatory mechanism visualised under the Act is also sufficiently indicative of the intention of the Parliament that the Medical Professionals have not been comprehended for inclusion under the Act cannot be also lightly brushed aside.

50. That apart, the preamble to the Act which proclaims the object and aim of the law the statement of objects and reasons as also the debates in both the Houses of Parliament, during consideration of the provisions of the Act, when it was at the anvil, would give a positive impression in most unmistakable terms leading to an inevitable and inescapable conclusion that the medical profession or the Hospitals were never in the contemplation of the framers of the Act as being comprehended within the scope of the Act. As noticed earlier, context of the legislative provisions is a vital key to an appropriate interpretation of the words in a statute. The Apex Court observed in this regard in the decision reported in *Reserve Bank of India v. Peerless General Finance and Investment Company Limited and others*, (1987) 1 S.C.C. 424, as hereunder:

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the classes provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed so as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be con-

strued so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the court construed the expression 'Prize Chit' in Srinivasa and we find no reason to depart from the court's construction."

51. There can be no two views on the necessity for the accountability of even professionals for their acts of commission and omission when it damns some one who utilised or availed of his services. A duty to their patients to exercise reasonable care inheres even in undertaking to carry out their properly skilled or diagnosis advice and treatment and in addition to the contractual or tortious liability, for failure to exercise reasonable care. All Medical Practitioners are also subject to duty of confidence themselves by equity. From ancient times, the medical practitioner has been held accountable for failure to exercise reasonable care in treating his patient *de hors* any contractual relationship with the patient and the fact that such a professional undertakes the task of providing advice, diagnosis or treatment *per se* gave rise to a duty to exercise proper care and skill and the fact as to who called the doctor to the patient or who pays him and whether he is paid for his services or not has no vital role, in respect of the accountability of the patient. But the question that looms large and surfaces for our consideration in these batch of cases is really as to where it should be rendered accountable; Is it before the ordinary courts of law or the Disputes Redressal Forums constituted under the Act in question? That issue, in our view, has to be analysed and considered not merely on any populist ideas carried away by mere sympathies, obsessed by the only fact that some disaster has befallen on a person who had to suffer some terrible consequences. Protection from the point of view of the administration of justice should be of both parties and public interest also ought not to be allowed to become a casualty by undertaking a partisan attitude or leaning towards one party to a cause merely on sympathies. Bestowing our serious thought to the complexities of the problem we are constrained to think that exposing the medical practitioners to the Disputes Redressal Forums constituted under the Act and render them answerable to claims by complainants in a summary procedure of trial of such

claims would have counter productive results on the very quality and standard of service by such professionals. Medical Practitioners who are constrained to think more of their own safety will have their initiative stifled and confidence undermined in undertaking and often may not prefer to undertake even elementary risks involved in handling variety of cases which come before them. Even *de hors* defensive methods of treatment, there will be very little possibility for innovations and application of advance technique which, in our view, would be more disastrous than the wail of sorrow and difficulties pleaded as standing in the way of one approaching ordinary civil courts for redressal.

52. Thus, viewed, pragmatics apart, the entire gamut of controversies in these cases with particular reference to the practicalities of the situation, we have no hesitation to hold that the word 'services' have to be construed in the context of the definition of the words 'consumer', 'restrictive trade practices' and 'unfair trade practices' as also the nature of constitution, the powers and the summary adjudicatory procedure prescribed under the Act and the need to read the provisions in such a way which would promote its constitutionality than expose the provisions to be susceptible to the attack of unconstitutionality. It is by now a well settled rule of construction that if a statutory provision is susceptible of or admits of even two reasonably possible views then the one which would promote its constitutionality should be preferred on the ground that the legislature is presumed not to have intended an excess of its own jurisdiction. By adopting such course, as also undertaking a *prima facie* consideration of the challenge made to some of the provisions to indicate the need for a reading down of certain provisions, we should not, however, be considered to have pronounced our views on the constitutionality of the Statute or some of the provisions of the Act in question. Consequently on an overall consideration of the matter, we are of the view that the words "consumer" and "service", defined under Sec.2(1)(d) and (o) respectively should be construed to comprehend consumer of services of commercial and trade oriented nature only in the context of an unfair trade or restrictive trade practices and not otherwise. With respect, we are unable to subscribe to the view taken to the contrary by some of the other decisions of court as also the Authorities

exercising jurisdiction under the Act, including the one reported in *Dr.A.Indira Narayanan v. The Government of India*, (1994)1 M.L.J. 24 by a learned single Judge of this Court. In substance, we are of the view that the services rendered to a patient by a Medical Practitioner or a hospital by way of diagnosis and treatment, both medicinal and surgical would not come within the definition of Sec.2(1)(o) and a patient or his representatives in interest will not fall within the definition of consumer in Sec.2(1)(d) and consequently, they cannot be subjected to claims, in respect of such services relating to diagnosis and treatment, both medicinal and surgical before the District Forum or State and National Commissions constituted under the Act. We also make it clear that Medical Practitioners or Hospitals undertaking exclusively or in addition to services of diagnosis and treatment—medicinal and surgical, para-medical services of all kinds and categories cannot claim similar immunity to the extent of such para-medical services undertakes to be rendered. We are of the view that rendering of paramedical services, though may also involve to certain extent professional skill and talent would fall within the definition of 'service' and those who avail of such services would answer the definition of 'consumers' under the provisions of the Act. Even assuming for purposes of consideration, that a patient undergoing treatment or availing the services of a medical practitioner or Hospital, in respect of diagnosis and treatment, both medicinal and surgical, would answer the description of 'consumer' and services rendered to him 'service' for the purposes of the Act. The next submission that may also require for consideration by us is as to whether the services rendered by a medical practitioner or hospital would fall within the exclusionary clause "under a contract of personal service", Sec.2(1)(o) of the Act. It is the contention of the learned counsel for the petitioners that the services rendered by a Medical Practitioner or a hospital in taking care of a patient and treating him would constitute 'personal service' whenever a medical practitioner is engaged he owes a duty to treat the patient personally and faith and reputation is the basis of selection or option of a particular patient of a hospital or Medical Practitioner of his choice. Personal confidence and personal qualification are the hallmark of availing of the services of a Medical Practitioner or Hospital. Not only personal attention

is required for the patient but the kind of treatment would also be personal to the patient and his disease concerned. Whether the relationship between them owes its origin to either a special contract or not is not really material but there is always an implied term to act at all times in the best interests of the patient, in accordance with the professed skill of the professional as such and normally not deligable. Even ordinarily a personal contract is one which depends upon the existence of the personal qualities, skill, or service of the parties. At times, it may also refer to one person, body or figure. The performance of such a contract also depends upon the peculiar talent or skill of intellectual, ability and judgment and there cannot be any forced enforcement of such a contract, since it would depend very much upon volition of parties too. The differences underlying the concepts of "contract of service" and "contract for services" were considered to be very thin and fine they being mixed questions of fact and law and that it is always for the Court or Forum concerned to decide about the true relation between parties. Even in the area of Industrial Law and Law of Master and Servants it was often considered to be impossible to lay down any rule of law of universal application for distinguishing the one from the other and always to be left to be decided by all the circumstances of a case. So far as the scheme and the object underlying the Act and phraseology adopted for defining the word 'service' in Sec.2(1)(e) is concerned, even such niceties of the controversies on the differences arising out of the language viz., contract of personal services and contract for personal services, may not be really relevant and for the purposes of the present Act it should be construed with reference to the nature and quality of service only and not in the context of finding out the existence or otherwise of the employer and employee relationship. Thus viewed, it would be obvious that the services rendered by a Medical Practitioner, or a hospital by way of diagnosis and treatment, medical and surgical, other than paramedical services, would fall within the exclusionary clause "contract of personal services" and, therefore, would be outside the purview of the Act.

53. Having regard to the above conclusions of ours, it has become unnecessary to pronounce upon the constitutionality of some of the provisions challenged by the petitioners. Though the

object of providing a cheap and speedy remedy may have a lofty and laudable motives that by itself cannot justify a construction of the provisions of the Act in a manner to subject medical practitioners and also the hospitals providing and undertaking treatment of a patient to the type and character of forums created under the Act with summary jurisdiction. A concession in the Court-fee payable or stipulation of a reasonable period for the conclusion of the proceedings may be a desirable need, but the remedy thought of cannot be more dangerous and disastrous than the disease itself. Before parting with these cases, we may state that it is high time for the legislature to clarify the position specifically without leaving room for any doubts in such a vital and important area of enforcement of the provisions of the Act, with not only far reaching importance but drastic and serious consequences.

54. To summarise, the following are our conclusions:

(i) The services rendered to a patient by a medical practitioner or a hospital by way of diagnosis and treatment both medicinal and surgical would not come within the meaning of 'service' as defined in Sec.2(1)(e) of the Consumer Protection Act, 1986.

(ii) A patient who undergoes treatment under a medical practitioner or a hospital by way of diagnosis and treatment both medicinal and surgical cannot be considered to be a 'consumer' within the meaning of Sec.2(1)(d) of the Act.

(iii) The medical practitioners or hospitals undertaking and providing paramedical services of any categories or kind cannot claim similar immunity from the provisions of the Act and they would fall, to the extent of such services rendered by them within the definition of 'service' and a person availing of such service would be a 'consumer' within the meaning of the Act.

(iv) Consequently, it has become unnecessary for this Court to finally adjudicate and pronounce upon the constitutional validity of some of the provisions of the Act challenged in these writ petitions.

55. These writ petitions shall stand ordered in the above terms. No costs

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan and Thangamani, JJ.*

App.No.192 of 1993 and Transfer App.Nos.1115 and 1116 of 1989 10th November, 1993.

A.Sangameswaran and others ...Appellants
v.

Sri Lakshmi Textiles a registered firm by partner P.Sundararajan and others ...Respondents.

Partnership Act (IX of 1932), Sec.20 - Person knowingly permitting himself to be represented to be partner in firm - Liability to persons who gives credit per firm on such representation - Extent of.

Under Sec.20 of the Partnership Act, anyone who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented to be a partner in a firm is liable as a partner in that firm to anyone who has, on the faith of such representation given credit to the firm whether the person permitting himself, represented to be a partner does not know that the representation has reached the person so giving credit. [Para. '21]

Appeal and Transfer Appeals against the decree of the Court of the Subordinate Judge, Salem, dated 8.3.1983 in O.S.Nos.981 of 1978, 1055 of 1978 and 109 of 1982, respectively.

Hariharan, S.Subbulakshmi and P.Selvaraj, for Appellant.

N.Meenakshisundaram and M.Sathyanarayanan, for Respondent.

The Judgment of the Court was delivered by *Thangamani, J.*: The appellants in A.S.No.192 of 1983 are defendants 2 to 5, 11 and 1 in O.S.Nos.981 of 1978, 1055 of 1978 and 109 of 1982 respectively on the file of learned Subordinate Judge of Salem. In another two appeals the 1st defendant does not figure as an appellant. Three different plaintiffs have laid those suits against the present appellants and 5 others. In the first suit there is one more defendant by name Goodluck Textiles. The plaintiffs are registered partnership firms dealing in textiles on wholesale business. Hereafter parties are referred to as arrayed in the suits.

2. The first defendant is the father of defendants 2 to 5. Defendants 6 to 9 are their close relations and associates. They were doing textile business under

the name and style of Dhanalakshmi Textile Traders who is the 10th defendant in the suits at Door No.3-4-395 Tobacco Bazaar in Secunderabad, Andhra Pradesh. The first suit has been instituted for the recovery of Rs.60,000 for the value of textile goods supplied on credit for the business requirements of the defendants from 1974 to 27.4.1978. The sum includes Rs.27,500 payable by way of interest as per the agreement at 12% per annum on the outstandings. While the claim in O.S.No.1055 of 1978 is for the recovery of Rs.12,300 that in C.S.No.109 of 1982 is for recovery of Rs.4,685 on similar allegations.

3. In all the three suits defendants 2 to 5 are sought to be made liable on the ground that the first defendant represented that he was the main partner of the business run under the name and style of the 14th defendant. Only on believing the representation of the first defendant and his sons, the plaintiffs supplied goods to the 10th defendant firm on credit. By conduct and representation they held out that they were the actual partners of the firm. The defendants 1 to 5 were frequently visiting and looking after the business of Dhanalakshmi Textile Traders conducted at Door No.3-4-395, Tobacco Bazaar, Secunderabad. As such they are personally liable to pay the amounts under Sec.28 of the Partnership Act. Plaintiffs further alleged that the name of the 10th defendant has now been changed as M/s.Mayilone Textile Corporation which is the 11th defendant in the suits. The said concern is also run by the same defendants 1 to 9 with the same stock-in-trade. This arrangement has been done by the first defendant evidently with a view to defraud the lawful creditors. The 12th defendant has been impleaded for the reason that some of the defendants have also started a textile business under the name and style of Goodluck Textiles in Hyderabad.

4. The trial court found that the defendants have purchased textiles on credit from the plaintiffs for the sake of the 10th defendant firm and as per the custom and usage of the trade, they have to pay interest at 12% per annum, that defendants 6 and 7 have filed written statement supporting the case of the plaintiffs, that though defendants 1 to 5 are not partners of the 10th defendant firm, they have held out as partners and as such defendants 1 to 5 and 11 are also liable to pay the debts due to the plaintiffs in all the suits along with the defendants 6 to 9. Accordingly, all the suits were decreed as

prayed for with costs against defendants 1 to 11 and the suit against the 12th defendant was dismissed without costs. And those appeals are directed against the said judgment and decree.

5. Originally, the first defendant was carrying on business in Secunderabad under the name and style of Dhanalakshmi Textiles. The business was run in the premises bearing Door No.3-4-395 belonging to the father of P.W.1 Rajeswara Rao. The latter states in his evidence that he had leased out the shop to the first defendant. In 1968 the first defendant approached him and represented that he was going to change the name of the shop from Dhanalakshmi Textiles to Dhanalakshmi Textile Traders-10th defendant. Ex.B-24 is the copy of rental agreement dated 14.5.1968 entered into between P.W.1 Rajeswara Rao and the second defendant Sangameswaran who is the son of the first defendant in respect of this shop. This document recites that the lease is for the purpose of carrying on cloth business. The tenant shall be entitled to carry on the business under any name and style which he may from time to time decide subject to the condition that the ownership of the tenancy is not changed. Accordingly Sangameswaran was doing business there. The plaintiff in O.S.No.1055 of 1978 as P.W.2 also states that the first defendant was doing business with him since 1954 in the name of Dhanalakshmi Textiles. Subsequent to 1956 he represented to him that he was going to do business thereafter with defendants 6 and 7 and with his sons defendants 2 to 5 in the name of Dhanalakshmi Textile Traders. Prior to that defendants 6 and 7 were working as clerks in the shop of the first defendant. Since all the seven were jointly doing business as proprietors of 10th defendant firm in Secunderabad, he supplied goods on credit. Defendants 1, 2 and 4 to 7 were managing the shop in turn. Defendants 6 and 7 were permanently residing in Secunderabad. P.W.3 Janakiraman is a former partner of the plaintiff firm in O.S.No.109 of 1982. His evidence is also to the effect that only on the representation that the business was being carried on by the first defendant and his sons, goods were supplied by him. He further states that either the first defendant or the second defendant was looking after the business. They came in person to the shop of this witness at Trichy and Salem, selected goods and bargained for the price. P.W.4 Hariharan is a partner of the plaintiff firm in O.S.No.981 of 1978. He also speaks

about defendants 2 to 5 participating in the business of 10th defendant firm. We shall now examine whether there are sufficient materials to substantiate these verbal versions of the creditors.

6. Though the appellants objected to the marking of Ex.B-24 by the Commissioner while he was examining P.W.1 Rajeswara Rao on commission at Secunderabad, the first defendant as D.W.1 admits even in his chief examination that Ex.B-24 lease deed was executed by his son second defendant. As we have already seen under this lease deed the second defendant has taken premises No.3-4-395, Tobacco Bazaar, Secunderabad on lease for the purpose of his cloth business. This is one of the factors which weighed with the trial court in holding that the sons of the first defendant are also partners of the 10th defendant firm. It is significant to note that the residential address of second defendant Sangameswaran is described in Ex.B-24 as Swami Vivekananda Street, Secunderabad. It is not the case of the appellants that the second defendant has any other business in Secunderabad. The second defendant has not gone into the witness box. So, it is quite likely that the shop was taken on rent only for the purpose of 10th defendant firm.

7. D.W.1 states in his evidence that he was present when Ex.B-24 lease deed was executed. In 1967 he closed Dhanalakshmi Textiles business because he incurred loss. But he did not vacate the shop since his idea of executing the lease deed was that by holding on the premises, his sons would be able to get good 'pagadi'. He further states that the shop was sub-leased to defendants 6 and 7 as per Ex.B-25 dated 25.5.1968. This lease deed had been executed by second defendant Sangameswaran in favour of the sixth defendant. And this lease purports to be for the business purpose of the 10th defendant Dhanalakshmi Textiles Corporation. But we find from Ex.A-5 the counter statement of the second defendant in R.C.No.454 of 1978 before the Rent Controller, Secunderabad, that he has categorically denied the sub-lease. It is significant to note that the 2nd defendant has filed this counter in his capacity as a partner of 11th defendant firm.

8. Ex.B-23 is the registration copy of the partition deed dated 17.6.1965 entered into among the first defendant and his four sons in respect of their family properties including business at

Hyderabad. This was pressed into service by the appellants in support of their contention that they could not have been partners of 10th defendant firm. They also relied on Ex.B-26 the Firm Registration Certificate dated 8.3.1966 which shows defendants 6 and 7 only as partners of the 10th defendant firm and Ex.B-27 Firm Registration Certificate dated 19.5.1978, whereunder defendants 2 to 5 are indicated as partners of 11th defendant firm in order to substantiate their contention that the appellants have nothing to do with 10th defendant concern. That the father and sons had become divided long back cannot raise a presumption that in 1978 they could not have carried on business jointly as partners. No doubt in the firm Registration Certificate of the 10th defendant, the names of the appellants do not find a place. But it is necessary to bear in mind that the appellants are sought to be made liable only on the basis that the first defendant and his sons had held out that they are also partners of that firm.

9. According to D.W.1 subsequent to 1978, defendants 2 to 5 were doing business in the name of 11th defendant in their individual capacity. The firm of the 11th defendant did not take the stock-in-trade of the 10th defendant. But he admits that 11th defendant firm was supplying goods to the 10th defendant. He also says that during 1968-1977 he had been to Secunderabad on many occasions. Unless he had business connection there, there is absolutely no reason for D.W.1 to undertake these journeys as pleasure trips.

10. The second defendant has alleged in Ex.A-5 counter that the 10th defendant firm was closed on 23.1.1978 and thereafter the 11th defendant business was started. But as per the evidence of D.W.2, defendants 6 and 7 had closed the business of 10th defendant firm even prior to that. On 30.11.1977 defendants 6 and 7 had handed over the key of the shop. And prior to that they had decorated the shop to commence the new business. This is also a factor which belies the claim of the appellants that the tenth defendant firm did not exist during the said period.

11. P.W.4 Hariharan states that he used to go to Secunderabad for collection and on one occasion the 5th defendant himself had paid a sum of Rs.1,700 on behalf of the 10th defendant firm. He was in the habit of passing receipts at the time of collection. Ex.A-18 is the copy of one such receipt. And 5th defendant A.Sadanantham has signed the receipt

in his presence. The 5th defendant as D.W.2 no doubt denies that he was looking after the 10th defendant business at Secunderabad. However, he admits that Ex.A-18 bears his signature. This is a counterfoil of the receipt book of the plaintiff firm in O.S.No.109 of 1982 dated 20.12.1977. This reads that on that day the firm has received Rs.1,700 from 10th defendant Dhanalakshmi Textiles Traders towards the balance amount due to them. According to P.W.2 when he was looking after the business of 11th defendant firm, the clerk of the plaintiff in O.S.No.109 of 1982 came to Secunderabad on 20.12.1977. He handed over a draft for Rs.1,700 to him and left for Karur. As per his instructions he handed over the draft when somebody connected with that firm came to him and only for that purpose he obtained Ex.A-18 receipt. The trial court has rightly rejected this explanation. There is nothing in Ex.A-18 to indicate that P.W.2 has signed this counterfoil on behalf of the 11th defendant firm. Besides this receipt expressly recites that the money has been received from 10th defendant firm M/s.Dhanalakshmi Textiles Traders towards the balance amount due from them. This receipt, in the absence of any satisfactory explanation from D.W.2, improbabilises the contention of the appellants that they had nothing to do with 10th defendant firm.

12. P.W.4 also states that towards the amount due to them under Ex.A-17 accounts, one of the sons of the first defendant paid him Rs.1,580 when he went for collection on 12.1.1978. Ex.A-19 is the receipt passed by him in this connection. This also reads that the money had been received from Dhanalakshmi Textile Traders. As per Ex.A-20 another sum of Rs.1,800 had been paid by Dhanalakshmi Textiles Traders on 23.3.1978. Under Ex.A-21 on the same day the firm of P.W.4 has passed a receipt in favour of Dhanalakshmi Textile Traders for Rs.415. According to P.W.4, this sum was paid at Secunderabad and the receipt was issued there. No doubt, Exs.A-20 and A-21 do not contain the signature of either the first defendant or the second defendant. However, there is no reason to doubt the genuineness of those two counterfoils in the receipt book of N.C.R.Mahadeo maintained in the usual course of their business. The appellants have not offered any explanation as to why payments were made on behalf of the 10th defendant Dhanalakshmi Textile Traders, if they were doing business only in the name of 11th

defendant Mayilone Textile Corporation since January, 1978 and the 10th defendant firm had been wound up even prior to that date.

13. The stand of the defendants 2 to 5 in their written statement is to the effect that they are carrying on business under the name and style of M/s. Mayilone Textile Corporation from 1968 onwards. The 11th defendant has nothing to do with the 10th defendant Dhanalakshmi Textile Traders. Defendants 2 to 5 are partners of only 11th defendant firm. And P.W.1 states in the witness box that only defendants 6 and 7 are doing business in the name of 10th defendant. But significantly enough in both Exs.B-26 and B-27 the Firm Registration Certificate, the place of business is described as 3-4-393 Tobacco Bazaar, Secunderabad. D.W.1 pretends that he does not know when defendants 6 and 7 started the business in the same premises where the concern of 10th defendant is located. He further concedes that he cannot say with certainty whether the business of 10th defendant firm was terminated on 23.1.1978. But there are accounts to show that goods were purchased for 11th defendant firm from concerns other than the 10th defendant. N.C.R. Fabrics the plaintiff in O.S.No.109 of 1982 had sent goods to Dhanalakshmi Textiles.

14. P.W.4 Hariharan states that dealings between his firm and the first defendant prior to 5.7.1977 are already settled. D.W.1 used to come to his shop and select goods for the purpose of 10th defendant firm. For goods sent subsequent to 5.7.1977 the relevant ledger entries are Ex.A-16 and A-17. And as per Ex.A-17 a sum of Rs.4,189 is due to his concern. According to P.W.3 Janakiraman, Ex.A-15 is the ledger entry from 7.6.1968 to 31.5.1969 for sending goods to first defendant from his shop. He admits in his cross-examination that neither of the appellants has signed in any cheque or signed any draft or signed in any order book or in any other accounts. P.W.2 Palaniappan deposes that Ex.A-7 is the ledger account for sending textiles to the 10th defendant since 1975. Till 1978 he was sending goods. Exs.A-9 and A-10 are ledger entries in his accounts from 19.4.1976 to 14.4.1977 and from 18.4.1977 to 20.2.1978 respectively. And Ex.A-10 discloses that there are outstandings to the tune of Rs.12,300 from the 10th defendant.

15. Ex.B-32 purports to be the ledger entry relating to goods supplied to 11th defendant from the main office of Erode. Ex.B-33 is the ledger entry

relating to Bhavani Branch of 11th defendant firm. D.W.2 admits that there signs of erasure in these entries. Besides while other entries dated 23.1.1978 contain bill numbers for the purchases, in Ex.B-32 no such bill numbers are given. Page 13 of Ex.B-4 relates to goods supplied to 11th defendant from the Erode shop. They also do not contain the bill numbers. This is also a circumstance which indicates that whatever be the name of the business, in reality it is the appellants who were doing business at No.3-4-395 Tobacco Bazaar, Secunderabad.

16. It is also the evidence of D.W.2 that the telephone bearing No.73419 is installed at his residence. D.W.1 pretends that he does not know whether the telephone number of the 10th defendant firm is 73419. Ex.A-33 is the letter written by the first defendant on 24.4.1978 to the plaintiff in O.S.No.981 of 1978. This is written on behalf of the 10th defendant firm Dhanalakshmi Textile Traders. Here telephone number is given as 73419. Unless the phone is in their shop, no one would print the phone number in their business letter head. This is also a circumstance which supports the claim of the respondents that after closing of the business the phone has been shifted to the place where the fifth defendant is permanently residing along with the second defendant.

17. P.W.3 swears in the witness box that though none of the defendants 1 to 5 has signed in any cheque or sent any draft or signed in any order book or in any other accounts, he had seen defendants 1 and 2 in the business premises of the 10th defendant at Secunderabad when he had occasion to go over there. They were actually doing business in that place. This evidence of P.W.3 has not been assailed in any manner in his cross-examination.

18. P.W.1 deposes that he leased out the premises to the first defendant. In 1968 the first defendant approached and informed him that he was going to change the name of the shop from Dhanalakshmi Textiles to Dhanalakshmi Textile Traders. Thereupon, the original of Ex.B-24 rent agreement was executed. Second defendant Sangameswaran alone was doing business there in the name and style of the 10th defendant. This witness had issued receipt to him for payment of rent for the premises and the first defendant has signed in the counterfoil of those receipts. Exs.A-1 and A-2 are receipt Nos.159 and 160 dated 17.1.1978 for the

month of December, 1977. They read that the money has been received from Dhanalakshmi Textile Traders and D.W.1 also has admitted that these counterfoils contain his signatures. D.W.1 further states that he had paid rent even as per Exs.B-1 and B-2. These are receipts issued on 11.4.1978 by P.W.1 in favour of Dhanalakshmi Textile Traders. D.W.1 has not offered any explanation as to how he came to sign in these counterfoils. Exs.B-3 and B-4 are also receipts dated 17.1.1978 passed by P.W.1 in favour of Dhanalakshmi Textile Traders. Had really the first defendant no interest in the 10th defendant firm as pretended by him, there is no reason why he has paid rent for and on behalf of this firm. Further though the rent has been paid by D.W.1, the accounts maintained by the 10th defendant firm does not contain any entry relating to it. And D.W.1, has not been reimbursed of the money parted by him. So those receipts clinchingly establish the means between the 10th defendant business and defendants 1 and 2.

19. We have already seen that according to D.W.1 since he had incurred loss in business, he closed down his Dhanalakshmi Textiles in 1967, left for Erode and settled there. He did not surrender possession of the premises and was keeping it in the name of the second defendant so that his sons could get pagadi. In 1968 defendants 6 and 7 wanted him to sub lease the premises to him. Ex.B-25 is the rent deed executed by them on 25.5.1988 in his favour. It appears from this lease deed that the first defendant has permitted 11th defendant to use the said premises and pay the rent for the building directly to the landlord on his behalf. It is unlikely that D.W.1 who was keeping the premises vacant expecting high pagadi readily obliged his erstwhile employees defendants 6 and 7 when they wanted to start a business of their own and parted with the possession of the premises.

20. Ex.A-8 purports to be a letter written by the first defendant to P.W.2 on 16.1.1975 soliciting support for the business of the 10th defendant firm. The trial court has rejected this evidence for the reason that the envelope concerning the letter has not been produced and the letter itself has been filed into court belatedly. D.W.1 also discount his signature therein. Learned counsel for the respondents also did not advance any argument on this document and we find no reason to differ from the view taken by the trial Judge.

21. Exs.A-11 and A-12 are marriage invitations relating to defendants 3 and 4, the sons of the first defendant. The trial court has proceeded on the assumption that in those invitations defendants 2 to 5 are described as partners of the 10th defendant firm Dhanalakshmi Textile Traders. However, a perusal of these invitations discloses that there are no such indications therein, and so they cannot help the plaintiffs in any manner. However, from the preponderance of probabilities in this case as pointed out in the discussion above, we have no hesitation in coming to the conclusion that the appellants held out that they were partners of 10th defendant firm and only on that basis the plaintiffs had sold textiles on credits to the said concern. And under Sec.20 of the Partnership Act, anyone who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented to be a partner in a firm is liable as a partner in that firm to any one who has, on the faith of such representation given credit to the firm whether the person permitting himself, represented to be a partner does or does not know that the representation has reached the person so giving credit. So the trial court has rightly decreed the suit.

22. In the result, all these appeals are dismissed with cost.

B.S.

---- *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.910 of 1988 *29th September, 1993.*

Arumugha Pillai

...Petitioner

v.

Vadivel Pillai

...Respondent.

Indian Stamp Act (II of 1899), Secs.35 and 36 - Promissory note - Insufficiently stamped - Admitted in evidence inadvertently - Whether can be eschewed at a later stage.

If none of the parties to a suit and the Judge noticed that a document was insufficiently stamped and hence could not be admitted in evidence in view of section 35 of the Indian Stamp Act and the document was inadvertently marked, Sec.36 of the Indian Stamp Act will not come into play. The presiding Officer of the Court, if at a later stage came to know of the mistake, can eschew it from evidence.

[Para. 10]

If either the presiding officer of the Court or any one of the parties therein were aware of the fact that the document was insufficiently stamped but yet the document was admitted in evidence without any objection by either side, at any subsequent stage of the suit or in appeal or revision it cannot be contended that the document was inadmissible in evidence and in these circumstances Sec.36 of the Indian Stamp Act will come into play.

[Para. 10]

Cases referred to:

Ram Rattan v. Bairang Lal, A.I.R. 1978 S.C. 1393: (1978) 3 S.C.C. 236. [Para. 4]

Basavaiah Naidu v. Venkateswarulu, A.I.R. 1957 A.P. 1022: 1956 An.W.R. 490. [Para. 6]

Warrier v. Kochunarayana, A.I.R. 1962 Ker. 265: 1962 K.L.T. 228: (1962) 1 Ker.L.R. 508: 1962 Ker.L.J. 528: I.L.R. (1962) 2 Ker. 294. [Para. 7]

Ma.Pwa.May v. Chettiar Firm, A.I.R. 1929 P.C. 279. [Para. 7]

M.K.Lodhi v. Zia Ul Haq, A.I.R. 1939 All. 588. [Para. 7]

Simmadri v. Varalakshmi, A.I.R. 1962 A.P. 398: (1962) 1 An.W.R. 156: (1962) 1 An.L.T. 247. [Para. 8]

Javer Chand v. Pukh Raj Surna, A.I.R. 1951 S.C. 1655. [Para. 9]

Perumal v. Kamakshi, A.I.R. 1938 785 (F.B.). [Para. 12]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Attur, dated 20.8.1987 and passed in O.S.No.95 of 1987.

S.P.Subramanian, for Petitioner. Miss.S.S.Jayanthi for M/s.R.Muthukrishnan and K.R.Ramakrishnan, for Respondent.

The Court made the following

ORDER: This civil revision petition is directed against the judgment in O.S.No.95 of 1987 on the file of the District Munsif, Attur.

2.Short facts are: The revision petitioner has filed the suit against the respondent on the foot of a

pronote. That was resisted by the respondent. After trial, the learned District Munsif had held that the suit pronote was insufficiently stamped and hence not admissible in evidence and when that was taken out of account, the suit claim cannot be sustained and dismissed the suit. Aggrieved by the said judgment, the plaintiff has come forward with this revision petition.

3. Mr.S.P.Subramanian, the learned counsel appearing for the revision petitioner would submit that the suit pronote was admitted in evidence by the learned District Munsif and while so he cannot at the later stage of the Suit, say that the document was insufficiently stamped and hence it was inadmissible in evidence. He would further submit that by virtue of Sec.36 of the Indian Stamp Act, 1899, once a document was admitted in evidence, such a document, shall not be called in question at any stage of the same suit. He would further submit that the trial Court had admitted Ex.A-1 in evidence and so it ought not have eschewed from evidence at a later stage of the suit on the ground that no judicial order was passed with regard to the admissibility of the document, at the time when it was exhibited. I have heard Miss.S.S.Jayanthi, for Mr.R.Muthukrishnan the learned Counsel appearing for the respondent, on the above aspects.

4. I have carefully considered the submissions made by rival counsels. The suit is on the foot of a pronote for Rs.2,000. It is marked as Ex.A-1. Only 20 paise revenue stamp was affixed, over which the alleged signature of defendant finds a place. It is not in dispute that it was insufficiently stamped. In the backside of Ex.A-1, the number of the suit, the date on which it was admitted and on whose behalf it was admitted that through whom it was admitted and the mark given for the document are all noted and the District Munsif had initialled. As per O.13, Rule 4, C.P.C. the endorsements on the documents admitted in evidence to be made. As per the said Sub-rule (1) the number and title of the suit, the name of the person producing the document, the date on which it was produced and a statement of its having or initialled by the Judge are all to be endorsed and the endorsement shall be signed or initialled by the Judge, There was no plea in the written statement that the suit pronote was insufficiently stamped and hence not admissible in evidence. Neither any objection was taken for the marking of the document, at the time

when it was produced and exhibited. Since it was insufficiently stamped, as per Sec.35 of the Indian Stamp Act, it shall not be admitted in evidence for any purpose. But it was admitted in evidence, Mr.S.P.Subramanian, would submit that when once it was admitted in evidence in view of Sec.36 of the Indian Stamp Act, it cannot be questioned at any stage in the same suit. Sec.36 reads as follows:

"36. Admission of instrument where not to be questioned: Where an instrument has been admitted in evidence, such admission shall not except as provided in Sec.61 called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

Sec.61 refers to revision of certain decisions of courts regarding the sufficiency of stamps and we are not concerned about it, in this case. The court below has stated in its judgment that at the time when P.Ws.1, 2 and 3 were examined on 13.8.1987, neither the learned counsel appearing for the plaintiff nor the learned counsel appearing for the defendant or the court noted that only 20 paise stamp was affixed in Ex.A-1. The court below has also pointed out that only after Ex.A-1 was marked, during cross-examination, the mistake was found out. The court below had stated that only due to inadvertence, Ex.A-1 was admitted and exhibited as Ex.A-1 and it was an accepted fact that it was not judicially considered whether the document was admissible in evidence or not. The court below has also stated that the learned counsels appearing for both sides had admitted it. The court below proceeds further and has stated that since there was no exercise of judicial mind regarding the question whether Ex.A-1 was admissible in evidence or not, at the time when it was exhibited, he is now holding that it is barred under Sec.35 of the Indian Stamp Act. Thus, the trial Court has clearly, categorically and in unambiguous terms has stated that neither the court nor the counsel appearing for the rival sides noted this fact that Ex.A-1 was insufficiently stamped at the time when it was exhibited and no judicial decision was given regarding admissibility of the same. These facts stated by the court below are very material and relevant while considering whether Sec.36 would apply to this case or not. The learned District Munsif had relief upon the ruling *Ram Rattan v. Bairang Lal*, A.I.R. 1978 S.C. 1393: (1978) 3 S.C.C. 236 and had

extracted the relevant portion. It reads as follows:

"When the document was tendered in evidence by the plaintiff while in witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for want of registration, it was obligatory upon the learned trial Judge to apply his mind to the objection raised and to decide the objection in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore a very convenient device is restored of marking the document in evidence subject to objection. This, however, would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; It is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would nonetheless be obligatory upon the court to decide the objection. If after applying mind to the rival contentions the trial court admits a document in evidence Sec.36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The court and of necessity it would be trial court before which the objection is taken about admissibility of document on the ground that it is not duly stamped has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to the question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The court, and of necessity it would be trial court before which the objection is taken about admissibility of document on the ground that it is not duly stamped has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to the question of admissibility the instrument could not be said to have been admitted in evidence with a view to attracting Sec.36".

5. From the facts stated by the trial court in its judgment, as to how Ex.A-1 came to be exhibited, it is apparent that Ex.A-1 had been inadvertently admitted without the court applying its mind as to the question of admissibility of the instrument and while so it cannot be said to have been admitted in evidence with a view to attract Sec.36 of Indian Stamp Act. The aforesaid ruling of the Apex Court applies squarely to the facts of this rare case.

6. Mr.S.P.Subramanian, relied upon *Basavaiah Naidu v. Venkateswarulu*, A.I.R. 1957 A.P. 1022: 1956 An.W.R. 490. In that case the facts are: The suit was brought on an insufficiently stamped promissory note. The promissory note was produced along with the plaint and filed into court. Objection was taken in the written statement to the validity of the pronote. Then issue was framed in these terms "whether the suit pronote is not true, valid and binding on the defendant?". On the date of beginning of the trial on 4.9.1951, the defendant's pleader put in a memo, stating that he did not question the genuineness of the promissory note but questioned its validity. The plaintiff was examined as P.W.1 and in the course of his evidence, the promissory note was put to him and he proved it. It was thereupon marked as Ex.A-1 in the case. The endorsements required under O.13, Rule 4, C.P.C. were made on the pronote and the initials of the District Munsif also finds a place. Later it was held that the pronote was not admissible in evidence and the trial court and the lower appellate court had dismissed the suit. Aggrieved by the same, the plaintiff went up on appeal to the High Court. The High Court had held that Sec.36 would apply even if the document had been wrongly admitted or admitted without objection. In this case, objection was taken by the defendant even at the outset that the pronote was insufficiently stamped. Despite that when the plaintiff was examined, it was allowed to be proved without any objection and it was admitted in evidence and exhibited. On those facts, it was so held. In the case before me, as I have indicated above, the fact that Ex.A-1 was insufficiently stamped went unnoticed by the learned counsels appearing for both sides and as well as by the court and it was inadvertently marked. In the circumstances, the ratio of the ruling of the Apex Court alone would apply to this case.

7. Mr.S.P.Subramanian, would rely upon *Warrier v. Kochunarayana*, A.I.R. 1962 Ker. 265: 1962 K.L.T.

228: (1962)1 Ker.L.R. 508: 1962 Ker.L.J. 528: I.L.R. (1962)2 Ker. 294. In this case, a Division Bench of the Kerala High Court had held that once a court, rightly or wrongly decides to admit a document in evidence, so far as the parties are concerned, the matter is closed and the admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument had not been duly stamped. In para 5, the learned Judges had laid as follows:

"The words of the section are clear, and there can be no doubt that once a document has been admitted in evidence-as in this case- its admissibility cannot be questioned on the ground that it has not been duly stamped".

Ma.Pwa.May v. Chettiar Firm, A.I.R. 1929 P.C. 279. The expression "admitted in evidence" means "let in as part of the evidence". To hold as the respondent wants us to do-that a document should not be considered as having been admitted in evidence unless the court has applied its mind to the question of admissibility from the point of view of the stamp law will involve an addition to the section of the words "after judicially considering the question of sufficiency of stamp" after the words "admitted in evidence, *M.K.Lodhi v. Zia Ul Haq*, A.I.R. 1939 All. 588, with respect, I do not agree with this view of the Kerala High Court, in view of the ruling of the Apex Court referred to supra.

8. Mr.S.P.Subramanian, would further rely upon *Simmadri v. Varalakshmi*, A.I.R. 1962 A.P. 398: (1962)1 An.W.R. 156: (1962)1 An.L.T. 247. In this case,, the court took objection, at the time of the presentation of the plaint, that the suit promissory note was insufficiently stamped and returned the plaint for the specific purpose of enabling the plaintiff to pay the penalty. The plaint was there after represented with the requisite penalty and at the stage of the trial of the suit, the promissory note was tendered in evidence. The document was then marked and admitted and the endorsements appearing thereon were initialled by the presiding officer as required by O.13, Rule 4, C.P.C. and no objection was taken regarding the admissibility of the document. It was held that the document was admitted in evidence, and such admission could not be called in question at a subsequent stage of the proceeding on the ground that it had not been duly stamped. In this case, the fact that the pronote was insufficiently stamped was

brought to the knowledge of the court even at the time of the filing of the plaint. Then later, when that trial commenced, it was admitted, in evidence without any objection on the side of the defendant. In such circumstances, it was held that Sec.36 would come into play. But the facts of the case before me are different. Hence this ruling does not apply.

9. In *Javer Chand v. Pukh Raj Sarna, A.I.R. 1951 S.C. 1655*, the facts are: Suit was laid on the fact of two hundis. The defendant resisted the claim on many grounds, *inter alia* contending that the hundis were inadmissible in evidence because they had not been stamped according to Stamp Law. It was admitted in evidence. The Apex Court had held that once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Sec.36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial court itself or to a court of appeal or revision to go behind that order. Thus, in this case, there was an objection taken by the defendant during trial that the two hundis were insufficiently stamped. Thus, that was an issue raised by the defendant. The facts of the case before me are different. In this case, none of the parties were aware of the facts of the insufficiency of the stamp in the pronote and hence it was inadvertently marked. So the ruling of the Apex Court, which I have referred earlier alone is applicable to this case.

10. From the above rulings, the following principles emerge:

(i) If none of the parties to a suit and the Judge noticed that a document was insufficiently stamped and hence could not be admitted in evidence in view of Sec.35 of the Indian Stamp Act, and the document was inadvertently marked, Sec.36 of the Indian Stamp Act will not come into play. The presiding officer of the court, if at a later stage came to know of the mistake, can eschew it from evidence.

(ii) If either the presiding officer of the court or any one of the parties therein were aware of the fact that the document was insufficiently stamped but yet the document was admitted in evidence without any objection by either side, at any subsequent stage of the suit or in appeal

or in revision, it cannot be contended that the document was inadmissible in evidence and in these circumstances Sec.36 of the Indian Stamp Act will come into play.

11. This case falls under the first principle referred to above and hence the court below was right in eschewing Ex.A-1 from evidence and while so, the suit has to be necessarily dismissed and the dismissal of the suit by the court below is correct.

12. Mr.S.P.Subramanian, would further submit that even if the suit pronote was held to be insufficiently stamped and the bar imposed by Sec.35 of the Indian Stamp Act would become operative, still the suit can be construed as one laid on the original debt and the court below ought to have considered the evidence and recorded a finding and without adopting such a procedure had simply dismissed the suit and that judgment cannot stand. He relied upon *Perumal v. Kamakshi, A.I.R. 1938 785 (F.B.)*. In it, the Full Bench had held that if the promissory note embodies all the terms of the contract and the instrument is improperly stamped, no suit on the debt will lie. Sec.91 Evidence Act and Sec.35 of the Stamp Act, bar the way. But if it does not embody all the terms of the contract the true nature of the transaction can be proved; and where an instrument has been given as collateral security or by way of conditional payment, a suit on the debt will lie. Whether a suit lies on the debt apart from the instrument therefore depends on the circumstances under which the instrument was executed. The plaintiff cannot avail the benefit of this Full Bench ruling because the claim in this case was solely on the fact of the promissory note, which was insufficiently stamped. Hence neither this submission made by Mr.S.P.Subramanian can be accepted.

13. Since none of the submissions made by Mr.S.P.Subramanian finds acceptance with me, the inevitable result is that this civil revision petition is to be dismissed and shall stand dismissed. No costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Raju, J.

C.R.P.SR.No.82263 of 1993 3rd December, 1993.

**Amra Press by Managing Partner M.Swaminathan,
Madras and another** ...*Petitioners*

v.

Md.Muneeruddin ...*Respondent.*

Constitution of India (1950), Art.227 - Alternative remedy - Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) and Tamil Nadu Buildings (Lease and Rent Control) Rules (1974), Rule 12(3) - Ex parte order of eviction passed - Appeal against order not filed - Application to set aside ex parte order not filed - No explanation for not following the courses - Filing revision under Art.227 after a long delay - Recourse to Art.227, if can be had. The remedy of revision under Art.227 of the Constitution is no doubt a Constitutional remedy and though the availability of an alternative remedy is no bar for the court exercising such a jurisdiction, certainly the court is entitled to take into account the conduct of the party also in by passing the normal equally effective remedies available under the Act without sufficient or justifying reasons and the inordinate delay in approaching this Court. The provisions of Art.227 of the Constitution of India are not meant to override and set at naught the inbuilt statutory safeguards and provisions under a special enactment or meant to be licence to a lethargic party to approach for relief at his whim and fancy.

...Permitting litigants to have recourse to Art.227 of the Constitution indiscriminately de hors the effective reliefs and remedies available otherwise under the statute itself and at that their convenience and leisure after long lapse of time would only set at naught the very system itself and encourage indiscriminate and unprincipled and indisciplined litigation. It is not as though that the petitioners cannot urge the ground which they are now raising in this revision before the forum provided for under the Act itself. [Para. 3]

Cases referred to:

G.Kuthabaksh v. A.P.Swamy, 93 L.W. 615. [Para. 2]

S.S.K.Mohammed Rowther and Company v. Sundaram and Brothers, (1978) 1 M.L.J. 79: A.I.R. 1978

Mad. 147. [Para. 2]

Petition under Art.227 of the Constitution of India praying the High Court to revise the Order of the Court of Small Causes (XIV Judge), Madras, dated 23.12.1988 and made in R.C.O.P.No.3348 of 1988.

P.J.George, for Petitioners.

The Court made the following

ORDER: The above revision petition has been filed under Art.227 of the Constitution of India challenging the order of eviction dated 23.12.1988 passed by the Rent Controller (XIX Judge, Court of Small Causes) in R.C.O.P.No.3348 of 1988. A copy of the order has been made available in the typed set of papers and it is seen from the said order that the order of eviction has been made ex parte on examining the witness for the petitioner alone, on account of the absence of the respondent in the eviction petition. This revision petition has been filed on the averments stated in the affidavit filed in support of the stay application that the petitioners came to know of the passing of the order of eviction when notice was received in the execution proceedings in E.P.No.229 of 1989. It is also stated in the affidavit which only explains the circumstances under which the petitioners have come to this Court with this revision, that notices in the eviction petition were received by somebody else viz., the clerk in respect of the first petitioner and one C.H.L.Narayanan, on behalf of the second petitioner at the initial stages and they have not brought it to the notice of the petitioners. Averments are also made that the ground on which the eviction has been ordered viz., wilful default is not only baseless but the order of the court below also does not contain any objective consideration of the claim as visualised under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960.

2. Learned counsel for the petitioners relied upon the following two decisions in support of his claim to justify recourse to this Court under Art.227 of the Constitution of India directing against the order of eviction. The decision in *G.Muthabaksh v. A.P.Swamy, 93 L.W. 615* is that of a learned single Judge of this Court where it has been held that there is a statutory obligation on the statutory authorities functioning under the Act to give a finding about the *bona fide* requirement of the landlord even though the petition may be disposed of *ex parte* and that even in a case where the tenant is absent, the statutory authority

is obliged to consider the evidence adduced by the landlord and arrive at proper findings. It may be noticed that the said judgment was rendered by this Court on a revision filed under Sec.25 of the Act apparently after exhausting the remedy of appeal before the court below. The decision next relied upon is that of another learned Judge in *S.S.K.Mohamed Rowther and Co. v. Sundaram and Bros.*, A.I.R. 1970 Mad. 147. That was also a case which came up to this Court in a revision under Sec.25 of the Act. The learned Judge was of the view that even an *ex parte* order of eviction should contain a finding about the satisfaction of the Rent Controller and in the absence of any finding on the satisfaction recorded by the Rent Controller as obliged under the provisions of the Act, the order would be a nullity. On the basis of the above two decisions, it is contended that the order of the Rent Controller being one made without complying with the statutory requirements of recording a finding of satisfaction before ordering eviction, it should be considered to be a nullity and, therefore, the petitioners were right in invoking the jurisdiction of this Court under Art.227 of the Constitution of India.

3. I have carefully considered the submission of the learned counsel appearing on behalf of the petitioners. In my view, the petitioners have misconceived their remedies in approaching this Court with the above revision under Art.227 of the Constitution of India. Indisputably, there is an *ex parte* order of the eviction made on 23.12.1988. Though it is stated that the petitioners come to know of the *ex parte* order only on receipt of a notice in E.P.No.229 of 1989, there is no information furnished to this Court as to the date of such knowledge. The said information would go to expose the belated approach of the petitioner to this Court. The petitioners, if they were genuinely aggrieved, had an effective remedy not only in the form of a statutory appeal before the appellate authority but had a right to file an application under Rule 12(3) of the Tamil Nadu Buildings (Lease and Rent Control) Rules, 1974 within thirty days from the date of the order or within thirty days from the date of knowledge of the order which has been passed *ex parte*. The third proviso to the said Rule would effectively protect the interest of such a party by providing that where an application for setting aside an *ex-parte* order has been received under Sub-rule 3 of Rule 12 of the Rules for the first time, all execution proceedings

in pursuance of the *ex parte* order shall be stayed until the disposal of the application. In spite of such effective remedies available, it would be futile on the part of the petitioners to approach this Court under Art.227 of the Constitution of India. No explanation is forthcoming as to why such a course has not been adopted. The remedy of revision under Art.227 of the Constitution is no doubt a constitutional remedy and though the availability of an alternative remedy is no bar for the court exercising such a jurisdiction, certainly the court is entitled to take into account the conduct of the party also in bypassing the normal equally effective remedies available under the Act, without sufficient or justifying reasons and the inordinate delay in approaching this Court. The provisions of Art.227 of the Constitution of India is not meant to override and set at naught the inbuilt statutory safeguards and provisions under a special enactment or meant to be licence to a lethargic party to approach for relief at his whim and fancy. As noticed while considering the decisions relied upon for the petitioners those judgments have been rendered in the revision filed by the concerned persons who felt aggrieved when they invoked this Court the revisional powers available under Sec.25 of the Act after availing of the appellate remedies available under the Act. Permitting litigants to have recourse to Art.227 of the Constitution indiscriminately *de hors* the effective reliefs and remedies available otherwise under the statute itself and at that their convenience and leisure after long lapse of time would only set at naught the very system itself and encourage indiscriminate and unprincipled and undisciplined litigation. It is not as though that the petitioners cannot urge the ground which they are now raising in this revision before the forum provided for under the Act itself.

4. For all the reasons stated above, I am of the view that the present revision ought not to be entertained under Art.227 of the Constitution of India. The revision fails and therefore, shall stand rejected. The rejection of this revision shall not preclude the petitioners from approaching the court under the provisions of the Act itself as are permissible in law and as and when any such proceedings are initiated, the courts concerned shall consider such proceedings on their own merits and in accordance with law.

B.S.

Petition dismissed.

**IN THE HIGH COURT OF JUDICATURE AT
MADRAS.**

Present: *Kanakaraj, J.*

W.P.No.22598 of 1993

9th March, 1994.

**Consumer Action Group represented by its
Trustee** *...Petitioner*
v.

**The Union of India, by its Secretary, Ministry of
Environment and Forests, New Delhi and others**
...Respondents.

Constitution of India (1950), Arts. 21, 48-A and 51-A(g) - Preservation of ecology and environment - Duty of State and citizens - State of Tamil Nadu proposing to erect memorial to Dr. Ambedkar at Adyar by conversion of wet lands - Petitioner, Consumer Action Group filing writ petition to restrain State Government from proceeding with the construction of the memorial on the ground that such conversion of wet lands would be detrimental to the eco systems - Writ petition whether maintainable.

The petitioner, Consumer Action Group filed the present writ petition to direct the respondents, including the State of Tamil Nadu, to restore an extent of 100 acres of land in Survey No.4309, Block No.96, Mylapore Village, to its original character and to restrain the Government of Tamil Nadu and the other respondents from proceeding with the erection of a memorial to Dr. Ambedkar on the ground that the conversion of wet lands for the purpose would be detrimental to the eco systems as it would lead to environmental deterioration. The respondents, besides challenging the maintainability of the writ petition, denied that the erection of the memorial would in anyway lead to environmental deterioration.

Held: There is enough material to suggest that the wet lands of the nature and characteristic found in the Adyar estuary has promising potentialities and capabilities to become a bird sanctuary or water resources. The court cannot permit the conversion of wet lands which have a considerable potential to preserve and maintain the eco sys-

tems.

[Paras. 15 & 16]

In the present case, it need not be emphasised that the construction of a memorial along with Auditorium, car parks, dining halls and kitchen will certainly pollute the area apart from destroying the wet lands. *[Para. 15]*

In view of this the following directions were given to the respondents:

(i) the sixth respondent (the Adi Dravida Housing Development Corporation), is permitted to construct a memorial or monument in an extent of 1.5 acres (a little more or little less) at the eastern end of the five acre plot allotted to them under G.O.Ms.No.293, Rev. dated 8.4.1993.

(ii) respondents are directed to remove the sands spread on the western side of the said five acre plot and restore the said area to its original position.

(iii) respondents are restrained by an order of injunction from constructing an Auditorium or any other type of building other than what is permitted under clause (i) above, in any place of Survey No.4309 and its sub-divisions.

(iv) the entire low-lying wet land in Survey No.4309 and its sub-divisions which are vested with the fourth respondent under G.O.Ms.No.2186, Rev. dated 16.10.1990 shall be maintained and preserved as low lying wet lands.

(v) In future, if some unexpected need arises, it is open to the parties to seek for appropriate directions from this Court. *[Para. 28]*

Cases referred to:

Janata Dal v. H.S. Chowdhary, A.I.R. 1993 S.C. 892. [Para. 13]

People United for Better Living in Calcutta v. State of West Bengal, A.I.R. 1993 Cal. 215. [Para. 17]

Bangalore Medical Trust v. B.S. Muddappa, A.I.R. 1991 S.C. 1902. [Para. 19]

Tarun Bharat Sangh, Alwar v. Union of India, A.I.R. 1992 S.C. 514. [Paras. 20, 21]

Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420. [Para. 22]

Rural Litigation and Entitlement Kendra v. State of U.P., (1988)4 J.T. 710: A.I.R. 1989 S.C. 594. [Para. 23]

S.Pandey v. State of West Bengal, (1987)2 S.C.J. 70: A.I.R.1987 S.C. 1109. [Para.24]

Sriram Panchu, for Petitioner.

K.Subramaniam, Advocate-General assisted by *P.Sathasivam*, *Miss Naga Saila*, *A.Chella Kumar* and *V.R.Rajasekaran*, for Respondents.

The Court made the following

ORDER: Not a day passes with a conference on pollution control and environmental management at some part of the world or atleast an article in the Newspaper and Weekly Magazines about the importance of the subject or the lack of awareness on the part of the citizens, the Government and the Governmental Authorities. The subject has assumed the Worldwide importance because it threatens the very life and existence of the human race. That is precisely the reason why several enactments have been passed by the Central and State Governments on the control of water pollution, air pollution, noise pollution as well as the Environment (Protection) Act, 1986, etc.

2. The petitioner in this case is a trust set up for the purpose of representing consumers and fighting their cause in protecting public health, public safety and the performance of public duties in this regard. The deponent of the affidavit is a trustee of the said trust and is a well-known member of the Bar. It is stated that the petitioner trust had earlier filed several writ petitions in preventing the authorities from converting the peoples' park occupying the erstwhile Madras Zoo into a Five Star Hotel. Recently, they have filed W.P.No.19915 of 1993 to restrain the State of Tamil Nadu from changing the water catchment and ground water areas in the State of Tamil Nadu for building activity and housing projects. In particular, they are seeking to protect five major lakes in Ambattur, Kakkalur, Nolumbur and Chitlapakkam from being converted into house sites.

3. The petitioner seems to have come across a report in the "Indian Express" dated 20.12.1993

about the conversion of a low lying area by filling the same with sand for the construction of a memorial to Dr.Ambedkar. The writ petition is for the issue of a writ of *mandamus* to direct the respondents to restore the land in Survey No.4309, Block No.96, Mylapore village, to its original character and to forbear the respondents from undertaking any development or construction activity in the area.

4. In the affidavit filed in support of the writ petition, the construction activity is opposed on the following grounds:

(a) Under Sec.2 of the Forest Conversion Act, 1980, the State Government or other authority cannot use any forest land or any portion thereof, for non-forest purpose. According to the petitioner, the salient feature of this provision is to prevent deforestation which cause ecological imbalances leading to environmental deterioration. The area has a board proclaiming "Forest Department - Poaching prohibited".

(b) The low lying area comprises of about 100 acres and is a source for ground water recharge especially for the residents of the area in and around Greenways Road, Santhome, Adyar, M.R.C.Nagar, Mandavelli, etc. In this connection reference is made to Madras Metropolitan Area Ground Water Regulation Act, 1986.

(c) Right to a safe and healthy environment and the right to have adequate water supply are part of the right to life guaranteed under Art.21 of the Constitution of India. Any attempt to negate the said right should be controlled by appropriate directions under Art.226 of the Constitution of India.

(d) The proposed construction of a memorial and other allied building would contravene the various provisions of the Development Control Rules with particular reference to the Zoning of the area.

5. Before seeking the relief the petitioner has in categorical terms welcomes the construction of a memorial to Dr.Ambedkar who is a well-known

architect of the Constitution of India. The only grievance is that memorial should be located in an appropriate place and not by converting low lying areas which are absolutely essential for the maintenance of environment and ecology.

6. A counter-affidavit sworn to on 31.12.1993 has been filed on behalf of the respondents 2 and 3. The deponent of the affidavit is the Secretary to Government, Adi-Dravidar and Tribal Welfare Department, which is dealing with the question of putting up a memorial to Dr. Ambedkar. It is stated that the sixth respondent is implementing the scheme formulated by the Government in the Adi-Dravidar and Tribal Welfare Department. To begin with it is stated that the Government of Tamil Nadu are implementing several historical and note-worthy schemes in order to promote the interest of Adi-Dravidars and Scheduled Tribes in the State. It is then stated that Baba Saheb Dr. B. R. Ambedkar is a multi-sided genius and an eminent son of India. He had championed the cause of the downtrodden people and helped them to reach the main stream of Indian life. He was also an architect of the Constitution of India. Says the counter-affidavit, that the Government of Tamil Nadu are trying "*to translate all his ideals into reality*" (*Italics supplied*). It is stated that with a view to perpetuate a memory of Dr. Ambedkar, the Government of Tamil Nadu have decided to build a fitting monument in Tamil Nadu. Here and now I may state that the respondents have not placed before the court the discussion in the Ministry and the manner in which the Government decided to erect a memorial. I am referring to this aspect because there is considerable confusion in the various affidavits filed by the respondents as to the scope and purpose of such a monument or memorial. Be that as it may, the counter-affidavit proceeds to say that the Government decided to locate the Centenary Memorial Auditorium in an extent of five acres of land at the Adyar Creek area. Out of an extent of 45.45 acres vested with the Madras Metropolitan Development Authority (hereinafter called "M.M.D.A."), an extent of five acres have been allotted to the sixth respondent-Corporation, which is said to be a quasi-State Government Agency, enabling them to enter upon the land to put up the memorial. The counter-affidavit also says that final orders and the mode of disposal of the land to and in favour of the sixth respondent have not yet been

finalised. But the Corporation has been given possession of the lands to the extent of five acres on 30.4.1993. The foundation stone for the memorial was laid by the Hon'ble the Chief Minister on 14.4.1993. Out of the extent of 5 acres it is stated that the memorial will only occupy 3,000 M² (that is 0.75 acres) and the balance area will be used as parks, lawns and approach roads. They have started filling up the land with sea-sand Coovam house. The site in question falls within Survey No. 4309/1-2 and 8 of Mylapore village. The area is admitted to be the backwater stretch of Adyar River. The sub-surface formation being clay, it is stated that the same retards the percolation of stagnant water. Therefore, it is stated that there is no question of re-charge of aquifer in this area.

7. Apart from this development to the extent of five acres, the counter-affidavit proceeds to say that the entire Adyar Creek area is to be developed as an open area concept which envisages a large wooded area and a cultural and recreational complex. According to the counter-affidavit the development will keep the area environmentally friendly. According to them, the development will not impede backwater movement. The counter-affidavit then proceeds to say that the allegation that the area is classified as forest land is not correct. There was only a notification under Sec. 37(1) of the Wild Life (Protection) Act, 1972, meant for the protection of the migratory birds visiting the area and to protect the mangrove species in the area. The notification is only to prevent hunting or shooting wild animals in the area. In other words, the said notification does not prevent the building activities, nor does it amount to declaration of the area as a sanctuary. In respect of the second ground urged by the petitioner, it is stated that the quality of water, both surface and sub-surface, is highly brackish. There is formation of clay at a shallow depth and therefore, there is no question of percolation of stagnant water. It is therefore, contended that stagnant water does not constitute as re-charge aquifer in the area. It is also contended that the proposed development will be a boon for the public and prevent mosquito breeding and avoid other kinds of pollution. It is also stated that the proposed development is not contrary to any of the Development Control Rules or zoning of the area. It is also stated that the built up area is meager when compared to vast extents of vacant space. There is also a proposal to have a

library containing the books of Dr. Ambedkar and other Government publications relating to the Scheduled Castes and Scheduled Tribes people. It is further stated that the sixth respondent has already spent more than Rs.22 lakhs by way of filling the area with sea-sand.

8. The very same deponent of the affidavit sworn to on 31.12.1993 has filed another counter-affidavit sworn to on 14.2.1994. The facts disclosed in this counter-affidavit clearly show that either the true facts were not disclosed in the counter-affidavit dated 31.12.1993 or that there has been some change in the attitude of the respondents. This is precisely the reason why I stated earlier that the respondents are not very clear in their mind as to the manner in which they propose to construct the memorial to Dr. Ambedkar. In this counter-affidavit it is stated that the Government had decided to construct the memorial auditorium as a conventional centre type and not as a memorial sanctity. It is rather difficult to understand what the respondents mean by the words "memorial of sanctity". However, they say that the auditorium is to be used for conducting Seminars, Conferences, Annual General Body Meetings of Companies, Cultural programmes, Marriages, Dramas and Government functions which will propagate the ideals and teachings of Dr. Ambedkar. By merely adding at the end of each sentence that the Auditorium is for propagating the ideals and teachings of Dr. Ambedkar, the respondents cannot improve their case. It is rather difficult to understand how the Annual General-Body Meeting of the Companies, Marriages and Dramas can propagate the message of Dr. Ambedkar. What is more it is stated that the Managing Director of the sixth respondent-Corporation will alone be the authority for the allotment of the Auditorium. It is further stated that near the entrance there will be provision of library and a mini-conference hall. It is again difficult to understand as to how there can be a library at the entrance of the Auditorium. There is clearly a confusion of thoughts in the minds of the respondents regarding the construction of the memorial or monument. The counter-affidavit proceeds to say that certain Rules and Regulations have been framed for the allotment of Auditorium and sets out such Rules which are about nine in number. The respondents have not placed before me any original records to prove that rules have been framed. When the construc-

tion of the Auditorium has not even commenced, I do not know how the respondents will frame the rules for the allotment of the Auditorium. There is a rule which says that no performance will be held after 10.00 p.m. except with the specific permission of the Managing Director. Experience shows that such Rules will be observed only in the breach. The fact that Auditorium will be leased out for marriages, conference, etc. shows that there will be a dining hall and a big sized kitchen. By way of making a lip service to the memory of Dr. Ambedkar, it is stated that preference will be given to those people who belong to the Scheduled Caste and Scheduled Tribe community in respect of the allotment of the Auditorium. The respondents have not also shown before me any sanctioned plan for the construction of the Auditorium. The rough plan that was shown to the Court has now been explained by the learned Advocate General, by stating that the best part of the five acre plot will be occupied by the Auditorium, and the dining hall and the car park. The plan shown to me signed by the Chief Architect says that it is the proposed Baba Saheb Dr. Ambedkar Centenary Memorial Auditorium. There is a 72 metres wide road on the western extremity as well as in the eastern extremity. The road also runs through the centre of the plot reaching the Greenways Road. There is large car parking area plus a small park on the south-eastern side of the plot. It is also stated that there is going to be a statue of Dr. Ambedkar abutting the Greenways Road.

9. I will now refer to the counter-affidavit filed by the fourth respondent-M.M.D.A. This counter-affidavit gives certain basic facts which may be useful for the disposal of the writ petition. It is stated that the crescent shaped land of the extent of 56 acres in Block No.96, Mylapore village of which the said five acres forms part, is a low-lying area in most of its parts. During flood times this site is said to hold the backwaters of Adyar river. In G.O.Ms.No.2186, Revenue, dated 16.10.1990, the fourth respondent was entrusted with the task of reclamation and development of 45.45 acres allotting the balance of 10 acres to the Central Institute of Brackish Water Acqua Culture (CIBA). About 0.275 acres was allotted to the War Widows Association and Government of Assam. The fourth respondent took possession of the said land of 45.45 acres on 5.2.1991. Later about 0.07 acres of land was allotted to the Kuchipudi Arts Academy in

G.O.Ms.No.622, dated 29.5.1993. Similarly, about 5 acres were allotted to the sixth respondent in G.O.Ms.No.293, Revenue, dated 8.4.1993. The fact that the Government has not been making any final decisions in regard to the allotment of lands in the low-lying area and that there is no finality attached to these allotments, is seen from the counter-affidavit. Out of 10 acres allotted to CIBA, about 7 acres were resumed from CIBA by G.O.Ms.No.751, Revenue, dated 16.8.1993. About three acres of land had been allotted to Pallavan Transport Corporation and about 0.30 acres to Indian Oil Corporation. It is stated that the respondents are considering changing the location of three acres allotted to CIBA. It is admitted that there is a sewerage pumping station of Metro Water Board in the site occupying an extent of 0.69 acres. These lands are situate in Survey Nos.4309/1 Part 2, part 8, 24 and 25 of Block No.96, Mylapore Revenue Village. The land is said to fall partly under the category of "Open space and Recreational" and partly under "Institutional" and partly in "Commercial Use Zones". This is seen from the Detailed Development Plan for Avvai Nagar area of Mylapore. The fourth respondent, however, hastens to add that under the Development Control Rules, Memorials, Botanical Gardens, Water front developments, Office complex and Transportation terminals are permissible under the above zones. It is further stated that the sale proceeds from the proposed office complex the fourth respondent has decided to make the other improvements. The fourth respondent however, admits that the development scheme is called "Development of Urban Forest in Adyar Creek Area". The fourth respondent then proceeds to say about the future developments like an Urban Forest in an extent of 21.39 acres and two flood moderation ponds on an extent of 12 acres with necessary pumping arrangements with a holding capacity of 2.5 million cubic feet of water. There will be walk-ways and resting places and boating facilities in the ponds. The cost of such development proposals is expected to be around Rs.8.5 crores. The fourth respondent has not commented upon the proposed Auditorium to be constructed by the sixth respondent. So far as the other proposals of the fourth respondent, it is stated that the same will be ecofriendly and the area will be converted into a clean forest of selected species with water-bodies, which will be-

come an improved source for ground water re-charge for people residing around. It is further stated that the afforestation proposed in the scheme will invite more migratory birds to nest in the area. What one can decipher from the counter-affidavit of the fourth respondent is that the development referred to in the counter-affidavit will no doubt, help to improve the environment and preserve the migratory birds as well as the ground water re-charge facility. I do not read the fourth respondent's counter-affidavit as approving of the proposal to construct an Auditorium by the sixth respondent. The fourth respondent nowhere says that such an Auditorium has been permitted by the M.M.D.A. In my opinion, the counter-affidavit of the fourth respondent is clearly in favour of the contention of the petitioner and does not in any way support the theory of the sixth respondent as adumbrated in his counter-affidavit.

10. The Miscellaneous Petitions, W.M.P.Nos.621 and 622 were filed by the 7th and 8th respondents for impleading themselves as party to the writ petition. By an order dated 20.1.1994, I allowed the petitions and impleaded them as parties because their affidavits also disclose that their interest in maintaining the ecology and environment of the area. A large extent of 4.3 square kilometres has been declared under Sec.37 of the Wild Life (Protection) Act, 1972 as being an area closed to hunting for a period of five years from 13.5.1992. This area is right from the Adyar river on the south upto the road leading from Foreshore Estate to the Kabali theatre. Similarly, on the East, the boundary is given as Bay of Bengal and on the West the road from Kabali theatre proceedings to the Bridge on the Adyar River. As correctly explained by the sixth respondent in his first counter-affidavit this notification only means that hunting of wild animals and birds is prevented in the area. It does not certainly mean that the area has been declared as Forest or a Sanctuary.

11. Before taking up the various contentions of the learned counsel for the petitioner I may refer to the classification of the lands in the Permanent Land Register produced by the respondents. It shows that Survey No.4309/2 is said to belong to the Fisheries Department and meant for the development of Adyar Fish Farm. The plan attached to the said Permanent Plan Register shows that the proposed five acre plot for the memorial is to be located on the eastern side of R.S.No.4309/2

and bounded on the East by the Temple View Apartments. As stated in the counter-affidavit of the fourth respondent R.S.No.4309 has been subdivided into smaller extent as and when the lands were assigned to the various parties for various purposes. But the major part of the low-lying area is comprised in R.S.Nos.4309/1 Part and 4309/8 and 4309/2 Part. Several maps and sketches have been placed before me and I will refer only to those maps which are relevant for the case. In the Madras Guide Maps published by Survey of India with copy rights reserved in favour of the Government of India, prepared in the year 1970 shows that the entire area notified under the Wild Life (Protection) Act as the area closed to hunting, is nothing but the Adyar River estuary. In fact the backwaters from the mouth of Adyar River is supposed to enter the Creek with which we are concerned. In course of time and without any regard for the preservation of ecology and the environment, most of the low-lying areas have already been converted into the bungalows for the Honourable Ministers and the Honourable Judges. It is significant to note that even in such bungalows several low-lying areas and large size ponds are still in existence. It is good that such ponds and low-lying areas are maintained and developed. These are the bungalows which are available on the south of Greenways Road. The conversion of the low-lying area on the north of the Greenways Road has also commenced long back. Apparently, the agencies like the petitioner and the 7th and 8th respondents were not active during those days. But they have woken up and come to court atleast at this stage when there is yet a large extent of about 50 acres available as a low-lying area. The plan filed by the fourth respondent in respect of Avvai Nagar area as per the development plan referred to in their counter-affidavit shows R.S.No.4309 and the use to which the same can be put to as per the Development Control Rules. It is only necessary to refer to the fact that out of the 56 acres referred to in the counter-affidavit of the fourth respondent most of it is shown as "open space and recreational zone". There are only two small patches where already the Government had permitted a construction of a Fish Farm and a building for the Kuchipudi Arts Academy. In any event as seen from the counter-affidavit of the fourth respondent atleast 45.45 acres are today available as a low-lying area, vested with the fourth

respondent.

12. There is one other intriguing point which has not been explained by the parties. According to the fourth respondent an extent of 56 acres in the area called as Adyar Creek comprises of low-lying wet lands. This area is said to hold the backwater of Adyar river during flood times. By G.O.Ms.No.2186, Revenue, dated 16.10.1990. The entire area except for the sites allotted to others, was handed over to the fourth respondent and they took possession of 45.45 acres as early as on 5.2.1991. No doubt, the Government has been making hap-hazard allotment to various bodies out of the said area. However, none of the counter-affidavits disclose as to the manner in which the extent of 5 acres is being allotted to the sixth respondent without resuming the same from the fourth respondent. The counter-affidavit of the second third respondents gives an indication that the respondents have not finalised as to the manner of transferring the five acres of land from the fourth respondent to the sixth respondent. This is clear from the following sentence:

"The Government have also permitted the Tamil Nadu Adi-Dravidar Housing and Development Corporation, a Quasi State Government Agency to enter upon the land to put up the memorial *pending issue of final orders and mode of disposal of the land*". [Italics supplied]

I am unable to see as to why the Government should act in such a haste and hurry, to fill up the wet lands with sea-sand even before proper decisions are taken, after consideration of the various issues.

13. The learned Advocate General raises a preliminary objection as to the maintainability of the writ petition on the ground that the petitioner cannot raise the issue as a public interest litigation. The locus of the petitioner is not challenged. But it is said that prayer cannot be sustained because no legal wrong or legal injury is sought to be caused to a determinate class of persons and such determinate class of persons, is by reason of poverty disabled to approach the court for relief. In particular the following passage in *Janata Dal v. H.S. Chowdhary*, A.I.R. 1993 S.C. 892 is relied on:

"We may also point out that as a matter of prudence and not as a rule of law, the court may confine this strategic exercise of jurisdiction to

cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal-aid organisation which can take care of such cases".

I do not agree with this contention. Firstly, it is not a public interest litigation in the strict sense of the term. This is a case initiated by a Consumer Action Group strictly for the purpose of protection and improvement of human environment. Their action is supported by two well known organisations, namely, 7th and 8th respondents who are equally interested in the welfare of the people. This is a litigation for and on behalf of the public and not a public interest litigation. Further, the very same Hon'ble Judges of the Supreme Court quote with approval the dictum laid down in *S.P. Gupta's case*. It is as follows:

"....any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objectives".

I therefore, reject the preliminary objection raised by respondents 1 to 6.

14. Though the arguments of the learned counsel for the petitioner on the basis of preserving wet lands and maintaining the eco systems are very attractive and tempting. I repeatedly asked the counsel to show as to how a court of law can interfere in such matters. A discussion on the points raised by the counsel will to some extent answer the question posed by me. At the outset I may record the concession made by the petitioner that he is not pressing the point based on the notification issued by the Ministry of Environment and Forest relating to coastal stretches and imposing restrictions on such coastal zones. Though there is a reference to estuary and creeks and backwater which are influenced by tidal action, learned counsel for the petitioner says that the

petitioner has not been able to collect necessary materials to show that the subject creek falls within a coastal regulation zone referred to in the notification. One other aspect of the case can also be disposed of. This aspect relates to the notification issued under the Wild Life (Protection) Act. I have already indicated that the notification issued under Sec.37 of the Wild Life (Protection) Act, is only in respect of the prevention of hunting wild animals and birds in the area. There is no notification declaring the area as a Forest area or a sanctuary. Therefore, it cannot be contended that the respondents have violated any of the notifications under the Wild Life Protection Act or the Forest Conservation Act, 1980.

15. While paying homage and deliberating on the Centenary Celebration of Dr. Ambedkar, it is but proper that we begin with a reference to the Constitution of India. Though a later introduction by the Constitution 42nd Amendment, 1976. Art.48-A is in furtherance of the United Nations Conference on human environment held at Stockholm in June, 1972 in which India had participated. That conference had taken a number of steps for the protection and improvement of human environment. Art.48-A of Constitution of India is as follows:

"48-A. The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Protection of environment. Read with Arts.51-A(g), 14 and 21, the Supreme Court has drawn the following conclusions:

(a) It is a constitutional duty not only of the State but also of every citizen to protect and improve the environment and natural resources of the country.

(b) Though neither Art.48-A nor 51-A is judicially enforceable by itself, it becomes enforceable through the expanding interpretation of Art.21, so that in case of a failure of the foregoing duties, the Supreme Court or a High Court would entertain a petition under Art.32 or 226, as a Public Interest Litigation brought by any individual or institution in the locality or any social action group, even by a letter".

The fundamental duties introduced by the same Amendment Act is also worth looking into. Art.51-A is as follows:

"51-A. It shall be the duty of every citizen of India--

(a)

(b)

(c)

(d)

(e)

(f)

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures."

The emphasis made by the learned counsel for the petitioner is that the respondents have no right or jurisdiction to convert wet lands and low-lying areas into building auditorium or car parks. At the risk of repetition I make it clear that the petitioner has no objection for the construction of a memorial to Dr. Ambedkar in a fitting manner. The manner in which the Auditorium has to be constructed has been explained by in the second counter-affidavit of the sixth respondent. It does not make a secret of the idea of the respondents to erase the wet lands atleast an extent of five acres for the present. It need not be emphasised that the construction of an Auditorium with Car parks, dining halls and kitchen will certainly pollute the area apart from destroying the wet lands. The question is whether the court can permit such a conversion of wet lands.

16. Learned counsel for the petitioner has also placed before me certain Text Books on India's Wetlands Mangroves and Coral Reefs issued by the World Wide Fund For Nature India for the benefit of the Ministry of Environment and Forests (Government of India). A perusal of the said book makes one feel as to why there should be no systematic destruction of such wet lands when they have considerable potential to preserve and maintain the eco systems. To quote one passage:

"Wetlands are transitional zones that occupy an intermediate position between dry land and open water. Ecosystems dominated by the influence of water, they possess characteristics of both terrestrial and aquatic ecosystems and properties that are uniquely their own".

There is enough material to suggest that the wet lands of the nature and characteristic found in the Adyar estuary has promising potentialities and capabilities to become a bird sanctuary or water resource. There is an interesting passage on how to identify a wet land. There is another book on preserving our fresh water. Wet lands issued by

the U.S. Department of Interior, Fish and Wild Life Service. Here again there is an interesting passage on how certain water birds depend only on small wet lands. It is stated that they nest on small, often temporary wet lands ranging in size from fractional acre puddles upto 100 acres or more. There is yet another book by Edward Maltby on "Water-logged Wealth". The National Institute of ecology and the International Scientific Publications have brought out a book on "Wet lands - Ecology and Management." (This is a book published with the support from UNESCO, Paris and the Department of Science and Technology, New Delhi. There are interesting articles about the development of Mangroves in estuary. I am not certainly going to write a thesis on Wet Lands. But I am only referring to these Text Books to show that the Authorities should have bestowed some thought to these interesting aspects of life before embarking upon the construction of an Auditorium by converting wet lands.

17. Turning now to certain decided cases, the first reference is to *People United for Better Living in Calcutta v. State of West Bengal*, A.I.R. 1993 Cal. 215. In that case the very question was raised as to whether wet lands in the eastern fringe of the City of Calcutta should be maintained as wet lands or whether any development could be permitted. The learned Judge who decided the case had traced the history of Law of Environment and the use of wet lands as areas which not only promote environment but also provide a haven for vast number of living creatures. Disappearance of such wet lands would threaten the very existence of such living creatures including migratory birds. There was also reference to the land use of the city under the Town and Country Planning Act. The court was concerned with the conversion of a large tract of wet lands for the construction of a World Trade Centre. It was urged that the construction of such a Centre will enhance the trading activities of the country as a whole. It was further urged that it will be in the interest of the public because several benefits were accepted to flow from the construction of the Trade Centre. While accepting that the object of the project was laudable, the Calcutta High Court directed the preservation of the wet lands and restrained the conversion of the same for any other purpose. The court issued an order of injunction against the State from reclaiming any further wet land. The court also restrained the

respondent from granting any permission to any person whatsoever for the purpose of changing the use of the land from agricultural to any other purpose. The respondents were directed to maintain the character of all the wet lands in the then existing form. Several paragraphs in the said judgment of the Calcutta High Court were relied upon by the learned counsel for the petitioner. In particular, it is good to see the manner in which the court tried to weigh the balance of interest namely, the benefits arising out of retaining the wet lands and the benefits arising out of a development like the construction of a World Trade Centre. In my opinion the said judgment completely supports the case of the petitioner. Learned Advocate General sought to distinguish the said judgment by referring to paragraph 39 of the judgment. In other words, according to the learned Advocate General, in that case the respondents were unable to prove economic viability of the new project. But it is to be remembered that the ratio of the judgment was not based on the above lack of particulars, only. The ratio of the above judgment was based on the other considerations relating to the preservation of environment which is relied on by the learned counsel for the petitioner.

18. The next important submission on behalf of the petitioner is based on the Town and Country Planning Act read with the Development Rules. To begin with the counter of the fourth respondent as well as the plan relating to Avvai Nagar area submitted by them clearly shows that the subject area comprising of five acres where the memorial and auditorium is sought to be put up is declared as "open space and recreational". No doubt the other areas vested with the M.M.D.A. comprising of 45.45 acres have been shown as institutional, commercial etc. But we are not concerned with those areas because the proposed construction is of an extent of five acres allotted to the sixth respondent which clearly lies within the description "open space and recreational". Rule 4 of the Development Control Rules relates to the use of the site or premises as specifically designated in the development plan. Sub-clause (d) says that no piece of land shall be used as a site for the construction of a building for any development if the authority considers that,

(iv) if the site is likely to be inundated and satisfactory arrangement for proper drainage is not possible, or

(v) if the site is a filled up tank or low lying or of made up soil by depositing rubbish or offensive matters and the proposal is likely to be affected by dampness owing to the sub-soil water, or

(vi) if the site does not abutt any existing public or private street forming part of a layout sanctioned under the provisions of the relevant local body act."

Rule 14 describes the purpose for which a site which is zoned as "Open Space and Recreational" can be put to. Argues Mr. Sriram Panchu that the various uses mentioned therein does not permit the construction of a "Kalyana Mandapam" or an Auditorium. There is a restriction for the use of electric motors exceeding 5 horse powers. It is argued that in an Auditorium of the magnitude proposed by the sixth respondent there will necessarily be generators. Similarly, if a dining hall and kitchen are to be provided there will be modern type of cooking implements which will far exceed 5 horse power motor. By contrast learned counsel refers to Rule 13 which specially permits "Kalyana Mandapam". Similarly, Cinema theatres, Assembly Halls and Reading rooms are permitted under mixed residential zones under Rule 8 of the Development Control Rules. Under Rule 7, primary residential zone, Community Halls, clubs and welfare institutions occupying a floor area not exceeding 300 square metres is permitted with the special sanction of the concerned authority. The argument is that the proposed construction is not permissible in the zone declared as "Open Space and Recreational". It is also contended that no special sanction has been obtained from any authority.

19. In support of these arguments learned counsel for the petitioner cites the judgment in *Bangalore Medical Trust v. B.S. Muddappa, A.I.R. 1991 S.C. 1902*. That case related to a tank in the City of Bangalore, which had been reserved as an "Open Space" in the improvement scheme. By an order of the Government, the said area was allotted to a Medical Trust for the purpose of constructing a hospital. The action of the Government was challenged by the residents of the locality on the ground it is contrary to the provisions of the Act and the legislative intent to protect and preserve the environment which was absolutely essential as a place of recreation and play ground for the general public. In that case, no doubt, the Apex

Court approached the issue from the point of view of the reservation of the area by the Bangalore Development Authority as an Open Space and the concomitant public interest arising therefrom. The Apex Court has posed several questions in paragraph 45 of the judgment all of which can be equally asked against respondents 1 to 6 in this case. I am in particular attracted by these sentences in the said judgment:

"The role of the administration was highly disappointing. In their notings even a show of awareness of law and fact was missing. This culture of public functionary, adorning highest office in the State of being law to himself and the administration acting on dictate, for whatever reason disturbs the balance of rule of law".

Learned Advocate General seeks to distinguish these judgments by saying that the Apex Court was concerned with breach of statutory rules whereas we are not concerned with such violation of such statutory rules. I do not agree with this contention. The reference to the various rules under the Development Control Rules suggests that the proposed development cannot be made in the zone categorised as "Open Space and Recreational". In this case, I have to record that not even the sanctioned plan has been placed before the court, much less a special sanction for using the area for any purpose other than the purpose mentioned in the development plan and the Development Control Rules.

20. There is one other judgment of the Supreme Court which supports the case of the petitioner. That is *Tarun Bharat Sangh, Alwar v. Union of India*, A.I.R. 1992 S.C. 514. In that case also a Social Action Group concerned with the protection of environment and preservation of wild life filed an public interest action for the enforcement of the statutory notification promulgated under certain laws relating to Wild Life, Environmental Protection and Forest Conservation. Despite such notifications, the authorities were permitting mining operations by various persons, by grant of as many as 400 mining privileges to private persons. In that case there was a notification under Sec.35 of the Wild Life (Protection) Act, 1972 declaring the area as a sanctuary. There were also certain other notifications under Rajasthan Forest Act, 1953. The Apex Court observed while professing to protect environment by means of such notifica-

tions, they cannot at the same time permit degradation of the environment by authorising mining operations. Learned Advocate General sought to distinguish this case by saying that no such violation of any such notification is alleged in the present writ petition. In my opinion, the approach of the learned Advocate General cannot be sustained. If one goes through the entire judgment, one is able to see that the court was enforcing the twin task of compliance with notifications and also the prevention of the devastation of the environment and Wild Life in the protected area. The Apex Court in that case has gone to the extent of saying that the damage already done by mining operations should be rectified as far as possible by restorative and reafforestation scheme.

21. The last aspect of the case is based on the proposal made by the World Wild Life Fund for declaring the Adyar estuary as the Bird Sanctuary. In this report the manner in which the Adyar Creek comprising of an extent of 56 acres referred to in the counter-affidavit of the fourth respondent is explained. It is stated that the Adyar River opens into the sea at a place close to Theosophical Society, on the southern shore there are still remnants of mangrove growth. In the northern side of the river leads into the backwater which is a shallow of water about 1 square mile in the area lying between Santhome and Adyar. The list of Marine Wealth and the list of birds mammals etc. found in the area are attached to the report. Reference is made to as many as 176 types of birds which visit the area during various times of the year. Certainly all the 176 types of birds may not still be visiting the area. But one can see that quite a number of birds do visit the area even now. Though I do not propose to rest my case on the basis of such reports and text books, some weight and credence has to be given to the letter written by the Joint Secretary to the Government, Forests and Fisheries Department to the Chief Conservator of Forests under letter No.54872/FRV/84-1 which relies on the said report of the World Wild Life Fund and gives the following instructions:

"This area of about 1 1/2 sq. miles in extent is the mouth of the river Adyar where it meets the sea and comprises of a shallow backwater and mud flats. About 175 species of birds of which 73 are migrants (some from such distant countries as Siberia) and 52 are breeding species. The Port Trust Management Training

Institute which was proposed to be situated on the beach at the Estuary has been shifted further south along with the coast to Uthandi, thus saving the estuary from Great disturbances and possible destruction, but there is always the chance of something else being located here. The way to prevent this is to have the area declared a sanctuary for the birds so that further possible dangerous developmental activity may be prevented."

In this case, it is admitted in the counter-affidavit dated 31.12.1993 that the notification under Sec.37(1) of the Wild Life (Protection) Act, 1972 has been issued in respect of the subject area and that notification is meant for affording protection to migratory birds visiting this area and to protect the remaining mangroves species. Therefore, the respondents cannot escape the dictum of the Supreme Court as laid down in *Tarun Bharat Sangh, Alwar v. Union of India*, A.I.R. 1992 S.C. 514 to which I have made a reference.

22. I will now come to the argument advanced on behalf respondents 7 and 8. Reference is made to *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420. That was a writ petition seeking to restrain certain authorities from discharging slurry/sludge into the Bokaro river. That was also a public interest litigation. The Apex Court has looked at the case from the view point of Art.21 of the Constitution of India. Observes the Apex Court: "Right to live is a fundamental right under Art.21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art.32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life".

Ms. Naga Shila learned counsel for the 7th respondent refers to Schedule I of the notification issued under the Wild Life Protection Act and says that the common birds mentioned therein are referred to in the report of the World Wild Life Fund as Serial Nos. 28, 39 and 79. She further argues that the prevention of hunting or shooting in the area means and that the notification prevents the destruction of such migratory birds from the area, altogether. The proposed development, as already stated will certainly cause such kinds of noise and air pollution that will certainly prevent migratory

birds from visiting the area.

23. The last of the decisions which is relied on both the sides is *Rural Litigation and Entitlement Kendra v. State of U.P.*, (1988) 4 J.T. 710: A.I.R. 1989 S.C. 594. There is an interesting passage quoted by the Apex Court from a reply given by the wise-Indian Chief of Seattle" to an offer made by the "Great White Chief in Washington in respect of sale of a land. The Apex Court had thought it fit to quote the entire reply, but it is sufficient to refer to one passage in the reply which appeals to me.

"Every part of the earth is sacred to my people. Every shining pine noodle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man."

No doubt in that case after weighing the pros and cons, the Apex Court found that the Government was alive to the ecological considerations and all other related matters and had in a *bona fide* manner allotted an extent of four acres to a Five Star Hotel. The important point to be noticed in this decision is that the Government of West Bengal did not fail to take into account the relevant considerations. I have already referred to the fact that in the case before me there has been no such deliberations or considerations by respondents 1 to 6. In fact, I have already referred to the fact that even the question of transfer of the five acre plot to the sixth respondent has not yet been finalised. I have also referred to the confusion remaining in the minds of respondents 1 to 6 as to the manner in which the proposed development area either as memorial or as an auditorium. I have referred to this aspect of the case while dealing with the two counter-affidavits one sworn to on 31.12.1993 and the other on 14.2.1994.

24. In answer to the above arguments learned Advocate General apart from raising the preliminary objections, which I have already dealt with, says that the scheme formulated by the Government and the sixth respondent are historically noteworthy. He refers to the life and ideals of Dr. Ambedkar. He also says that the memorial is to be constructed only in an extent of 0.75 acres and the balance will be utilised as Parks, lawns and approach roads. But unfortunately, in the second counter-affidavit filed on 14.2.1994 a totally different story is given. The main object of the

proposed development is to construct a Centenary Memorial Auditorium and not as a Memorial of sanctity. Learned Advocate General says that the affidavit of the petitioner makes no reference to the availability of wet lands and the argument addressed by Mr. Sriram Panchu, learned counsel for the petitioner, cannot be entertained. He also says that the affidavit of the petitioner does not proceed on the basis that there has been any violation of the Development Control Rules or the Environment Protection Act. He relies on the judgment of the Apex Court in *S. Pandey v. State of West Bengal*, (1987) 2 S.C.J. 70: A.I.R. 1987 S.C. 1109 and says that there has been a conscious decision and the respondents were not actuated by any *mala fide* considerations. According to him, the object of the proposed development is to propagate the ideals of Dr. Ambedkar and perpetuate his memory by building a fitting monument. As against this public purpose the protection of environment as adumbrated by the petitioner and respondents 7 and 8 could not have precedents or preference. It is here that I must make it clear that the petitioner has no objection for the erecting of a memorial or a monument in the memory of Dr. B.R. Ambedkar in an area of 0.75 acres. But such a development should be in a place which is least in convention to the migratory birds or the preservation of the environment of the area.

25. Having regard to the rival submissions, having perused the text books and the authorities cited at the Bar I have given my anxious consideration to the issues involved in this case. What is the best way of perpetuating the memory of Baba Saheb Dr. Ambedkar and what is the best way of propagating his ideals? No doubt a fitting monument or memorial is one way of remembering the great son of India. But in my opinion if really respondents 1 to 6 are interested in serving the cause of the down-trodden people and the people belonging to the Adi Dravidar Scheduled Caste and Scheduled Tribes, the best way is to create a fund or endowment and run a free hostel for the students belonging to the Scheduled Castes and Scheduled Tribes. They can show a series of concessions by granting scholarship to as many students as possible. If the sixth respondent has so much money to invest in a big auditorium of the size proposed in the counter-affidavit, I can easily visualise the flow of interest if such amount of money is invested in a proper

manner. The fact that the sixth respondent is mobilising the huge amount for the construction of the Auditorium dining hall, kitchen, car parks, etc., can easily be seen from the fact that for the purpose of spreading sand on the five acre plot. They claimed to have spent already a sum of Rs. 22 lakhs. The filling up of the five acre plot has been done only upto an extent of 75% of the plot or roughly 4 acres. When I asked the learned Advocate General as to how a sum of Rs. 22 lakhs has been spent for this purpose, because the sand has been brought only from the mouth of the Coovam river where it flows into the sea. Learned Advocate General on instructions says that the statement in the counter-affidavit to this effect may not be correct and that only a sum of Rs. 6 lakhs has been spent and that probably the counter-affidavit refers to the total amount allotted for the purpose of filling the area. Whatever it may be, it is clear that a huge amount is set apart for the proposed construction and if diverted, it will beneficiary reach the down-trodden, the poor Scheduled Castes and Scheduled Tribes students or other aspirants for jobs, etc. That is the only substantial and proper way of helping the people belonging to the Scheduled Castes and Scheduled Tribes community. What is the use of pomp and show? As I have already stated a memorial or monument is no doubt necessary as an outward expression of our gratitude to the great son of India. We have seen enough memorials in the City of Madras and there can be no objection to the building of such a monument or memorial. There was some argument about building only a monument and not a memorial. This only reflects the confusion in the minds of the respondents 1 to 6. There is no big difference between a monument and a memorial. A monument is a structure such as a building or tower erected as a memorial. A memorial is defined as a monument designed or established to serve as a remembrance of a person or an event. Therefore, as claimed in the counter-affidavit of the sixth respondent dated 31.12.1993, the memorial can be allowed in an extent of 0.75 acres. I am in fact willing to concede an extra 0.75 acres to have a lawn or park around the memorial. I am thus inclined to conceal an extent of 1.50 acres for the building of memorial or monument in the very area allotted to the sixth respondent. But I propose to demorganate the area upto an extent of 1.50 acres, so that it will cause least inconvenience to

the maintenance of the wet land and the preservation of the environment and habitat for the migratory birds.

26. As I was reading the text books on Wetlands especially the Book by Edward Maltby on "*Waterlogged Wealth*", I started to indulge in a little bit of a day dreaming. If only the odd construction in Survey No.4309/2 in the farm Fisheries Training Centre, is shifted to some other place, the respondents 1 to 6 will have a large and compact extent of low-lying lands available for development as a pond or lake with walk-ways all round and a Children's Park, more or less in the manner set out in paragraph 7 of the counter-affidavit of the fourth respondent. Leaving apart the existing buildings and the extent of 1.5 acres which I propose to allot for the construction of the memorial, the respondents can still have a chance of developing a large tract of low lying wet lands in the manner suggested by the World Wild Life Fund and the letter of the Government dated 5.11.1984 addressed to the Chief Conservators of Forests, Madras-6. The heart of the City is already blocked in many places. Even now it is not impossible for the respondents 1 to 6 to do a by-pass surgery and give a fresh leash of life to the residents of the Madras City. Let us preserve the few open spaces and wet lands which are available in the city. Let us plan things properly and in doing so let us not be adverse to consult private agencies who are well-versed in the subject. My dream can easily be translated into a reality if only the respondents 1 to 6 include this Scheme in the proposed "Madras Vision-2000".

27. Before reducing my conclusions into specific directions, I must record with appreciation the steps taken by the petitioners and their counsel in promoting and preserving the environment of the City. Equally I record with appreciation the steps taken by the seventh and eighth respondents. All of them have taken pains to study the issue thread bare and have assisted the court to the maximum extent. I also thank the Advocate General who has presented the case in a fair and reasonable manner. It is particularly gratifying to note that the petitioners have approached the court at the earliest point of time without allowing other equities to set in. For instance, there are cases and cases where people come to Court after the mischief is done the buildings are completed. No court will be inclined to direct the demolition of a building unless the circumstances warrant the same.

28. I give below the following directions in the writ petition:

(i) The sixth respondent (the Adi Dravida Housing Development Corporation), is permitted to construct a memorial or monument in an extent of 1.5 acres (a little more or little less) at the eastern end of the five acre plot allotted to them under G.O.Ms.No.293, Rev. dated 8.4.1993, within the following boundaries:

The extent on which the construction of a memorial is permitted will be the land bounded on the north by existing Temple View Apartments, on the east by Beach Road, on the south by Greenways Road and on the west by an imaginary north-south straightline drawn from the western tip of the Temple View Apartments to the Greenways Road (by the shortest distance).

(ii) Respondents 1 to 6 are directed to remove the sands spread on the western side of the said five acre plot and restore the said area to its original position. It is open to the sixth respondent to retain the sand spread on the eastern side of the five acre plot upto an extent indicated by the boundaries in clause (i) above.

(iii) Respondents 1 to 6 are restrained by an order of injunction from constructing an Auditorium or any other type of building other than what is permitted under Clause (i) above, in any place of Survey No.4309 and its sub-divisions.

(iv) The entire low-lying wet land in Survey No.4309 and its sub-divisions which are vested with the fourth respondent under G.O.Ms.No.2186, Revenue, dated 16.10.1990 shall be maintained and preserved as low-lying wet lands. If at all any development is sought to be made by the respondents it shall be only as per paragraph 7 of the counter-affidavit of the fourth respondent. They shall not permit or authorise construction of any type be it an Office Complex or a Commercial Complex.

(v) In future, if some unexpected need arises, it is open to the parties to seek for appropriate directions from this Court after serving notice to all the parties to this writ petition.

29. The writ petition is ordered in the above terms. There will be no order as to costs.

V.K.

Directions given.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Abdul Hadi, J.

C.R.P.No.3424 of 1991 6th December, 1993.

Muniappa Reddiar. .Petitioner
v.
Gancsa Reddiar and another ...Respondents.

(A) Civil Procedure Code (V of 1908), Sec.115 - Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955) - Cultivating tenant in arrears of rent - Rent court passing orders directing payment of arrears in instalments - Order not challenged by tenant - Landlord filing revision against order of revenue court dismissing his petition for ejection - Tenant, if can challenge the validity of order directing payment of arrears.

In the present case, the respondents-tenants have not challenged the order dated 21.12.1989 which directed the abovesaid payment to be made in four instalments. So, it is not open to them to question the validity of the order dated 21.12.1989 now in this civil revision petition filed by the landlord.

[Para. 7]

(B) Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), Sec.3(4)(a) - Cultivating tenant in arrears of rent - Landlord filing petition for eviction - Revenue court directing payment of arrears in four instalments - Tenant not making payment on dates stipulated but belatedly - Landlord receiving payment - Revenue court dismissing petition - Order, if can be sustained.

Even assuming that the landlord has accepted these belated payments without any protest, that conduct of the landlord has no bearing to decide the issue on hand. The mere receipt by the landlord of the rental arrears admittedly due to him cannot be put against him to decide the above issue. The respondents-tenants having not challenged the original order dated 21.12.1989 cannot now contend that the original order itself is bad and that hence eviction cannot be ordered. Therefore, the impugned order dated 4.10.1991 is absolutely unjustified and without jurisdiction since the tenants have not complied with the original order dated 21.12.1989 as they had paid the rental arrears very much belatedly beyond the time stipulated in the original order dated 21.12.1989 and

they had not even chosen to file a petition for extension of the time originally fixed for payment. Therefore, the impugned order is set aside.

[Paras. 10, 11 & 12]

Cases referred to:

V.Lakshmanan v. Sambandam Pillai, (1958)1 M.L.J. 26. [Paras. 3, 5, 8]

Muthukumar Padayachi v. Sambandam Pillai, (1960)1 M.L.J. 20. [Paras. 3, 9]

Navamarianimal v. Ammani Ammal, (1958)2 M.L.J. 145. [Paras. 4, 6, 8, 9, 10]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the Special Deputy Collector (Revenue Court), Cuddalore, dated 4.10.1991 and made in C.D.P.No.296 of 1985.

N.Vanchinathan for M/s.G.Jeremiah and P.Krishnan, for Petitioner.

M.V.Chandran, for Respondents.

The Court made the following

ORDER: The landlord under the Tamil Nadu Cultivating Tenants Protection Act, 1955 (hereinafter referred to as 'the Act') has filed this revision petition against the order dated 4.10.1991 in his petition C.D.P.No.296 of 1985 on the file of the Special Deputy Collector (Revenue Court), Cuddalore. By the said order dated 4.10.1991, the Special Deputy Collector dismissed the said C.D.P. filed under Sec.3(4)(a) of the Act for ejectment of the respondents- tenants from the petition land on the ground of arrears of rent for ten years, that is from 1977 to 1987. Originally by order dated 21.12.1989, the said revenue court, in the said petition computed the arrears due at Rs.6,000 and gave time to the tenants to pay the said sum to the landlord in four instalments as follows:

- (1) Rs.1,500 on 20.1.1990
- (2) Rs.1,500 on 20.2.1990
- (3) Rs.1,500 on 20.3.1990
- (4) Rs.1,500 on 20.4.1990

The said order also stipulated that if the payment is not made accordingly, necessary steps would be taken for eviction of the tenants.

2. The respondents- tenants did not pay the abovesaid four instalments as stipulated but paid the abovesaid sum of Rs.6,000 belatedly as follows:

- (1) Rs.1,500 on 24-1-1990
- (2) Rs.3,000 on 30-8-1990
- (3) Rs.1,500 on 4-10-1991

No doubt the landlord has received the said payments and has also given in writing that there are

no arrears. Therefore, the abovesaid Revenue Court has passed the abovesaid order dated 4.10.1991, virtually dismissing the said C.D.P. Aggrieved by the said order, the landlord has filed this revision.

3. The learned counsel for the petitioner submits that since admittedly the abovesaid four instalments had not been paid in time as stipulated, the revenue court should have only allowed the C.D.P. and ordered ejectment of the tenants from the suit land. On the other hand, the learned counsel for the respondents-tenants points out that the original order dated 21.12.1989 itself is not in accordance with law, since the relevant provision, viz., Sec.3(4)(b) of the Act provides for the tenants depositing the arrears of rent into Court and not payment of the arrears to the landlord. According to the said counsel, the revenue court can only direct the tenants to deposit the arrears of rent in court and it has no jurisdiction under the said provision to direct the tenants to pay the rent to the landlord. In this connection, he relies on *V. Lakshmanan v. Sambandam Pillai*, (1958) 1 M.L.J. 26 and *Muthukumar Padayachi v. Sambandam Pillai*, (1960) 1 M.L.J. 20.

4. On the other hand, the learned counsel for the petitioner relies on *Navamaniammal v. Ammani Ammal*, (1958) 2 M.L.J. 145 to contend that when the tenants have not challenged the original order dated 21.12.1989, directing payment and not directing deposit, it is not open to them to question later the validity of the said order dated 21.12.1989. The learned counsel for the respondents in this connection, contends that (1958) 2 M.L.J. 145 will not apply to the present case since the landlord has accepted the payments made without any demur.

5. I have considered the rival submissions. Admittedly the payments have not been made in time as stipulated in the order dated 21.12.1989 and the payments have been made very much belatedly. No doubt in *V. Lakshmanan v. Sambandam Pillai*, (1958) 1 M.L.J. 26, it has been held that Sec.3(4)(b) makes it obligatory on the Revenue Divisional Officer to order eviction in the event only of failure to deposit. It has further held on its facts that, not having made an order for deposit, the Revenue Divisional Officer was wrong in holding that he had no option except to pass an order for eviction. But, it must be noted that there, on 24.4.1957, direction to pay arrears on or before

21.3.1957 was made and when on 22.5.1957 the petition was posted it was found that the tenant did not pay on or before 21.5.1957, but sought to make the payment on 22.5.1957. The Revenue Divisional Officer turned down the said request and passed an order of eviction on 22.5.1957. Then the tenant challenged the original order dated 24.4.1957 in revision before this Court and in that context, this Court held as stated above.

6. But, in *Navamaniammal v. Ammani Ammal*, (1958) 2 M.L.J. 145, it has been held that where an order for payment has been made under Sec.3(4)(b) of the Act and the tenant did not raise any objection to it, it is not open to him to question later the validity of that order, in the revision proceeding arising out of the eviction order passed against him due to his failure to tender the rent as directed. In the said case, on 15.4.1957, the Revenue Divisional Officer made the order directing the tenant to pay the arrears of rent within one month from the said date on 1.5.1957, the tenant sent money order to the landlord for the amount of arrears of rent. But the said money order was returned, filed a petition for evicting the tenant and that was allowed and the tenant sought to canvass the correctness of the said order evicting the said tenant. In that context, after holding that there was no evidence to show that the direction to pay the arrears had been properly complied with, this Court has held that though under Sec.3(4)(b) of the Act, the Revenue Divisional Officer could only direct the tenant to deposit the arrears of rent into court and had no jurisdiction to direct to pay the rent to the landlord; the tenant having not raised any objection to the order directing him to pay the rental arrears, cannot question later the validity of the eviction order that was subsequently passed against him due to his failure to pay the rent as directed, the relevant observation of this Court in the said decision is as follows:

".....the order of the Revenue Divisional Officer is no doubt at variance with this requirement of the statute. But then the petitioner should have come up to this court to revise that order. That she did not do so shows that in spite of its irregularity she did not really feel aggrieved by it. I cannot now, after the various events that have happened since then, be asked to reopen an order about which, at the time it was made, the petitioner had no grievance."

7. In the present case also the respondents- tenants have not challenged the above referred to order dated 21.2.1989, which directed the abovesaid payment to be made in four instalments. So, here also, it is not open to them to question the validity of the order dated 21.12.1989 now in this civil revision petition filed by the landlord.

8. Thus, the ruling laid down in *Navamaniammal v. Animani Animal*, (1958)2 M.L.J. 145, squarely applies to the present case. *V.Lakshmanan v. Sambandam Pillai*, (1958)1 M.L.J. 26, does not deal with a case as the present one or the case that arose in (1958)2 M.L.J. 145. In (1958)1 M.L.J. 26, the tenant challenged the original order directing payment in revision. That is not the case either in the present case or in the case is (1958)2 M.L.J. 145.

9. Further the decision in *V.Lakshmanan v. Sambandam Pillai*, (1960)1 M.L.J. 20 only holds, as it was held in (1958)1 M.L.J. 26, that an order for payment is wrong under Sec.3(4)(b) of the Act. That division also does not actually deal with the other question which has been decided in *Navamaniammal v. Animani Animal*, (1958)2 M.L.J. 145, holding that when the tenant does not challenge the original order for payment it is not open to him to question later, the validity of the said order.

10. No doubt, the learned counsel for the respondent-tenants submits that unlike the case in *Navamaniammal v. Animani Animal*, (1958)2 M.L.J. 145, in the present case, the landlord has accepted the abovesaid belated payments made by the tenants. But, even assuming that the landlord has accepted those belated payments without any protest, that conduct of the landlord has no bearing to decide the issue in hand. The mere receipt by the landlord of the rental arrears admittedly due to him, cannot be put against him to decide the abovesaid issue. Further, what is emphasized in (1958)2 M.L.J. 145 is that if the tenant keeps quiet and does not challenge the original order for payment he cannot later on challenge the validity of the said order. In the present case, the respondents-tenants having not challenged the original order dated 21.12.1989, cannot now contend that the original order itself is bad and that hence eviction cannot be ordered.

11. Therefore, the impugned order dated 4.10.1991 is absolutely unjustified and without jurisdiction since the tenants have not complied with the origi-

nal order dated 21.12.1989 as they had paid the rental arrears very much belatedly beyond the time stipulated in the original order dated 21.12.1989, and as they had not even chosen to file a petition for extension of the time originally fixed for payment.

12. Therefore, the impugned order is set aside and the abovesaid C.R.P.No.296 of 1985 is allowed and eviction is ordered as prayed for. The civil revision petition is allowed with costs.

B.S.

Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *Bakthavatsalam, J.*

W.P.No.3324 of 1992

7th December, 1993.

Soundararajan and others

...Petitioners

v.

The Secretary to Government of India, Ministry of Labour, New Delhi and another ...Respondents.

(A) *Constitution of India (1950), Art.226 - Petition under, involving only a question of law - Counter-affidavit, filing of - If necessary - Counter-affidavit when necessary.*

It is well-settled that no counter-affidavit is necessary if a question of law involves in the petition before this Court, a counter-affidavit is necessary in a writ petition only when disputed question of fact arises. When facts are taken as it is and only law is to be applied, in such cases, there is no need for filing a counter-affidavit. [Para. 7]

(B) *Industrial Disputes Act (XIV of 1947), Sec.2(J) - Industry - Definition of - Ordnance Depot, Avadi under the Army Ordnance - Corp which is part of the defence service - If industry.*

In *Union of India v. Central Government Industrial Tribunal*, 1986 Lab.I.C. 1269, the barred Judge has considered the definition of 'Industry' and held that the definition is of very wide import and should be interpreted in a manner so as not to whittle but to advance the object of the Act and came to the conclusion that the Engineers Store Depot was a defence establishment under the Ministry of Defence and manufactures nuts, bolts, brackets etc., for running repairs and its functions related primarily to the holding and handling of stores required for defence purposes. In that case, the learned Judge has also held that merely because it is a Military Department maintained under the exercise of the regal sovereign function of the Central Government, the establishment does not cease to be an industry. The Supreme Court in *Bangalore Water Supply v. A.Rajappa*, A.I.R. 1978 S.C. 548, exhaustively discussed the scope of 'Industry' which is defined under Sec.2(d) of the Act and held 'even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, they can be considered to come within Sec.2(j)'. The principle laid down in the above mentioned decision has been followed by S.Ramalingam, J., in W.P.No.14320 of 1989, dated 8.12.1989. Even after considering the arguments of the learned Additional Central Government Counsel, this Court does not see any reason to differ from the view taken by this Court following the order of S.Ramalingam, J., in W.P.No.14320 of 1989, dated 8.12.1989.

[Para. 9]

Cases referred to:

Union of India v. Central Government Industrial Tribunal, 1986 Lab.I.C. 1269. [Paras. 2, 6, 7, 8]
Bangalore Water Supply v. A.Rajappa, A.I.R. 1978 S.C. 548; 1978 Lab.I.C. 467; 36 Fac.L.R. 268; (1978)1 Lab.L.J. 349; 52 F.J.R. 197; (1978)1 Lab.L.N. 376; (1978)1 S.C.J. 481; (1978)2 S.C.C. 213.

[Para. 8]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records on the file of the 1st respondent in No.L.14012/53/90-IR(DU), etc.

N.R.Chandran, Senior Counsel for S.Sathyachandran, for Petitioners.

C.Krishnan, Additional Central Government

Standing Counsel, for Respondents.

The Court made the following

ORDER: The prayer in the writ petition is to issue a writ of *certiorarified mandamus* or direction or any other appropriate order or direction and calling for the records on the file of the first respondent in (1) No.L.14012/53/90-IR(DU), (2) L.14012/56/90, (3) L.14012/85/90, (4) L.14012/38/90-IR, (5) L.14012/28/90, (6) L.14012/47/90, (7) No.L.14012/44/90, (8) L.14012/22/90, (9) No.L.14012/66/90, (10) L.14012/68/90, (11) L.14012/28/90, (12) L.14012/73/90, (13) L.14012/57/90, (14) L.14012/79/90, (15) L.14012/89/90, (16) L.14012/65/90, (17) L.14012/81/90, (18) L.14012/30/90, (19) L.14012/29/90, (20) L.14012/49/90, (21) L.14012/46/90, (22) L.14012/60/90, (23) L.14012/77/90, (24) 14012/34/90, (25) 14012/82/90, (26) 14012/45/90, (27) 14012/31/90, (28) 14012/37/90, (29) 14012/19/90, (30) 14012/51/90, (31) 14012/55/90, (32) 14012/52/90, (33) 14012/54/90, (34) 14012/72/90, (35) 14012/74/90, (36) 14012/84/90, (37) 14012/52/90, (38) 14012/63/90, (39) 14012/24/90, (40) 14012/36/90, (41) 14012/21/90, (42) 14012/11/90, (43) 14012/50/90, (44) 14012/75/90, (45) 14012/70/90, (46) 14012/41/90, (47) 14012/25/90, (48) 14012/67/90, (49) 14012/69/90, (50) 14012/33/90, (51) 14012/52/90 (52) 14012/35/90, (53) 14012/27/90, (54) 14012/86/90, (55) 14012/20/90, (56) 14012/39/90, (57) 14012/45/90, (58) 14012/76/90, (59) 14012/98/90, (60) 14012/71/90, (61) 14012/83/90, (62) 14012/58/90, (63) 14012/26/90, (64) 14012/64/90, (65) 14012/59/90, (66) 14012/81/90, (67) 14012/62/90, (68) 14012/40/90-IR(DU) and quash the order passed therein and consequently direct the respondents to reinstate the petitioners in the second respondent's office from the date of termination till the date of reinstatement and grant salary, allowance and treat the period as continuity of service.

2. The petitions alleged that they are the casual labourers and they were abruptly terminated from the service on 31.3.1990 without giving any show cause notice. It is stated that they took steps under Sec.2A of the Industrial Disputes Act 1947, (hereinafter referred to as the 'Act') before the Assistant Labour Commissioner, Central, Madras and the second respondent herein also filed counter taking a stand that the casual labourers were taken as hired porters. The Assistant Labour Commissioner has filed a failure report on conciliation and the first respondent did not pass orders on the

failure report within a reasonable time. As such the petitioners filed W.P.No.5479 of 1991 before this Court and Kanakaraj, J, by order dated 10.4.1991 directed the second respondent herein to look into the matter and pass orders as early as possible. Subsequent to the orders of Kanakaraj, J. the impugned order came to be passed on 18.7.1991. The petitioner alleges that the order of the first respondent dated 18.7.1991 rejecting the claim of the petitioner on the ground that the work carried out by the second respondent in the official transaction is not the "industry" is not correct. It is also alleged that the petitioners' service cannot be terminated without proper notice under the provisions of the Act. It is also alleged that the continuity of service for more than two years of continuity of service of all the petitioners cannot be denied and as such the first respondent ought to have considered the issue, in the proper way. It is also pointed out in the affidavit that in an identical matter, S.Ramalingam, J. has decided the issue in W.P.No.14320 of 1989, in favour of the petitioners therein. The affidavit also refers to a decision of the Calcutta High Court in *Union of India v. Central Government Industrial Tribunal*, 1986 Lab.I.C. 1269.

3. A counter-affidavit has been filed by the second respondent stating that the functions the Commandant, Ordnance Depot, Madras-55 are under the Army Ordnance Corps and governed by the Regulations pertaining to Army Ordnance Services issued by the Ministry of Defence. It is also alleged in the counter-affidavit that the second respondent holds all types of stores of ordnance supply other than ammunitions and it is responsible for the supply to units within the area of supply allotted to the depot. It is pointed out in the counter-affidavit that it is headed by an Officer commanding and composed mainly of Military Personnel and that it also contains civilian employees of Class "C" categories such as clerical staff, storekeeping staff, leading hand fire, fire engine drivers, fire supervisors, stenographer, cashier, motor transport driver etc., and in "D" group categories, Safaiwala, Mazdoor, Firemen, Gardner, Carpenter, Dhobi, Tailor, Painter, Barber and Cook etc., to carry out the day to day normal work of the said type. It is also stated in the affidavit that in case of vacancy in respect of the aforesaid "C" or "D" category, persons are recruited for the respective trade through employ-

ment exchanges in accordance with notification given under Employment Exchange Act and Rules made thereunder. It is also pointed out that in this case, this depot was directed by the overall Peace Keeping Force Commander to provide logistic support during OP PAWAN operations at Sri Lanka and that in order to provide logistic support for the troops and to free flow of vital arms and ammunitions for effective operation in the Island, CVD Avadi, that is the second respondent depot had given an additional role to supply ordnance stores to the Indian troops located in Sri Lanka as an emergency measure. It is also stated in the counter-affidavit that the petitioners herein are hired porters as their services were requisitioned as per the orders of the Southern command for unloading of military stores, and as such the petitioners cannot be construed as employees under the employment of the second respondent herein. It is further stated that the contention of the petitioners that they must be treated as casual labourers have no legal basis at all, that the nature of service for which the petitioners were engaged relates to the activities of the Government in exercising sovereign functions and as such the petitioners' service is outside the purview of the Act. It is also pointed out that the Writ petition itself is not maintainable on the ground that second respondent is not an "industry" within the definition of Sec.2(j) of the Act. It is further stated in the counter-affidavit that the petitioners have been engaged as hired porters and that the petitioners engagement was only for a temporary period for a specified purpose relating to operational activities of the Armed Forces. With regard to the writ petition W.P.14320 of 1989 which has been decided by S.Ramalingam, J. It is pointed out that the petitioners therein were engaged as Barbers, Dhobies, Cooks, etc., to meet the IPKF Army requirement during "OP PAWAN" when the Indian troops were deployed in Sri Lanka, that when Sovereign activities of the Government of India were over, the engagement of the petitioner therein were dispensed with and that all the said facts were not put forth in detail before the learned Judge. It is also pointed out that the learned Judge in that case, was made to understand that the petitioners were engaged to perform the normal activities of the second respondent which are similar in nature as the Engineers Stores Depot which is a defence establishment manufacturing nuts, bolts etc. It is

also claimed that the judgment of the Calcutta High Court, relied on by the Petitioner, is not applicable herein. A stand has also been taken that the learned Judge while deciding the writ petition in W.P.No.14320 of 1989 has passed orders without going into the merits in detail but it was ordered by consent. It is also pointed out that the issue raised in this writ petition, 'being a service matter, this Court has got no jurisdiction to entertain this matter and it has got to go before the Administrative Tribunal.

4. An additional counter-affidavit has been filed in which it is stated that the Ministry of Defence has two wings i.e. Defence Services and Defence Productions and that under the Ministry of Defence Production all Ordnance Factories relating to defence productions are functioning. It is also stated that the said defence establishments are provided in Schedule I of the Act. It is also stated that Ordnance Depot, Avadi is under the Army Ordnance Depot, Avadi is under the Army Ordnance Corps which is a part of Defence service and as such it is not a defence establishment as contended by the petitioners.

5. Mr.N.R.Chandran, learned Senior Counsel appearing for the petitioners relies upon an unreported decision of S.Ramalingam, J. in W.P.No.14230 of 1989 dated 8.12.1989 (1. Chandran 2. D.Kondalah, 3. B.Sitamma, 4. Sunadamma, 5. P.Krishnamoorthy, 6. G.Murali, 7. A.Selvam, 8. S.Thangavel v. Regional Labour Commissioner (Central) Shastri Bhavan, Madras-6 and 2 others) and contended that the issue had already been decided in favour of the writ petitioners and as such this writ petition has got to be allowed straightaway.

6. Mr.C.Krishnan, learned Additional Central Government Standing Counsel, appearing for the respondents contends that when the writ petition W.P.No.14320 of 1989 came up before S.Ramalingam, J., time was requested for filing counter-affidavit, but the learned Judge proceeded to hear the writ petition stating that the said writ petition involves purely a question of law and decided the issue following the decision in *Union of India v. Central Government Industrial Tribunal, 1986 Lab.I.C. 1269*. According to Mr.C.Krishnan, learned Additional Central Government Standing Counsel, the said issue was not argued before the learned Single Judge and moreover it was a consent order passed and as such it cannot be

treated as a precedent. Learned Additional Central Government Standing Counsel emphatically argues that the petitioners cannot be treated as if they are within the purview of the Act and if at all they are aggrieved they have to approach the Administrative Tribunal and as such this Court has got no jurisdiction to entertain this writ petition. Learned counsel took pains to impress upon by the argument that the Ministry of Defence has two wings, and that the persons who worked under the Ordnance Factory cannot be taken within the purview of the Industrial Disputes Act and that it cannot be treated as "Industry".

7. I have considered the arguments of Mr.N.R.Chandran, the learned senior counsel appearing for the petitioners and of Mr.C.Krishnan Additional Central Government Standing Counsel. First of all, the contention of Mr.C.Krishnan, learned Additional Central Government Standing Counsel that the order of the learned single Judge in W.P.14320 of 1989 dated 8.12.1989 was made in consent of parties, is not correct. The said writ petition was taken up for final disposal, by consent. That is all. Nothing were conceded. It is true that the learned Judge has considered whether The Commandant, Ordnance Depot, Avadi as "industry" or not and since the learned Single Judge thought that the issue was to be decided purely on a question of law, the learned Judge has taken up the matter for final disposal and decided the issue. It is not as if the respondents herein were not given opportunity to argue the issue before the learned Judge. It is also seen that a counsel appeared for the respondents and argued the matter before the learned Judge on merits. It is well settled that no counter-affidavit is necessary if question of law involves in the petition before the Court. A counter-affidavit is necessary in a writ petition, only when disputed question of fact arises. When facts are taken as it is and only law is to be applied, in such cases, in my view, there is no need for filing a counter-affidavit.

8. That apart, almost a similar issue came up before this Court on an earlier occasion, in W.P.No.16203 of 1991 and this Court by order dated 3.12.1993, following the order of S.Ramalingam, J. in W.P.No.14320 of 1989 dated 8.12.1989, mentioned above, had given a direction to refer the matter under Sec.10 of the Act. In that case also, no counter-affidavit has been filed. However, taking note of the fact that the matter is

pending for two years and the point involved is a question of law, the said issue has been decided, following the order of S.Ramalingam, J. mentioned above. Though the learned counsel appearing for the respondents contended that this Court can take a different view, since in this case all the facts are before this Court and also a counter-affidavit has been filed, in the abovementioned case, this Court came to the conclusion only after looking into the unreported decision of S.Ramalingam, J. in W.P.14230 of 1989 dated 8.12.1989, and also looking into the judgment of Calcutta High Court in *Union of India v. Central Government Industrial Tribunal, 1986 Lab.I.C. 1269*.

9. Sec.2(j) of the Act defines "industry" and it is to the following effect, as it stands today.

".....'industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen...."

There are certain exceptions given to the term "industry" one of which is any activity of the Government relating to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space. In the abovementioned decision in *Union of India v. Central Government Industrial Tribunal, 1986 Lab.I.C. 1269*, the learned Judge has considered the definition of "industry" and held that the definition is of very wide import and should be interpreted in a manner so as not to whittle down but to advance the object of the Act and came to the conclusion that the Engineers Store Depot was a defence establishment under the Ministry of Defence and manufactured nuts, bolts, brackets, etc for running repairs and its functions related primarily to the holding and handling of stores required for defence purposes. In that case, the learned Judge has also held that merely because it is a Military Department maintained under the exercise of the regal sovereign functions of the Central Government, the establishment does not cease to be an industry. The Supreme Court in *Bangalore Water Supply v. A.Rajappa, A.I.R. 1978 S.C. 548: 1978 Lab.I.C. 467: 36 Fac.L.R. 268: (1978)1 Lab.L.J. 349: 52 F.J.R. 197: (1978)1 Lab.L.N. 376: (1978)1 S.C.J. 481: (1978)2 S.C.C. 213* exhaustively discussed the

scope of "industry" which is defined under Sec.2(j) of the Act and held as follows (at page 550).

"... Sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by Government or statutory bodies..." Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Sec.2(j)..."

The principle laid down in the abovementioned decision has been followed by S.Ramalingam, J. in W.P.14320 of 1989 dated 8.12.1989, mentioned above. Even after considering the arguments of Mr.C.Krishnan, the learned Additional Central Government Standing counsel, I do not see any reason to differ from the view taken by this Court following the order of S.Ramalingam, J. in W.P.No.14320 of 1989 dated 8.12.1989, mentioned above. In view of that, the impugned orders in this writ petition are set aside and instead of granting the prayer as asked for, moulding the prayer to suit the occasion, I am of the view that a direction is to issue to the first respondent herein, to refer the matter under Sec.10 of the Industrial Disputes Act, within a period of two months from the date of receipt of copy of this order. To that extent, this writ petition shall stand allowed. However, there will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Janarthanam, J.

W.P.No.5912 of 1987 24th December, 1993.

Parry and Co. Ltd., by its Director,
K.V.Ramachandran, Madras ...Petitioner
v.

Deputy Commissioner of Labour (Appeals), D.M.S.
Compound, Teynampet, Madras and another
...Respondents.

(A) *Tamil Nadu Shops and Establishments Act (XXXVI of 1947), Sec. 41(1) - Tamil Nadu Shops and Establishments Rules (1948), Rule 9(2) - Powers of Appellate Authority under - Nature of - It debarred from taking additional evidence.*

The nature of the power of an Appellate Authority under Sec. 41 of the Tamil Nadu Shops and Establishments Act clearly expressed in express and explicit phraseology, namely, 'misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose. Such an expression denotes, in no uncertain terms, that in proof of the misconduct of an employee, there must be an inquiry; that in the said inquiry, evidence must be adduced; that the evidence so adduced cannot be stated to be some evidence touching misconduct but satisfactory evidence in proof thereof, thereby making it clear that the evidence adduced must be adequate and sufficient enough to derive satisfaction in the mind of the appellate authority in proof of the alleged misconduct and this aspect of the matter can further be emphasised by referring to the adjective form of the Word 'satisfactory' prefixing the Word 'evidence'. Further, the power of the appellate authority under Sub-sec.(2) of Sec. 41 of the Act cannot at all be deemed to be so restricted as to permit him to consider only the evidence recorded by the employer of the dismissed employee at the time of inquiry and debarring him from taking additional evidence. Sub-rule (2) of Rule 9 of the Tamil Nadu Shops and Establishments Rules, 1948 prescribes the procedure to be followed by the appellate authority in exercise of the jurisdiction under Sub-sec.(2) of Sec. 41 of the Act. It is thus clear that neither Sub-sec.(2) of Sec. 41 nor Sub-rule (2) of Rule 9 of the Rules confines the appellate authority to the evidence already recorded in the inquiry for which Sub-sec.(1) of Sec. 41 provides. The appellate authority has jurisdiction to take such further evidence as it considers necessary in order to enable that authority to come to a decision which would be final and binding on both the employer and the employee as prescribed under Sub-sec.(3) of Sec. 41. The appellate power may be construed in the widest possible manner so as to take in also the power to take additional evidence when necessary. [Paras. 21 & 22]

(B) *Constitution of India (1950), Art. 226 - Jurisdiction under - High Court, if can re-asses materials on record and come to a different conclusion from one*

arrived at by Appellate Authority under the Tamil Nadu Shops and Establishments Act, 1946.

Held on facts High Court cannot issue a writ quashing such order. [Para. 30]

Cases referred to:

Davey Sons v. Additional Commissioner for Workmen's Compensation, (1963) 1 L.L.J. 44. [Para. 23]
Remington Rand of India Limited v. R. Jambulingam, 1974 Lab.I.C. 1283. [Para. 24]

Thirumangalam Co-operative Urban Bank Limited v. Assistant Commissioner of Labour, Madurai and another, (1992) 2 L.L.J. 886. [Para. 25]

Chingleput Bottlers v. Majestic Bottling Company, (1984) 3 S.C.C. 258. [Para. 28]

Syed Yakoob v. K.S. Radhakrishnan, (1964) 5 S.C.R. 64: A.I.R. 1964 S.C. 477. [Para. 29]

Hari Vishnu Kamath v. Syed Ahmed Ishaque, (1955) 1 M.L.J. (S.C.) 157: (1955) 1 S.C.R. 1104: A.I.R. 1955 S.C. 233: 1955 S.C.A. 105: 1955 S.C.J. 267. [Para. 29]

Nagendra Nath Bora v. The Commissioner of Hills Division and Appeals, Assam, 1958 S.C.R. 1240. [Para. 29]

Kaushalya Devi v. Bachittar Singh, A.I.R. 1960 S.C. 1168. [Para. 29]

Petition under Art. 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st respondent in TSE.No.31 of 1984 and quash his order dated 2.4.1987.

G. Subramaniam, Senior Counsel for *T.S. Gopalan, P. Ibrahim Kalifulla, Ravichandran*, for Petitioner.

P. Chandrasekaran, Additional Government Pleader, for Respondent No.1.

A.L. Somayaji, of *M/s. Aiyar and Dolia*, for Respondent No.2.

The Court made the following

ORDER: Parry and Co. Ltd., 'Dare House', Madras-1 (petitioner) commenced a new line in marketing portable Honda generating sets imported from Japan around April, 1982. This portable mini-generators were imported directly from Japan against special import licences by other agencies and sold to Parry and Co., for marketing. The petitioner Company had two sources of importers-one is perfect power system/Kamal Engineering Co., New Delhi and other is M/s. Ambadi Enterprises Pvt. Ltd., Madras. The market response was initially extremely good and many a

customer, it is said, were pouring into the office enquiring about the price, availability etc. In order to answer to such personal enquiries and also to submit quotations execute orders etc., it was found that the existing manpower in the Genlite Section was inadequate. Therefore, one K.Ramaswamy (second respondent), hitherto working in Administration section was transferred to Genlite section with effect from 31.5.1982. With effect from that date he was entrusted with the job of handling the functions connected with the sale of Honda generator in his capacity as clerk. Initially the petitioner-company was alone marketing Honda generating sets. As a consequence of great demand for such generating sets, number of other agencies happened to deal with such generating sets. Consequently, this resulted in cut-throat competition, which forced the petitioner-company to reduce the price of such generating sets to meet the competition from others. Despite sharp reduction in prices, the quantum of sale somehow or other deteriorated sharply.

2. During February, 1983, the petitioner-company, learnt from M/s.Ambadi Enterprises Pvt. Ltd., Madras that the second respondent made a visit to their office representing the interests of M/s.Continental Business and Finance, 248, Poonamallee High Road, Madras-29 and enquired for prices of Honda generating sets for purchase directly from them. As such an act of the second respondent was directly in conflict with the interest of the petitioner-company, it was decided by the Management to investigate the matter discreetly and an investigating agency, going by the name 'Globe Detective Agency (P) Ltd., Madras-2' was employed. This agency set up two of their senior investigators, one by name Mr.P.G.John and Mr.Malcom Fernandez to gather information about the discreet act.

3. Of them, P.G.John, posing as a businessman from Southern Air-Conditioners, Coimbatore was stated to have approached the second respondent for striking a deal with regard to supply of Honda Generating sets. In the course of discussion, the second respondent appeared to have represented to him that the rate quoted by Parry and Co., with reference to the various types of generating sets were quite high and if he is really interested in getting the generating sets at lower rates, he would see that he can arrange such sets from outside party, provided one per cent commission of the

total deal was given to him. He was stated to have written those things in a piece of paper, giving description of the generating sets, its rate and the incentive to be given. The conversation that lasted between them was also said to have been recorded in tape. The said Detective Agency submitted its report to the petitioner-company on the basis of which a memo was issued to the second respondent on 29.4.1983 framing charges of fraud, dishonesty in connection with the company's affairs and acts of omission against the interest of the company likely to cause huge loss and attempting to take illegal gratification, engaging in activities that may tarnish the fair name and image of the company and acts subversive of discipline. The second respondent submitted his explanation on 1.5.1983 denying the charges.

4. However, with reference to his alleged acts of dishonesty, a charge memo was issued on 1.3.1983 on an earlier occasion revolving on his receiving commission of Rs.300 from M/s.S.S. Trading Company, Madras.

5. One S.V.Govindaraju was appointed as the Enquiry Officer while one R.Madhusudan was the Presenting Officer. During the course of enquiry, the petitioner-company did not pursue with the earlier charge memo and consequently, the second respondent was exonerated of the said charge.

6. The Enquiry Officer, however, on consideration of the materials, found that the second respondent was guilty of the charges framed later. Based upon the report of the Enquiry Officer, the second respondent has, however, been dismissed from service by an order dated 19.4.1984 issued by the Chairman of the petitioner-company.

7. Aggrieved by the said order, the second respondent preferred an appeal in TSE. No.31 of 1984 before the Deputy Commissioner of Labour (Appeal), Madras-6 (Appellate Authority under Sec.41(2) of the Tamil Nadu Shops and Establishments Act, 1947 (for short 'the Act')-first respondent). The first respondent, however, on consideration of the materials available on record, held that the charges of misconduct levelled against the second respondent had not been proved by satisfactory evidence in the enquiry and hence the order of dismissal dated 19.4.1984 is in contravention of Sec.41(1) of the Act, which deserves to be set aside and accordingly set aside the order of dismissal, by his order dated 2nd April, 1987.

8. Aggrieved by the said order, the petitioner-company resorted to the present action praying for issue of a *certiorari* to quash the same.

9. The petitioner filed W.M.P.No.8511 of 1987 praying for stay of operation of the order impugned and this Court on 17.6.1987 passed the following order:

"Interim stay and notice".

This Court on 9.9.1987 passed a further order and the same is reflected as below:

"Though the second respondent has been served, he does not appear either in person or through counsel. Considering the facts and circumstances of the case and also the prior proceedings under the Industrial Disputes Act, this is a fit case, where the interim stay granted already should be made absolute. Accordingly, the interim stay is made absolute."

10. The second respondent filed W.M.P.No.10419 of 1987 praying for a direction to the petitioner for payment of backwages quantified in a specified sum pending disposal of the writ petition.

11. He also filed W.M.P.No.14376 of 1988 for modification of the order dated 9.9.1987 passed in the stay petition in W.M.P.No.8511 of 1987.

12. Both those W.M.Ps. were dismissed by an order dated 14.9.1988 as below:

"No ground is made out to modify the order passed already or to give directions as prayed for by the petitioner. These petitions are therefore, dismissed".

13. Aggrieved by the said order, the second respondent preferred W.A.No.937 of 1989 and a Division Bench of this Court allowed that appeal, by setting aside the order in those W.M.Ps., and remitted them back for fresh disposal.

14. Consequently, both the said W.M.Ps. were restored to file. Subsequently, on 14.8.1990, an order came to be passed, the operative portion of which reads thus:

"Considering the facts and circumstances of the case, I feel, in the interests of justice, the second respondent should be directed and is hereby directed to pay a lump sum of Rs.30,000 towards backwages within 4 weeks from to-day and also pay 50% of the salary every month commencing from 15th September till the disposal of the writ petition. In view of the request made by learned counsel for the writ petitioner, the hearing of the writ petition is fixed as 10.12.1990. These petitions are

ordered accordingly".

It may be noted here *Parry and Co.*, is the second respondent in both these W.M.Ps.

15. Thereafter, the petitioner-company filed W.M.P. No.29414 of 1992 praying for modification of the order dated 14.8.1990 in those W.M.Ps. This Court in the said W.M.P., passed the following order on 22.1.1993.

"This Court in W.M.P.No.14376 of 1988 has passed an order on 14.8.1990 directing the petitioner herein to pay a lump sum of Rs.30,000 towards backwages within four weeks and also pay 50% of the salary every month commencing from 15.9.1990 till the disposal of the writ petition, to the second respondent herein. The court also directed and fixed the hearing of the writ petition on 10.12.1990. It is stated that the said order has been complied with and Rs.30,000 has been paid within the time and the petitioner has been paying 50% of the salary every month to the second respondent.

2. However, what all required in this petition is that the second respondent herein has attained superannuation on 31.12.1992 and the question of paying 50% of the salary to the second respondent after 31.12.1992 has to be modified. The said application is opposed by the second respondent. It is stated that even though he is not entitled to 50% of the salary after attaining superannuation, in view of the arrears of backwages which are to be paid to him, the petitioner can be directed to pay the said amount. Further, both parties agree that even though date has been fixed for hearing of the writ petition on 10.12.1990, it has not been disposed of.

3. After hearing the arguments of the learned counsel appearing on both sides, I am of the view that the modification asked for by the petitioner is justified in view of the fact that the second respondent has attained the age of superannuation and the question of paying salary after 31.12.1992 does not arise. However, as regards payment of back wages it is in dispute.

4. I feel that in the interest of justice, the disposal of the writ petition can be expedited. The office is directed to post the writ petition for final hearing on 5.2.1993 before the Bench which is hearing writ petitions."

16. Mr.G.Subramanian, learned Senior Counsel

appearing for the petitioner would, with all seriousness and serenity, contend that the general and normal rule applicable to civil proceedings—appeal is after all, but continuation of the trial of a suit or proceeding and such being the case, the appellate forum, possessed of all the necessary and requisite powers of a trial court is entitled to re-assess, evaluate and appreciate the evidence and come to an independent conclusion of its own, of course for proper reasons cannot all be stated to be applicable in the case of a statutory appeal, like the one provided under Sec.41(2) of the Act and the appellate authority, exercising jurisdiction thereunder cannot be stated to be having any jurisdiction or power, other than the one conferred by such a provision expressed explicitly in the form of a language and such being the case, the language couched therein for the conferment of such a power, if interpreted and understood in broad spectrum analysis, cannot at all convey that the extent and amplitude of the power inhering in such an authority is as wide as that of the power inhering in an appellate forum in civil proceedings and to put it differently, he would further say that the power of the appellate authority under the statute is more or less akin to the power of a Labour or Industrial Tribunal sitting in judgment over the findings of a domestic enquiry, which in its very nature is very limited in scope and extent.

17. Mr. A.L. Somayaji, learned counsel appearing for the second respondent would, however, advance an argument that the submissions thus made by learned senior counsel could very well be made applicable if at all, to a proceeding under Art.226 of the Constitution of India, though not before an appellate authority under the relevant statute.

18. The rival submissions of either learned counsel may now fall for consideration in the arena of discussion.

19. For a better appreciation and understanding of such a submission, quite relevant and proper it is, to pen down, at this juncture, the salient provisions adumbrated under Sec.41 of the Act, which run as under:

“41. *Notice of dismissal:* (i) No employer shall dispense with the services of a person employed continuously for a period of not less than six months except for a reasonable cause and without giving such person at least one month's notice, or wages in lieu of such notice,

provided, however that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded in an enquiry held for the purpose.

(2) The person employed shall have a right to appeal to such authority and within such time as may be prescribed either on the ground that there was any reasonable cause for dispensing with his services or on the ground that he has not been guilty of misconduct as held by the employer.

(3) The decision of the appellate authority shall be final and binding on both the employer and the person employed”.

20. From what has been extracted above, it is abundantly clear that for purpose of Sub-sec.(1) of Sec.41 of the Act, the employer could dispense with the services of an employee, who has been continuously in service for a period not less than six months, without notice on a charge of misconduct supported by satisfactory evidence recorded in an inquiry held for the purpose. If the misconduct is not one of the grounds of discharge, then the employer can dispense with the services of an employee, if there is a reasonable cause and even if there is a reasonable cause, he can only dispense with the services only after giving him at least one month's notice. In all those cases, where the services of a person are not dispensed with in accordance with the provisions of Sub-sec.(1) of Sec.41 of the Act, he had a right of appeal to the prescribed authority. Within the prescribed time challenging the order either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct, as held by the employer, under Sub-sec.(2) thereof. Under Sub-sec.(3) thereof, the order of the appellate authority is final and binding on both the employer and employee.

21. The nature of the power of such an Appellate Authority is clearly expressed in express and explicit phraseology, namely,

“misconduct supported by satisfactory evidence recorded at an inquiry held for the purpose”. Such an expression denotes, in no uncertain terms, that in proof of the misconduct of an employee, there must be an inquiry; that in the said inquiry, evidence must be adduced; that the evidence so adduced cannot be stated to be some evidence

touching misconduct but satisfactory evidence in proof thereof, thereby making it clear that the evidence so adduced must be adequate and sufficient enough to derive satisfaction in the mind of the appellate authority in proof of the alleged misconduct and this aspect of the matter can further be emphasised by referring to the adjective form of the Word 'satisfactory' prefixing the Word 'evidence'. Further, the power of the appellate authority under Sub-sec.(2) of Sec.41 of the Act cannot at all be deemed to be so restricted as to permit him to consider only the evidence recorded by the employer of the dismissed employee at the time of inquiry and debarring him from taking additional evidence.

22. Relevant at this juncture to notice Sub-rule (2) of Rule 9 of the Tamil Nadu Shops and Establishments Rules, 1948 (for short 'the Rules') framed, in exercise of the power conferred by Sub-sec.(1) of Sec.49 of the Act, which prescribes the procedure to be followed by the appellate authority in exercise of the jurisdiction under Sub-sec.(2) of Sec.41 of the Act. It is thus clear that neither Sub-sec.(2) of Sec.41; nor Sub-rule (2) of Rule 9 of the Rules confines the appellate authority to the evidence already recorded in the inquiry for which Sub-sec.(1) of Sec.41 provides. The appellate authority has jurisdiction to take such further evidence as it considers necessary in order to enable that authority to come to a decision which would be final and binding on both the employer and the employee as prescribed under Sub-sec.(3) of Sec.41. The appellate power must be construed in the widest possible manner so as to take in also the power to take additional evidence when necessary.

23. Useful reference, at this juncture, may be made to the case of *Davey Sons v. Additional Commissioner for Workmen's Compensation*, (1963) 1 L.L.J. 44, in which a Division Bench of this Court consisting of late lamented eminent Chief Justice P.V.Rajamannar and Justice Venkatadri expressed that jurisdiction of the appellate authority to go into the merits of the misconduct for which the appellant/employee was dismissed from service does not stand on the same footing as that of the Industrial Tribunal or Labour Court to examine such question in a reference under Sec.10 of the Industrial Disputes Act.

24. In *Renington Rand of India Limited v. R.Jambulingam*, 1974 Lab.I.C. 1283, the Apex Court

said at paragraph 8 thus:

"8....The jurisdiction of the Commissioner is an appellate jurisdiction and is of wider scope unlike that of the Tribunal in an application under Sec.33 of the Industrial Disputes Act. The Commissioner is competent to re-hear the matter completely and come to his own conclusion after re-appreciation of the evidence. There is no legal bar in entertaining additional evidence if that is necessary in the interest of justice. The rule of law which has been laid down by this Court with regard to jurisdiction of the Industrial Tribunal in an application under Sec.33 of the Industrial Disputes Act in interfering with the order of dismissal passed in a domestic enquiry is not applicable to the case of an appeal before the Commissioner, provided for under Sec.41 of the Shops Act".

25. In *Thirumangalam Co-operative Urban Bank Limited v. Assistant Commissioner of Labour, Madurai*, (1992) 2 L.L.J. 886, this Court expressed reassessment of the evidence is permissible by the appellate authority under Sec.41(2) of the Act; but, however, such reassessment cannot be arbitrary or whimsical, but must be on proper basis.

26. Coming to the case on hand, the substratum of the accusation of the charges as levelled against the second respondent in the disciplinary enquiry conducted against the second respondent, as already indicated, was that he acted against the interests of the petitioner-company, in the sense of diverting the business of the company to third parties of course for his sole pecuniary benefits. In such a situation it is difficult, if not impossible, to procure direct testimony for the proof of such course of misconduct on his behalf. The reason is very obvious. The beneficiary of the transaction may not come forward to testify against him. It is also equally true that the business concerns, to which the business had been diverted by the second respondent would not come forward to depose to in the enquiry as against his interest. But, nonetheless, it cannot be stated that such a course of misconduct is incapable of being proved. Any fact is capable of being proved by evidence, either direct or circumstantial. If direct evidence is not possible, in the circumstances of the case, like the one on hand, it does not mean that it cannot at all be proved by resorting to the circumstantial evidence. Realising such a difficult and

predicament situation, the petitioner-company had been placed, in the sense of its inability to procure direct evidence, in proof of the misconduct on its part, tried its level best to procure best circumstantial evidence and that perhaps was the reason, it resorted to the help of the Globe Detective Agency. There is nothing wrong in resorting to the aid of such an agency in a situation like this. But the question is whether such an agency employed by the petitioner-company placed relevant materials during the course of enquiry, serving as sufficient and satisfactory evidence, in proof of the misconduct on its part.

27. The Enquiry Officer, of course, found that such an agency did admirably trace materials in bringing to light his clandestine activity and therefore found him guilty of the alleged misconduct. The first respondent - Appellate Authority, however, in exercise of its power, thoroughly scanned and sifted those materials and in the process of such sifting, he pointed out various infirmities and pitfalls, as found stated in his order, (vide pages 140 to 145 of the typed set appended to the writ petition) and ultimately came to the conclusion that the charges of misconduct levelled against him not having been proved by satisfactory evidence at the enquiry, the order of dismissal dated 19.4.1984 was in contravention of Sec.41(1) of the Act. Even eschewing the criticism as respects non-production of the tapped conversation that took place between the investigating agency and the second respondent, the discussion on other aspects of the evidence and other materials, as found typed in those pages, of course, had been done in an admissible way, without, in the least making it appear that such discussion of materials in the resultant product of mis-or-mal-appreciation, calling for interference.

28. The further question that arises for consideration is as to whether this Court, sitting in its extraordinary equitable jurisdiction under Art.226 of the Constitution can re-assess the materials on record and come to a different conclusion from the one arrived at by the first respondent. Such a question came up for consideration before the Apex Court of this country in the case of *Chingleput Bottlers v. Majestic Bottling Company*, (1984)3 S.C.C. 258, in which their Lordships expressed that the High Court could not have in proceedings under Art.226 of the Constitution interfered with the impugned order of the

Commissioner merely because on a reappraisal of the evidence, it might have come to a contrary conclusion.

29. In *Syed Yakoob v. K.S.Radhakrishnan*, (1964)5 S.C.R. 64: A.I.R. 1964 S.C. 477, a Constitution Bench of the Apex Court dealing with the question about the limits of jurisdiction of High Courts in issuing a writ of *certiorari* under Art.226 of the Constitution, took note of the earlier decisions, namely, *Hari Vishnu Kamath v. Syed Ahmed Ishaque*, (1955)1 M.L.J. (S.C.) 157: (1955)1 S.C.R. 1104: A.I.R. 1955 S.C. 233: 1955 S.C.A. 105: 1955 S.C.J. 267, *Nagendra Nath Bora v. The Commissioner of Hills Division and Appeals, Assam*, 1958-S.C.R. 1240 and *Kaushalya Devi v. Bachittar Singh*, A.I.R. 1960 S.C. 1168 and expressed the true legal position in that behalf in a scintillating fashion thus: (at pages 68-69)

"A writ of *certiorari* can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred in it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of *certiorari* is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal a writ of *certiorari* can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be

regarded as an error of law which can be corrected by a writ of *certiorari*. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of *certiorari* on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of *certiorari* can be legitimately exercised".

30. The facts of the instant case, if fell for analysis on the touchstone of the weighty observations of the Apex Court, as above, it goes without saying that the relief prayed for is incapable of being granted.

31. For the reasons above, the writ petition deserves to be dismissed and the same is accordingly dismissed. There shall, however, be no order as to costs, in the circumstances of the case.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT
MADRAS.

Present: K.M. Natarajan, J.

C.M.A. Nos. 60 and 61 of 1983

16th December, 1993.

Latha Maheswari
v.

Palaniswamy

...Petitioner

...Respondent.

Hindu Marriage Act (XXV of 1955), Secs. 10 and 13 - Medical Board declaring husband as fit for sexual relationship - Wife refusing sexual intercourse - Whether cruelty - Husband if entitled to decree for divorce.

On petition the husband was examined by a Medical Board. It is stated in the report that the husband is capable of normal sexual intercourse and he has no physical or mental disorder which would prevent him from normal sexual intercourse; neither has he any congenital defect nor is there any evidence to show that he was at any time sexually impotent. There is nothing on record to show that there is any *bona fide* attempt on the part of the appellant to show that she was willing to have sexual intercourse with the petitioner. It is clear that the wife has abused the husband as an impotent person and caused mental and physical cruelty to him by refusing to have intercourse with him. Hence, it cannot be said that the order passed by the court below granting divorce to the husband is either illegal or improper or the same requires any interference by the High Court in appeal. [Para. 6]

Cases referred to:

Anil Bhardwaj v. Smt. Nirmallesh Bhardwaj, A.I.R. 1987 Del. 111. [Para. 6]

Rita Nijhawan v. Balkishan, A.I.R. 1973 Del. 200. [Para. 6]

Gollin's Case, (1963) All E.R. 966. [Para. 6]

Sheldon v. Sheldon, (1966) 2 All E.R. 257. [Para. 6]

Atma Parkash Arora v. Neelam, (1981) 2 D.M.C. 43. [Para. 6]

Shakuntala Kumari v. Om Prakash, A.I.R. 1981 Del. 53; 1981 Rajadhami L.R. 121. [Para. 6]

T. Martin, for Petitioner.

M. Venkatachalapathy, for Respondent.

The Court made the following

ORDER: C.M.S.A. Nos. 60 and 61 of 1983 arise out of the order passed in C.M.A. Nos. 241 and 242 of 1982 respectively, which in turn arose out of the order passed in O.P. Nos. 119 of 1978 and 56 of 1981 respectively. The brief facts which are necessary for the disposal of these appeals can be stated as follows:

2. The appellant herein is the wife, while the respondent is her husband. The husband filed O.P. No. 119 of 1978 for divorce on the ground of mental cruelty and desertion. The appellant-wife filed O.P. No. 56 of 1981 for restitution of conjugal rights. According to the respondent he married

the appellant on 22.8.1976 and the said marriage took place without the consent of the appellant herein and only after the marriage the respondent came to know that the appellant did not like the marriage with the respondent, but she had love with one Balan. The appellant has not allowed the respondent to consummate the marriage. The respondent informed about this to the parents of the appellant. They pacified him and asked him to wait for some time. Subsequently when the respondent informed the parents of the appellant that the appellant was not permitting him to consummate the marriage, the appellant and her parents insulted the respondent and scolded him that he was impotent. The appellant removed the Tali and threw it away and the parents of the appellant beat the respondent by hands and chappal and drove him out of the house. The respondent is not willing to be the husband of the appellant as the appellant is not permitting him to consummate the marriage. The respondent issued a notice to the appellant. In the reply to the said notice, the appellant has stated that the respondent is impotent and she may not have any objection for divorce. Hence, the respondent filed a petition for divorce.

3. The appellant/wife filed a counter denying the allegations made by the respondent/husband. On the pleadings, the trial court raised two points, viz., (i) whether the appellant/wife caused mental and physical cruelty to the respondent/husband and (ii) whether the respondent/husband is entitled to a decree of divorce.

4. The case of the appellant/wife in her petition viz. O.P.No.56 of 1981, which was filed for restitution of conjugal rights, is the same as what has been pleaded by her in the counter filed in O.P.No.119 of 1978. In addition, she has stated she is willing to live with the respondent and it is only the respondent who has neglected to maintain her during the enquiry in O.P.No.119 of 1978. The respondent underwent medical test and now it is seen that he is medically fit to lead a marital life and therefore she prayed for a decree of restitution of conjugal rights. In the counter filed by the husband in O.P.No.56 of 1981, he has reiterated the allegations raised by him in O.P.No.119 of 1978. The respondent/husband stated that the appellant/wife did not allow him to have sexual intercourse and had subjected him to mental and physical cruelty. Both the petitions, viz. O.P.Nos.119

of 1978 and O.P.No.56 of 1981 were tried together. The respondent/husband marked Ex. A-1 and Ex.A-2 and the appellant/wife did not file any document. The appellant/wife and respondent/husband were examined themselves as P.W.1 and R.W.1 respectively. The learned trial Judge, after taking into consideration the oral and documentary evidence, came to the conclusion that on point No.1 in O.P.No.56 of 1981 that the appellant/wife has not caused mental and physical cruelty to the respondent/husband and on point No.2 that the appellant/wife is entitled for a decree for restitution of conjugal rights. On point No.1 in O.P.No.119 of 1978 the trial Judge came to the conclusion that the appellant/wife has not caused mental or physical cruelty to the respondent/husband and in view of the finding on point No.1, the trial Judge held point No.2 against the respondent/husband that he is not entitled to a decree for divorce. Aggrieved by the order of the trial Judge, the respondent/husband filed two appeals viz., C.M.A.Nos.241 and 242 of 1982. The learned Judge, after considering the oral and documentary evidence, and after hearing both parties, allowed the appeals with costs and reversed the judgment and decree of the trial court passed in O.P.Nos.119 of 1978 and 56 of 1981. It is against those judgments, the wife has preferred the present appeals.

5. The only substantial question of law that arises for consideration in these is whether the appeal from the decision of the court specified as "District Court" by the State Government by notification in the Gazette under Sec.3(1) of the Act lies only to the High Court and the appeal to the District Court from the said decision is not maintainable and whether the District Court has no jurisdiction to entertain the appeal. At the outset, learned counsel for the appellant has fairly conceded that the said substantial question has to be answered against the appellant in view of the provisions of Sec.28 of the Act that District Court alone has got jurisdiction and as such he is not pressing the said contention and it is answered against the appellant. Learned counsel, however, wants to argue the case on merits and he would submit that the finding rendered by the appellate court with regard to the mental and physical cruelty and desertion is not supported by any acceptable evidence and on that ground interference is called for. In this connection, he drew the

attention of this Court to the judgment of the trial court wherein the trial court has observed that according to P.W.1 the said Balan had married the respondent's maternal aunt's daughter. His further evidence indicates that though his wife loved Balan he wanted to live with her. In the cross-examination of P.W.1 it was suggested that the petitioner was educated by the parents of the respondent and a job was also secured by them to the respondent. R.W.1 has answered the said suggestion in affirmative that it was her parents who educated the petitioner and secured job for him. Hence, it can be inferred that the petitioner was aware of all the details about the family of the respondent before his marriage with her. If really the respondent was loving one Balan, the petitioner would have informed the same to the parents of the respondent at the time of the marriage negotiations. There is absolutely nothing to show that the petitioner had informed the parents of the respondents about the relationship that existed between Balan and the respondent. P.W.1 in his cross-examination has stated that Balan had married the niece of the respondent and that Balan's wife was aged about 19 years. When such is the case the allegations made by the petitioner that the respondent had refused to allow him to have intercourse and informed that if anybody could have sexual intercourse with her it could be only Balan cannot be true. As per the evidence of P.W.1 Balan was a married man. He had the niece of the respondent. Hence the allegation that the respondent was refusing the petitioner to have sexual intercourse with him on the ground that she is meant only for Balan has absolutely no basis.

6. *Per contra*, learned counsel for the respondent/husband would submit that the learned trial Judge has given cogent and convincing reasons for granting a decree for divorce and reversing the judgment of the trial court by the appellate court is not justified. In this connection, he drew the attention of this Court to the judgment of the trial court, wherein the trial Judge has observed that it is the admitted fact that the appellant/ wife was not living with her husband and she was living with her parents. It is in evidence that the appellant and her parents scolded and abused the respondent that he is not impotent. It is only the respondent/husband who had filed the petition at the first instance. In his petition he has alleged that the appellant/ wife has abused him as an impotent person and she did not permit him to have sexual

intercourse with her. Further, it is alleged by him that his wife was having illicit intimacy with one Balan. In the counter filed by the appellant/wife in O.P.No.119 of 1978 she has stated that her husband is an impotent person and that he refused to undergo medical test. On a petition, respondent/husband was examined by a Medical Board and submitted a report. It is stated in the report that the respondent/ husband is capable of normal sexual intercourse and he has no physical or mental disorder which would prevent him from normal sexual intercourse, neither he has any congenital defect and nor there is any evidence to show that he was at any time sexually impotent. Further even after filing of the petition there is nothing on record to show that there is any *bona fide* attempt on the part of the appellant to show that she was willing to have sexual intercourse with the petitioner. The appellant/wife has filed O.P.No.56 of 1981 on 22.2.1981 and in the said petition she has stated that since the Medical Report states that the respondent/ husband is a fit person to lead a married life, she is willing to live with the respondent/husband. It is clear from this that the appellant/ wife has abused the respondent/husband as impotent person and caused mental and physical cruelty to him. In this connection, learned counsel for the respondent/husband drew the attention of this Court to a decision of the Delhi High Court in the case of *Anil Bhardwaj v. Smt. Nirmlash Bhardwaj*, A.I.R. 1987 Del. 111, wherein the said court has held as follows:

"...refusal to have sexual intercourse amounts to cruelty on the other party. This was so in *Rita Nijhawan's case*, A.I.R. 1973 Del. 200. In para.21 at page 209 this is what the court had said:

"21. Thus the law is well settled that if either of the parties to a marriage being in a healthy physical capacity refused to have sexual intercourse the same would amount to cruelty entitling the other party to a decree. In our opinion, it would not make any difference in law whether denial of sexual intercourse is due to weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any wilful refusal by the respondent; this is because in either case the result is the same namely frustration and misery to the appellant due to denial of normal sexual life and hence cruelty. Prior to *Gollin's case*, 1963 All E.R. 966, in 1963 the Courts in England had

been taking the view that unless cruelty was aimed at by either of the parties the same could not amount to cruelty. But that is no longer a correct view and therefore subsequently the courts have proceeded on the basis that it is not necessary to prove the culpability of the respondent in order to hold him guilty of cruelty. What has to be found in each case is whether the act is such which the complaining partner should not be asked to endure. The Court of Appeal in *Sheldon v. Sheldon*, (1966) 2 All E.R. 257, granted a decree to the wife on the finding that the husband's persistent refusal of sexual intercourse over a long period without excuse caused a grave injury to the wife's health and amounted to cruelty on his part. Lord Denning observing that:

'the categories of cruelty are not closed. The persistent refusal of sexual intercourse is not excluded.'

Later on this Court reiterated what has been said in *Rita Nijhawan's case*, A.I.R. 1973 Del. 200. In *Aima Parkash Arora v. Neelam*, (1981) 2 D.M.C. 43, a decree was refused only because the husband had failed to prove that there was denial of sexual intercourse. In *Shakuntala Kumari v. Om Prakash*, A.I.R. 1981 Del. 53; 1981 Rajadhami L.R. 121. Justice Leila Seth held that if the wife is not willing for normal sexual relations, it is cruelty on the husband. Para. 25 of that judgment reads as under:

"A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case. But wilful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty, especially when the parties are young and newly married.

Applying the ratio of the said decision to the facts of the present case, it cannot be said that the order passed by the court below granting divorce is either illegal or improper or the same requires any interference by this Court. Thus on a careful consideration, this Court is of the view that both the appeals filed by the appellant/ wife are devoid of any merits in substance. Consequently, the appeals are dismissed. However, the parties are directed to bear their respective costs.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan, J.*

C.R.P.No.3741 of 1986 24th September, 1993.

K.N.Gunalan represented by his power agent Parimelazhagan and another ...*Petitioners*
v.

C.Santhalingam ...*Respondent.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(2)(i) - Tenant defaulting in payment of monthly rent - Payment of arrears in lump-sum - Whether wilful default.*

The course of conduct as seen will show that the tenant had been supinely indifferent in the matter of payment of rent. The fact that he has been irregular in making payment raising a false plea that he used to pay only in lumpsum once in a few months will show that he has committed default wilfully. [Para. 7]

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(2)(i) - Eviction order passed against tenant - Tenant subsequently purchasing landlord's property - Succeeding in suit for specific performance - Whether tenant not liable to be evicted.*

Whatever may be the merits of the case of the tenant in the suit for specific performance, is so far as these proceedings are concerned the respondent is a tenant of the petitioner and he is liable to be evicted as he has committed wilful default. If ultimately the decree for specific performance obtained by the respondent is confirmed in the appellate court, it will be open to him to execute that decree and realise the consequential benefits and that will not be a ground for resisting this eviction petition filed by the landlord. [Para. 9] *R.Balasubramaniam* for K.C.Jacob, for Petitioners.

S.M.Loganathan, for Respondent.

The Court made the following

ORDER: The landlord is the petitioner. The petition for eviction has been filed on the ground of wilful default in payment of rent for the period 1.7.1976 to 1.4.1980. The petition was filed on 24.1.1980. The monthly rent was Rs.125. The total amount due for the said period was Rs.5,875 out of which the tenant had paid Rs.3,725 in dribblets on

various occasions. The balance due as on the date of the filing of the petition was Rs.2,150.

2. Before the filing of the petition, the landlord had issued a notice on 3.8.1979 terminating the tenancy with the end of August, 1979. He had called upon the tenant to pay the arrears of rent due as on that date. The amount due on that date was Rs.1,325 which was arrived by deducting a sum of Rs.3,500 which was paid by the tenant by then towards the total rent of Rs.4,825 due for the period 1.7.1976 to 31.7.1979. To the notice dated 3.8.1979, the tenant sent a reply on 25.8.1979 under Ex.A-4 wherein he denied the arrears. He sent a demand draft for Rs.400 in the name of the petitioner's mother. The petitioner did not accept the draft and returned the same.

3. In the petition for eviction, the tenant admitted the ownership of the property with the petitioner and also the relationship of the landlord and the tenant between the petitioner and the respondent. The contention of the tenant is that he used to pay the rent in accumulated sums once in few months and that has been the practice from the inception. According to him, there are no arrears at all. A sum of Rs.375 was paid by him by way of advance and a sum of Rs.3,000 was paid by way of Pagadi to be adjusted in the rent. He claimed that as June, 1976 he was liable to pay Rs.50 by way of arrears and not Rs.200 as claimed by the landlord. It is further stated that a vacant site as taken in addition for a monthly rent of Rs.50. He had paid Rs.150 by way of advance and Rs.275 representing 5 1/2 months rent in advance. Thus, the tenant paid Rs.425. According to him that should be adjusted in the rent due for the building, as the vacant site was not delivered to him. It is the further case of the tenants that Rs.125 was paid to Meenakshi Sundaram, a servant of the petitioner's mother on 28.11.1977.

4. The Rent Controller found that the case of the tenant that rent was being paid in lumpsum was not proved. He relied on the documentary evidence on record and held that rent was being paid monthly and the tenant was bound to pay in every month as and when it accrues. Secondly, it was held that the tenant was guilty of wilful default on the circumstances of the case. Consequently, the Rent Controller ordered eviction.

5. The appellate authority did not disturb the finding that rent is to be paid every month and not in one lumpsum. However, he took a curious view

that on the date of Ex.A-3 the amount due being Rs.1,325 the tenant had sent with his reply Ex.A-4 a sum of Rs.400 leaving a balance of Rs.925. A sum of Rs.425 paid by way of advance for the vacant site should also be deducted and that thus the balance will be Rs.500 only. The appellate authority held that the said sum of Rs.500 represented the arrears of rent which accrued subsequent to Ex.A-3 dated 3.8.1979. He has also held that the conduct of the tenant shows that he is not in wilful default though he has committed default. As regards the subsequent arrears also. The appellate authority has taken the view that if the tenant had any intention not to pay the rent, he would not have paid any amount and that the fact that he had paid some amounts shows that he would not have committed any wilful default. On that finding, the appellate authority has reversed the order of the Rent Controller and dismissed the petition for eviction.

6. On the face of it, the order of the appellate authority is wholly unsustainable. The view taken by him that the balance due of Rs.500 even as calculated by him on 3.8.1979 would represent the arrears accrued subsequent to that date is erroneous. He has himself found that the amount due as on the date of Ex.A-3 was Rs.1,325. When he has deducted a sum of Rs.825 therefrom, naturally it follows that the balance of Rs.500 was due as on that date representing the past arrears. If the tenant had not paid the said amount within two months therefrom, the explanation to the Proviso to Sec.10(2) of the Act would automatically come into play. Hence, the tenant must be held in law to have committed wilful default.

7. Even assuming that the explanation is not applicable to the present case, there is no doubt whatever that the tenant has committed wilful default. The course of conduct as seen from the facts already stated will show that he had been supinely indifferent in the matter of payment of rent. The fact that he has been irregular in making payment raising a false plea that he used to pay only in lumpsum once in a few months will show that he has committed default wilfully. On 3.8.1979, the total amount payable was Rs.4,825 against which he had paid only Rs.3,500 and the balance was Rs.1,325. Even assuming that the adjustment made by the appellate authority for the amount sent by him subsequent to the notice, viz. Rs.400 and a sum of Rs.425 paid by way of advance for the

vacant site is given effect to, there is still a balance of Rs.500. The tenant has no explanation for not paying the same. Even after the said notice dated 3.8.1979, the tenant has again fallen in arrears. In the subsequent period of eight months, the tenant should have paid Rs.1,000 towards the rent but had paid only a total amount of Rs.225 leaving a balance of Rs.775. Thus, on the date of the petition, the total amount due from the tenant was Rs.2,150. If the adjustment of Rs.825 made by the appellate authority is accepted, there will be still a balance of Rs.1,325 as on the date of the petition.

8. There is no valid explanation at all on the part of the tenant for non-payment of the said amount. Hence, I have no hesitation in holding that the tenant has committed wilful default in payment of rent.

9. Learned counsel for the tenant contends that he has obtained a decree for specific performance of an agreement for sale of the vacant site in his favour. It is stated that the said decree been passed in 1992. Learned counsel for the petitioner states that an appeal has already been filed against the said decree. Whatever may be the merits of the case of the tenant in the suit for specific performance, in so far as these proceedings are concerned, the respondent is a tenant of the petitioner and he is liable to be evicted as he has committed wilful default. If ultimately the decree obtained by the respondent is confirmed in the Appellate Court, it will be open to him to execute that decree and realise the consequential benefits and that will not be a ground for resisting this revision petition filed by the landlord.

10. In the result, the civil revision petition is allowed, the order of the appellate authority in R.C.A.No.24 of 1982 on the file of the Sub Court, Kancheepuram is set aside and the order of the Rent Controller, viz., Rent Controller, Kancheepuram in R.C.O.P.No.17 of 1980 is restored. The petitioners will get their costs in the revision petition.

V.K.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Swamidurai, J.

S.A.No.746 of 1982

17th January, 1994.

T.P.Ratnam (died) and others ...Appellants
v.

Pandurangan and others ...Respondents.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act XXIII of 1973) - Landlord filing eviction petitions in respect of superstructures - Eviction ordered - Appeal by tenants dismissed - Superstructures washed away by floods - Tenants receiving subsidies from Government and putting up new superstructures in the same place - Eviction order, if has become inexecutable.

Learned counsel for respondents contended that the three superstructures admittedly have been washed away by flood and these superstructures do not belong to the first defendant and that the decrees in the three H.R.C.O.Ps. have become inexecutable. If the contention of the learned counsel for the respondents is accepted, it will be open to the tenants to destroyed and put up a house of their own and later on claim that the superstructure does not belong to the landlord and that it belongs to them and so, they are not liable to be evicted under the Tamil Nadu Buildings Lease and Rent Control Act. The court is unable to accept the submission made by learned counsel for the respondents. Even if the tenants obtained any subsidy from the Government for the loss of the superstructure it is given only for the loss of superstructure and not to loss of the person. In this case, the respondents received the subsidy from the Government. Therefore, whatever subsidy was given by the Government it was for the loss sustained by the owner of the superstructure. Admittedly, the respondents are not the owners of the superstructures and therefore the amount received from the Government is towards loss of the superstructure which admittedly does not belong to the respondents. In the circumstances, the respondents remain as tenants of the superstructures only. The character of the tenants does not belong to the respondents. In the circumstances, the respondents remain as tenants of the

superstructure only. The character of the tenants does not change even if the superstructure is put up by them for the subsidies received from the Government. [Para. 3]

Cases referred to:

Mohammed Sheriff v. P.S. Mohammed Thas Saheb, (1964) 2 M.L.J. 239; A.I.R. 1964 Mad. 453; 77 L.W. 172. [Para. 1]

Ellis and Sons Amalgamated Properties Limited v. Sisman, L.R. (1948) 1 K.B. 653. [Para. 2]

Morles Limited v. Slater, (1950) 1 All E.R. 331. [Para. 2]

Appeal against the decree of the Court of the II Additional Subordinate Judge, Tiruchirapalli, dated 17.11.1980 and passed in Appeal Suit No.148 of 1980 preferred against the decree of the Court of the I Additional District Munsif, Tiruchirapalli, dated 14.9.1979 in Original Suit No.17 of 1978.

The Court delivered the following

JUDGMENT: The first defendant in O.S.No.17 of 1978 on the file of learned I Additional District Munsif, Tiruchirapalli has filed this second appeal. The plaintiffs have filed a suit for declaration of their title over the superstructure mentioned in the plaint schedule property and also for a declaration that the decree passed in H.R.C.O.Ps. 334, 335 and 336 of 1973 have become inexecutable and for permanent injunction restraining the first defendant and his men from interfering with the possession of the plaintiffs upon the said superstructures by executing the orders passed in the said H.R.C.O.Ps. It is the case of the plaintiffs that all the superstructures originally belonged to the first defendant have been washed away in floods in 1977 and that they had received subsidies from the Government and put up new superstructures over the same. Therefore, it is their case that the superstructures do not belong to the defendants at all and so the decrees in the H.R.C.O.Ps. have become inexecutable and the defendants have to file only the suits for getting possession of the suit land from them. The fact that the superstructures were washed away by floods is not disputed by the defendants. Originally, the first defendant was the landlord in respect of the superstructures in which these plaintiffs have become tenants. It is also admitted that the abovesaid H.R.C.O.Ps. were filed for eviction and that learned Rent Controller ordered eviction in all the three H.R.C.O.Ps. on 23.12.1974 after contest. Against such orders, appeals were preferred by the plaintiffs and they

were also dismissed. It appears, at the request of the plaintiffs, the appellate authority granted further time for evicting tenants. Only under these circumstances, the suits have been filed. The trial court accepted the case of the plaintiffs and decreed the suit with costs as against the first defendant. The suit was dismissed against the second defendant without costs. The first defendant filed A.S.No.148 of 1980 before learned II Additional Sub Judge, Tiruchirapalli who also confirmed the view taken by the trial Court and dismissed the appeal. Learned appellate Judge has relied upon the decision in *Mohammed Sheriff v. P.S. Mohammed Thas Saheb*, (1964) 2 M.L.J. 239; A.I.R. 1964 Mad. 453; 77 L.W. 172, for the proposition that the superstructures do not belong to the first defendant as on the date of filing of the suit and so the first defendant as landlord cannot execute the decree obtained by him in the abovesaid three H.R.C.O.Ps. Learned counsel for the respondents contended that the three superstructures admittedly have been washed away by floods and these superstructures do not belong to the first defendant and that the decree in the three H.R.C.O.Ps., have become inexecutable.

2. I have gone through the judgment cited supra equivalent to *Mohammed Sheriff v. P.S. Mohammed Thas Saheb*, (1964) 2 M.L.J. 239; A.I.R. 1964 Mad. 453; 77 L.W. 172. Learned Judge (Venkatadri, J.) has referred to two judgments reported in *Ellis and Sons Amalgamated Properties Limited v. Sisman, L.R. (1948) 1 K.B. 653* and *Morles Limited v. Slater, (1950) 1 All E.R. 331*. After going through the judgments carefully, I am of the opinion that the judgment rendered in (1950) 1 All E.R. 331, is under the following circumstances:

"In this case, the premises were damaged by enemy action and become uninhabitable but the tenant was able and continued to use them for the purpose of his business. The landlords gave the tenant a notice in writing to quit the premises and claimed possession. It was held by the court of appeal that the premises were originally let as a dwelling house within the Rent Acts; they remained the same identifiable premises; the fact that owing to the damage the tenant was prevented from living in the premises did not change the character of the letting. What they pointed out is that the premises are still identifiable and still habitable and the tenant has got the right to live in the

premises.”

In *Ellis and Sons Amalgamated Properties Limited v. Sisman, L.R. (1948) 1 K.B. 653*, the facts of the case are briefly stated as follows:

“The original house having ceased to exist, and the tenant not being entitled to claim that the protection of the Acts and throughout attached to the plot of land, he has also failed in his contention that the building in the course of erection on these premises was at the material date a dwelling house let as a separate dwelling. That being so, it seems to me that, however, unfortunately it may be for him, he has no claim to occupy these premises now or at any future time. If this is a matter which calls for remedy in view of the unfortunate position of tenants whose houses have been destroyed, the remedy must be provided by the legislature. It is not for these courts, in an attempt to do what may appear to be justice to tenants, to put a strained and unnatural interpretation upon the language of these Acts of Parliament.”

3. I am of the opinion that the decision rendered by learned single Judge of this Court, cited supra, will apply to the facts of this case. If the contention of learned counsel for the respondents is accepted that the superstructures do not belong to the first defendant at present, then it will be open to the tenants to destroy the house by themselves (or) allow the house to be destroyed and put up a house of their own and later on claim that the superstructure does not belong to the landlord and that it belongs to them and so that they are not liable to be evicted under the Tamil Nadu Buildings Lease and Rent Control Act. I am unable to accept the submission made by learned counsel for the respondents. Even if the tenants obtained any subsidy from the Government for the loss of superstructures it is given only for the loss of the superstructures and not to loss of the person. In this case, the plaintiffs received the subsidy from the Government. Therefore, whatever subsidy was given by the Government, it was for the loss sustained by the owner of the superstructure. Admittedly, plaintiffs are not the owners of the superstructures and therefore the amount received from the Government is towards loss of the superstructure which admittedly does not belong to the plaintiffs. In the circumstances, the plaintiffs remain as tenants of the superstructures only. The character of the tenants does not change even if the

superstructure is put up by them from the subsidies received from the Government. In the circumstances, I am unable to accept the view taken by the lower courts. Hence, the decree and judgments of the courts below are set aside. The second defendant has stated in the written statement that if the plaintiffs are deserved persons, they will be allotted house sites in the northern half. There is no representation on behalf of the fourth respondent herein. In view of the admission made by the second defendant in the written statement before the trial court, I direct that the second defendant may accommodate the plaintiffs by allotting house sites at the northern half of the suit survey No. as admitted by them in the written statement.

4. In the result, the second appeal is allowed. No costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.3419 of 1993 1st December, 1993.

Andichi Ammal and another ...*Petitioner*
v.

Periya Muniyandi Moopar ...*Respondent.*

(A) *Civil Procedure Code (V of 1908), O.18, Rule 17*
- *Provision under - If can be invoked only by court and not by party.*

In view of the decisions of the Full Bench in *Shyamapada Neogy v. A.A. Biswas*, 71 C.W.N. 747. It cannot be said provisions of O.18, Rule 17, Civil Procedure Code can be invoked only by the court and not by the party. [Para. 4]

(B) *Civil Procedure Code (V of 1908), O.41, Rule 27*
- *Case remanded to trial court - For disposal giving liberty to parties to take some fresh witnesses and fresh documents - Plaintiff-respondent filing peti-*

nion to recall a witness for further cross-examination without giving reasons for doing so - Maintainability.

The appellate court had remitted the case back to the trial court and had given opportunity to adduce fresh evidence by examining fresh witnesses and filing fresh documents. That does not mean that fresh evidence by cross-examining the witness already examined was ruled out. When the matter is pending before the trial court for fresh disposal giving liberty to both parties to adduce fresh evidence will have to be adduced. It can be in the shape of fresh witnesses and documents and as well by eliciting further evidence from the witnesses already examined. Emphasis is to adduce fresh evidence for the purpose of determining the point in issue between the parties. While so, evidence cannot be shut out during trial on technical grounds. [Para. 5]

Cases referred to:

Shyamapada Neogy v. A.A. Biswas, 71 C.W.N. 747. [Para. 4]

Shankara Bhat v. Bheema Bhat, A.I.R. 1974 Karn. 123. [Para. 4]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Aruppukottai, dated 14.7.1993 and made in I.A.No.1078 of 1993 in O.S.No.229 of 1983.

S.Natarajan, for Petitioners.

M.S.Sampath (Caveator), for Respondent.

The Court made the following

ORDER: This civil revision petition is directed against the order passed in I.A.No.1078 of 1993 in O.S.No.229 of 1983 on the file of District Munsif, Aruppukottai.

2. Short facts are: The respondent has filed a suit for declaration and title and for recovery of possession and damages. That was resisted by the petitioners. After elaborate trial, the trial court decreed it. The petitioners took it on appeal. Learned appellate Judge had allowed the appeal, set aside the judgment and decree of the trial court and remitted the case back to the trial court for fresh disposal according to law giving liberty to parties to take some fresh witnesses and fresh documents. Thereafter, the respondent had filed a petition under O.18, Rule 17, C.P.C., praying to recall D.W.1 for further cross-examination. That was opposed by the petitioners. After hearing both parties, the learned District Munsif had al-

lowed the petition. Aggrieved by the said order, this revision has been filed.

3. Mr.S.Natarajan, learned counsel appearing for the petitioners would submit that (1) the provisions of O.18, Rule 17, C.P.C., can be invoked only court and not by the party; (ii) no reasons are given in the affidavit in support of the application as to why D.W.1 should be further cross examined; and (iii) the scope of remand does not go beyond examination of fresh witnesses and adducing fresh documents and not for recalling witnesses already examined.

4. I have carefully considered the submissions made by Mr.S.Natarajan. To consider his submission No.(i), O.18, Rule 17 need extraction. It reads as follows:

"17. Court may recall and examine witness: The court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the court thinks fit."

It is apparent that recalling of a witness at any stage is the inherent power of the court. In *Shyamapada Neogy v. A.A. Biswas*, 71 C.W.N. 747, the Calcutta High Court had occasion to consider O.18, Rule 17, C.P.C. In it the learned Judge had held as follows:

"No doubt, the court can invoke its power under O.18, Rule 17, even at the instance of a party. But that it can do, in its discretion, when an unforeseen situation has developed or even when an inadvertent omission is there, provided that it causes no surprise or prejudice to the other party."

In *Shankara Bhat v. Bheema Bhat*, A.I.R. 1974 Karn. 123, the learned single Judge has given his view as follows:

"However, the said rule, in my opinion, makes it abundantly clear that the right to put questions to the witness recalled under Rule 17 is given only to the court and even cross-examination is not ordinarily permitted on the answers given to such questions, without the leave of the court. Under that rule therefore, a witness cannot be recalled at the instance of a party for the purpose of examining, cross-examining, or re-examining, and that rule is not intended to serve such purpose, and the purpose for which that rule can as invoked is the one that is indicated above."

With respect, I do not agree with the view of the learned Judge. With respect, I am in full agreement with the view expressed in *Shyamapada Neogy v. A.A. Biswas*, 71 C.W.N. 747. Hence, I do not accept the submission made by Mr. Natarajan that the provisions of O.18, Rule 17, C.P.C., can be invoked only by the court and not by the party.

5. Regarding submission No.(ii), that no reasons are given in the affidavit in support of the application as to why D.W.1 should be further examined, I shall refer to the relevant allegations made in the said affidavit. In para.3 of the affidavit it is stated that the case has been remitted back by the appellate court for further trial and in order to prove this case and to bring forth certain facts and place it before the court D.W.1 is to be recalled. The affidavit gives out for what purpose D.W.1 was sought to be recalled. At this juncture, I would like to point out that the appellate court had remitted the case back to the trial court and had given opportunity to adduce fresh evidence by examining fresh witnesses and filing fresh documents. That does not mean that no fresh evidence by cross-examining the witness already examined was ruled out. When the matter is pending before the trial court for fresh disposal giving liberty to both parties to adduce fresh evidence will have to be adduced. It can be in the shape of fresh witnesses and documents and as well by eliciting further evidence from the witnesses already examined. In para.13 of the judgment, the appellate court has pointed out that the judgment is to as rendered regarding the land, which was owned by late Perumal Moopar and for fixing the past profits and the trial court has to give finding after considering the documents and evidence in that regard. That would mean that the evidence already available was not sufficient and so the order of remand was made. In that background, the allegations made in the affidavit in support of the application is to be considered and while so, I cannot accept the submission that no reasons are given in the affidavit in support of the application as to why D.W.1 should be recalled. Regarding submission No.(iii), as I have already pointed out, there is no bar imposed by the appellate court, for recalling and examining the witness already examined. Emphasis is to adduce fresh evidence for the purpose of determining the point in issue between the parties. While so, I am clear that evidence cannot be shut out during trial on tech-

nical ground.

6. Since none of the submissions made by Mr. Natarajan finds acceptance with me, this revision petition, which does not have merits, does not deserve admission and shall stand dismissed.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: S.M. Ali Mohamed, J.

C.R.P.No.245 of 1987 19th November, 1993.

Karra Kondamma

...Petitioner

v.

Karra Nagamma

...Respondent.

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act XXIII of 1973*, Sec.10(2), Explanation - Tenant under arrears of rent - Landlord issuing notice - Filing petition for eviction before expiry of two months after notice - Wilful default on part of tenant - If can be presumed.

In the instant case, the landlord has filed a petition for eviction of the tenant before the expiry of two months for the tenant to tender the arrears of rent. As such, the landlord has not complied with the provisions contained in Explanation to Sec.10(2) of the Act and he is not entitled for the benefit of presumption of wilful default on the part of the tenant.

[Para. 5]

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act XXIII of 1973*, Sec.25 - Delay in payment of arrears of rent by tenant - Condonation of - Discretion - If can be exercised by High Court in revision.

The court is of the view that the discretion to condone the delay in payment of arrears has to be exercised by the Rent Controller and the appellate authority specified under the Act. [Para. 5]

Case referred to:

S.Sundaram v. V.R.Pattabiraman, A.I.R. 1985 S.C.

582. [Para. 4]

P.Subba'Reddy, for Petitioner.

W.S.Venkataraman, for Respondent.

The Court made the following

ORDER: This revision petition is against the order in R.C.A.No.5 of 1986 dated 12.11.1986 of the appellate authority under the Tamil Nadu Buildings (Lease and Rent Control) Act.

2. The petitioners herein is the landlord. The petitioner herein filed a petition under Sec.10(2)(i) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as 'the Act') for eviction of the tenant in respect of a residential premises No.16, Perumal Koil Garden, 10th Lane, Sowcarpet, on the ground of wilful default. The Rent Controller allowed the petition. The respondent/tenant preferred an appeal before the appellate authority in R.C.A.No.3 of 1986 and the same was allowed. Aggrieved by the said order of the appellate authority, the petitioner/landlord, has preferred this revision petition.

3. It is vehemently contended by the learned counsel for the petitioner that the impugned order of the appellate authority is erroneous and unsustainable in law. The learned counsel submitted that there was arrears of rent for a period of six months from March, 1984 to August, 1984 and the petitioner/landlord issued a notice under Ex.P-8 dated 6.9.1984 in accordance with the Explanation to Sec.10 of the Act, giving time to the tenant to tender the rent within a period of two months. However, the tenant did not tender the rent within the said period. Therefore, a petition was filed before the Rent Controller by the petitioner/landlord on 29.10.1984 and after the filing of the rent control petition for eviction of the tenant, the arrears of rent was received by the petitioner/landlord and there was a delay of 146 days in tendering the amount. The learned counsel therefore contended that there is wilful default upon the facts and circumstances of the case and the order of the Rent Controller was justified when it held that the respondent/tenant did not tender the arrears of rent within two months of issue of notice Ex.P-8 dated 6.9.1984 and the appellate authority in reversing the finding of the Rent Controller on the ground that the petitioner/landlord has not let in evidence to prove that the payment was given beyond two months and the appellate authority was of the view that there was a delay of few days in tendering of the rent to the

landlord.

4. On the other hand, the learned counsel for the respondent/tenant submitted that both the Rent Controller and the appellate authority erred in law in assuming that the facts of the instant case will come under Explanation to Sec.10(2) of the Act. In the instant case, the landlord after issuing a notice under Ex.P-8 dated 6.9.1984 has filed the petition for eviction before the expiry of two months, to tender the rent and as such, the landlord is not entitled for the benefit of presumption of wilful default given in the Explanation to Sec.10 of the Act. Therefore, both the Rent Controller and the appellate authority erred in assuming that the facts of the instant case came under the benefit of Explanation to Sec.10(2) of the Act. In this connection, the learned counsel for the respondent cited the ruling of the Supreme Court reported in *S.Sundaram v. V.R Pattabiraman*, A.I.R. 1985 S.C. 582 and in particular para. 62 wherein the Supreme Court has observed as follows:

(1) Where no notice is given by the landlord in terms of the Explanation, the Controller having regard to the four conditions spelt out by us has the undoubted discretion to examine the question as to whether or not the default committed by the tenant is wilful. If he feels that any of the conditions mentioned by us is lacking or that the default was due to some unforeseen circumstances, he may give the tenant a chance of *locus poenitentiae* by giving a reasonable time, which the statute puts at 15 days, and if within that time the tenant pays the rent, the application for ejectment would have to be rejected.

(2) If the landlord chooses to give two months' notice to the tenant to clear up the dues and the tenant does not pay the dues within the stipulated time of the notice then the Controller would have no discretion to decide the question of wilful default because such a conduct of the tenant would itself be presumed to be wilful default unless he shows that he was prevented by sufficient cause or circumstances beyond his control in honouring the notice sent by the landlord."

5. There is force in the above contention of the learned counsel for the respondent/tenant. In that instant case, as the landlord failed to comply with the provisions of the Explanation to Sec.10(2) of the Act, he is not entitled to the benefit of

presumption of wilful default in payment of rent by the tenant. In the instant case, the landlord has filed a petition for eviction of the tenant before the expiry of the period of two months for the tenant to tender the arrears of rent. As such, the landlord has not complied with the provisions contained in Explanation to Sec.10(2) of the Act, and he is not entitled for the benefit of presumption of wilful default, on the part of the tenant. The discretion of the Rent Controller to condone the delay in payment of arrears of rent by the tenant is much wider than when a notice issued in accordance with the Explanation to Sec.10(2) of the Act. The learned counsel for the respondent submitted that upon the facts and circumstances of the case, there is only a delay of 14 days in payment of arrears and this delay ought to be condoned. However, I am of the view that the discretion to condone the delay in payment of arrears has to be exercised by the Rent Controller and the appellate authority specified under the Act.

6. In view of the above, the impugned order is set aside and the matter is remitted back to the Rent Controller to the limited extent to exercise his discretion to condone the delay in payment of arrears of rent by the tenant in accordance with law. Accordingly, this revision petition is allowed. Upon the facts and circumstances of the case, there shall be no order as to costs. The Rent Controller is directed to dispose of the petition expeditiously.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

C.R.P.No.4766 of 1987 21st September, 1993.

Marudavccran Moopan ...*Petitioner*
v.
U.K.Krishnan ...*Respondent.*

Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act (XXXVIII of 1990), Sec.7(5)(ii) - Landlord filing petition for eviction against a tenant on ground of arrears of rent - Revenue court directing deposit of Rs.5,135 on or before 31.5.1987 in default ordering eviction - Arrears not deposited - Landlord filing execution petition - Tenant paying Rs.1,570 and praying time for payment of balance, but not deposited or paid - Tenant, if can claim benefit of Sec.7(5)(ii).

The plain language of Sec.7(5)(ii) the Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act would show that the pre-requisite for claiming benefits of the said sub-section are, (i) the cultivating tenant shall pay or deposit under this Act, (ii) the said deposit or payment shall be the current rent and one third of the arrears of rent, (iii) application should be filed by the person affected by the order. So far as deposit or payment 'under this Act' is concerned, it shall be in accordance with Sec.7, sub-sec.(2). In the instant case, there is no material to show that there was any such payment or deposit as contemplated under Sec.7, sub-sec.(2). Further more, what has been contemplated was payment or deposit of the current rent and one-third of the arrears of rent. There is neither any material to show that the current rent and one-third of the arrears of rent were paid or deposited. The petitioner would submit that this is a case where eviction order was passed for arrears of rent and that arrears of rent were all paid and so the condition stipulated in Sec.7(2) was satisfied. The court is unable to accept this submission for the reason that the language of Sec.7(5)(ii) would show that the payment of deposit under this Act shall be not only the arrears of rent, but also the current rent. So far as the main part of Sec.7(5)(ii) is concerned, it would show that it can be pressed into service in a case where eviction of a cultivating tenant for non-payment of such current rent or such arrears of rent. Both cases are covered inasmuch as the word 'or' was used. But regarding the subsequent part of Sec.7(5)(ii), the word 'or' is not there. But the word used is 'and'. Payment or deposit of current rent and one-third of the arrears of rent was a condition precedent for claiming the benefits. For the reason, the court is unable to accept the submission of the petitioner that the arrears of rent were paid and that would be sufficient to claim the benefits of Sec.7(5)(ii). Neither any

application was filed by the revision petitioner claiming the benefits of this provision. For the reasons given above, the court is clear that in this revision, the revision petitioner claim the benefits under Sec.7(5)(ii) of the Act. [Paras. 5, 6, 7 & 8] Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the Special Deputy Collector (Revenue Court), Lalgudi, dated 27.10.1987 and made in E.P.No.325 of 1987 in Petition No.1379 of 1986.

M.S.Umapathy, for Petitioner.

S.Parathasarathy, for Respondent.

The Court made the following

ORDER: This civil revision petition is directed against the order passed in E.P.No.325 of 1987 in Petition No.1379 of 1986 on the file of Special Deputy Collector (Revenue Court), Lalgudi.

2. Short facts are: The respondent had filed petition for eviction against the revision petitioner on the ground of arrears of rent. After enquiry, the Revenue Court had found that there was arrears of rent to the tune of Rs.5,135 and had passed an order on 21.4.1987, directing deposit of the said amount on or before 31.5.1987, in default of which, order of eviction will follow. The revision petitioner had not deposited the arrears within the period specified viz. 31.5.1987. Thereafter, the respondent filed E.P.No.325 of 1987 for eviction. In that E.P. he paid Rs.1,570 and had prayed for time for payment of the balance. The petition was posted finally on 27.10.1987, on which date, he did not appear in court. Holding that still a sum of Rs.3,565 was not paid by the respondent the court below had ordered eviction. Aggrieved by the said order, this revision petition is filed.

3. Mr.Umapathy, the learned counsel appearing for the revision petitioner, would submit that the arrears pointed out in the order of the court below, viz. Rs.3,565 was not correct and that the receipt, the copy of which is filed in page 3 of the typed set, would show that balance yet to be paid was only Rs.2,415 and that by virtue of the order passed in C.M.P.No.20420 of 1987, he deposited in the court below, the admitted arrears of Rs.2,115 and that no arrears was now due. He would further submit that by virtue of Sec.7, sub-sec.(5) of the Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act, 1990 (Act 38 of 1990), if before the date of the publication of this Act, any decree or order had been passed in any proceeding for eviction of a cultivating tenant for non-payment of

such current rent or any arrears of rent, the court shall, if the cultivating tenant pays or deposits under this Act, the current rent, and one-third of the arrears of rent, the order of eviction cannot be executed and so in as much as arrears of rent were paid, the order of eviction passed by the court below has to be set aside. *Per contra*, Mr.Parthasarathy, the learned counsel appearing for the respondent, would submit that only in a case where the current rent and one-third of the entire arrears of rent were deposited or paid, as per the provisions of the Act, for which the time limit has been fixed, one can claim benefits under Sec.7(5) referred to supra and in the instant case those condition were not complied with and as such the revision petitioner cannot urge this ground.

4. I have carefully considered the submissions made by rival counsels. For considering the above submission, Sec.7, sub-secs.(1), (2) and (5) are relevant and need extraction. They are as follows:

"7. (1) All arrears of rent payable by a cultivating tenant to the landlord for the said years and outstanding on the date of the publication of this Act, shall be deemed to be discharged, whether or not a decree or order has been obtained therefor, if such cultivating tenant pays to the landlord or deposits in the court or before the competent authority, to the amount of the landlord in the manner specified in sub-secs.(2) and (3),---

(a) the current rent; and

(b) one third of the total amount of arrears of rent for the said years without interest (hereinafter referred to as the one-third of the arrears of rent).

(2) Any cultivating tenant may pay to the landlord or deposit in the court or before the competent authority to the account of the landlord,--

(b) the one-third of the arrears of rent in five equal annual instalments as specified below:

(i) the first instalment, on or before the 31st day of March, 1991;

(ii) the second instalment, on or before the 31st day of March, 1992;

(iii) the third instalment, on or before the 31st day of March, 1993;

(iv) the fourth instalment, on or before the 31st day of March, 1994; and

(v) the fifth instalment, on or before the 31st

day of March, 1995.

(5) If before the date of the publication of this Act, any decree or order has been passed in any suit or proceeding--

(i) for the recovery of the current rent or any arrears of rent referred to in sub-sec.(4); or
(ii) for the eviction of a cultivating tenant for non-payment of such current rent or any such arrears of rent,

the court or the competent authority shall, if the cultivating tenant pays or deposits under this Act, the current rent and the one-third of the arrears of rent and on the application of any person affected by such decree or order whether or not he was a party thereto, vacate the decree or order in so far as such decree or order relates to such recovery or eviction."

5. The plain language of Sec.7(5)(ii) would show that the pre-requisite for claiming benefits of the said sub-section are;

(i) the cultivating tenant shall pay or deposit under this Act;

(ii) the said deposit or payment shall be the current rent and one-third of the arrears of rent;

(iii) application should be filed by the person affected by the order-

6. So far as deposit or payment "under this Act" are concerned, it shall be in accordance with Sec.7, sub-sec.(2), which I have extracted above. In the instant case, there is no material to show that there was any such payment or deposit as contemplated under Sec.7, sub-sec.(2).

7. Further more, what has been contemplated was payment or deposit of the current rent and one-third of the arrears of rent. There is neither any material to show that the current rent and one-third of the arrears of rent were paid or deposited. Mr.Umapathy, would submit that this is a case where eviction order was passed for arrears of rent and that arrears of rent were all paid, as stated by him supra and so the condition stipulated in Sec.7(2) was satisfied. I am unable to accept this submission for the reason that language of Sec.7(5)(ii) would show that the payment of deposit under this Act shall be not only the arrears of rent, but also the current rent. So far as the main part of Sec.7(5)(ii) is concerned, it would show that it can be pressed into service in a case where eviction of a cultivating tenant for non-payment of such current or such arrears of rent. Both cases are covered

inasmuch as the word 'or' was used. But regarding the subsequent part of Sec.7(5)(ii), the word "or" is not there. But the word used is "and". Payment on deposit of current rent and one-third of the arrears of rent was a condition precedent for claiming the benefits. For the reasoning, I am unable to accept the submission made by Mr.Umapathy that the arrears of rent were paid and that would be sufficient to claim the benefits of Sec.7(5)(ii).

8. Neither any application was filed by the revision petitioner claiming the benefits of this provision. For the reasons given above, I am clear that in this revision, the revision petitioner cannot claim the benefits under Sec.7(5)(ii) of the Act, I do not find either any other ground to sustain this revision.

9. In view of the above, the civil revision petition fails and shall stand dismissed. No costs. The revision petitioner is at liberty to take any steps in this regard, if it is open to him under law.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *Bakthavatsalam, J.*

W.P.No.16514 of 1992 and Contempt Application No.392 of 1993 *9th December, 1993.*

Sri Arulmighu Sundara Mahalingaswamy Temple, Sathuragiri Hills, Madurai District represented by its hereditary trustee Sri Dorairaj alias Beriaswamy alias Paradesi *...Petitioner v.*

State of Tamil Nadu represented by its Secretary to Government, Commercial Taxes and H.R. & C.E. Department, Madras and others

...Respondents.

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.45 - Tamil Nadu Hindu Religious and Charitable Endowments Act (XXIV of 1976), Sec.11(2) - Tamil Nadu Hindu Religious and Charitable Endowments Act (XLVI of 1991), Secs.61 and 63 - G.O.Ms.No.763, Commercial Taxes and Hindu Religious and Charitable Endowments Department, dated 3.6.1976 - Executive Officer appointed to Hindu temple - Hereditary trustee of temple not challenging order - Order becoming final - Another hereditary trustee, if can challenge order - Effect of Secs.61 and 63 of Act XLVI of 1991.

There is no doubt that "K" had claimed to be the hereditary trustee when the impugned order (G.O.Ms.No.763, dated 3.6.1976) came to be passed in the year 1976 and that he died in the year 1981. He never thought of challenging that order and such that order has become final. Act XXIV of 1976 was passed during emergency and under Sub-sec.(2) of Sec.11 of that Act, Executive Officer was appointed for several institutions in Madurai and Ramanathapuram districts by G.O.Ms.No.763, Commercial Taxes and Religious Endowments Department, dated 3.6.1976. One such institution is the petitioner institution. This Act XXIV of 1976 expired due to efflux of time in the year 1981. Subsequently, an Act was passed in Tamil Nadu Act (XLVI of 1991) and under Sec.61 of the Act XLVI of 1991, non-hereditary trustees ceased to hold office. This Act came into effect during November, 1991. Under Sec.63 of the Act XLVI of 1991, if there is a vacancy occurred under Sub-sec.(1) of Sec.63 within a period of one-year from the date of commencement, it shall be filled up by notification. Even if it is taken that the third respondent is a Fit Person or an Executive Officer, the Court is of the view that effect is to be given by the respondents by Sec.61 of Act XLVI of 1991 by appointing non-hereditary trustees as the case of the respondents seems to be that the petitioner is not a non-hereditary trustee. [Para. 8]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent made in and relating to G.O.Ms.No.763, dated 3.6.1976, Commercial Taxes and Hindu Religious Endowments Department, dated 3.6.1976 insofar as it relates to the petitioner herein and

quash the same, etc.

B.Kumar, for Petitioner.

V.Raghupathy, Additional Government Pleader, for Respondent No.1.

R.Alagar, Senior Counsel for S.Krishnaswamy, for Respondent No.2.

P.M.Baskaran, for Respondent No.3.

The Court made the following

ORDER: Though the contempt application was filed and came up for hearing, since the writ petition falls within a short compass, the writ petition is taken up for final hearing.

2. The petitioner challenges a Government Order passed in G.O.Ms.No.763, dated 3.6.1976, Commercial Taxes and Hindu Religious and Charitable Endowments Department, dated 3.6.1976 by which a Fit Person was appointed for the petitioner institution. In April, 1976, an Executive Officer was appointed under the Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act 22 of 1959) (hereinafter referred to as the "Act 22 of 1959"). The petitioner challenge the order of appointment of the Executive Officer by way of writ petition, but it was dismissed on the ground that the petitioner can move the Government under the provisions of Act 22 of 1959. The petitioner challenged by way of filing suits in O.S.No.324 of 1976 on the file of Sub Court, Madurai for declaration that the order appointing Executive Officer void and certain other reliefs and also O.S.No.267 of 1976 to set aside and declare as nullity the proceedings connected with Sec.101 of the H.R. and C.E. Act. By common judgment dated 16.2.1978 it was held that the petitioner institution always had hereditary trustee and there has been usage in the institution to appoint Sishyas as heirs/successors and that the order of appointment under Sec.45 of the Act is void and violative of principles of natural justice. However, the suits were dismissed on the ground that they were barred by Secs.108 and 111 of H.R. and C.E. Act. Against the said judgment of the lower court, first appeals were filed in A.S.No. 546 of 1978 and 721 of 1980. By common judgment in the above first appeals, Bellie, J. dismissed the appeals taking the view that suits themselves had become infructuous, because the appointment of order purporting to appoint under Sec.45 of the Act, has been superseded directing the Executive Officer to act as Fit person under the Act passed in the year 1976. Learned Judge dismissed the suits

as having become infructuous. At this stage, the petitioner has come up before this Court challenging the impugned order passed under Sec.11 of Act 24 of 1976 by which the fit person was appointed.

3. The petitioner alleges in the affidavit that the Tamil Nadu Act 24 of 1976 itself is not applicable to the petitioner institution since according to the provisions of the Act, there must be a non-hereditary trustee appointed earlier to the date, the Act came into force and that the institution concerned should not have had hereditary trustee. It is also contended that the Executive Officer was a non-hereditary trustee appointed either under Sec.47 or 49 of the Act and that he was only appointed under Sec.45 of the Tamil Nadu Act 24 of 1976. It is also pointed out that the institution has always had hereditary trustee and such a finding has been rendered by Sub Court, Madurai when the suits were filed. It is also pointed out that the order directing the Executive Officer to function as a Fit Person is also vitiated because the order appointing fit person itself is void. It is also pointed out that the Government cannot assume jurisdictional fact and that if this was a religious institution or samadhi or denominational institution and proceeds to appoint Executive Officer.

4. A counter-affidavit has been filed by the respondents in which it is stated that the petitioner has not obtained a declaration either Sec.63(b) of the Act or under the earlier enactments. It is also claimed that the alleged hereditary trustee Kuzhandainathaswamy received an order on 9.6.1976 and that he has not chosen to challenge the above order till this date. It is also claimed that the present writ petition has to be dismissed on the ground of laches. It is also pointed out in the counter-affidavit that when the Government order was passed, the said Kuzhandainathaswamy was alive and that he has not challenged that order. Though the counter-affidavit refers to certain facts about O.S.Nos.267 and 324 of 1976 on the file of Sub Court, Madurai, I do not think it necessary to detail out the same for the purpose of deciding this case. It is further claimed in the counter-affidavit that on the date of coming into force of Act 24 of 1976, an Executive Officer was appointed as Fit Person and he is functioning from 1.6.1976, it is also stated that the decision of the Board under Act 2 of 1927 was final for the purpose of the Act 22 of 1959. It is also pointed out

that in the earlier suits, *i.e.* in O.S.Nos.6 of 1861 and 149 of 1889, the department was not a party. Obviously, there was no department at all. It is also pointed out in the counter-affidavit that the Executive Officer filed M.P.No.3 of 1976 under Sec.101 of the Act for the issue of certificate, that the said Kuzhandainathaswamy filed O.S.No.267 of 1976 against the said order passed in M.P.No.3 of 1976 and that the plaintiffs were aware of this order and their claims were resisted on the basis of the said order also. It is also pointed out that the suit filed in O.S.No.267 of 1976 for declaration was dismissed. It is also claimed in the counter-affidavit that inasmuch as the petitioner is not the hereditary trustee, he is not entitled to any notice which has been done earlier. It is also pointed out that the Executive Officer was appointed to the temple on 24.4.1976 and then he was appointed as the Fit Person of the said institution, that G.O.Ms.No.763, Commercial Taxes and Religious Endowments, dated 3.6.1976 was served on the petitioner on 9.6.1976 and as such the provisions of the Tamil Nadu Act 24 of 1976 have been given effect to.

5. A counter-affidavit has been filed by the third respondent. It is pointed out that the third respondent is holding office by virtue of G.O.Ms.No.763, dated 3.6.1976 of the first respondent issued in exercise of power conferred on the Government by Sec.11(2)(b) of the Act 24 of 1976. It is also pointed out that the alleged hereditary trustee Kuzhandainathaswamy received the order on 9.6.1976, that he did not challenge the order and that when he himself did not challenge the order, his heirs cannot challenge the order. It is also pointed out that merely because a temple is declared an excepted one, it does not mean to hold that the petitioner is hereditary trustee. It is also pointed out that the trial court in O.S.No.267 of 1976 and in O.S.No.324 of 1976, has held that the office cannot be held as hereditary. It is also pointed out that there is no judgment declaring the office as hereditary and that the only judgment in which there is a finding does not bind the Government because Government is not a party. It is also pointed out that Executive Officer was appointed under Sec.11 of the Act 24 of 1976 and that even if the appointment as a Fit Person cannot be challenged on this ground, because the Government can appoint any person as Fit Person. It is also claimed in the counter-affidavit that in view of

dismissal of W.P.No.1865 of 1976 and dismissal of O.S.No.324 of 1976, the petitioner cannot collaterally attack this validity of the order passed in the year 1976. The issue with regard to laches also raised in the counter-affidavit. It is also stated that the impugned order was passed on 3.6.1976, that it has been served on the incumbent on 9.6.1976, that it was relied on as a ground in M.P.No.3 of 1976 passed on 28.6.1976 for grant of certificate and as such this order cannot be quashed unless and until the petitioner gets an order that he is a hereditary trustee. It is also claimed that the petitioner's application in O.A.No.63 of 1976 for declaration that the office is hereditary was allowed to be dismissed for default.

6. Mr.B.Kumar, the learned counsel for the petitioner vehemently contends that when the petitioner is the hereditary trustee of the temple, the impugned order passed in the year 1976 is liable to be quashed as the Act will not be applicable where there is no hereditary trustee and that there are clear findings by the civil court that the petitioner is the hereditary trustee and as such the impugned order is liable to be set aside.

7. *Per contra*, Mr.R.Alagar, learned Senior Counsel appearing for the third respondent Fit Person, points out Sec.11 of Act 24 of 1976 and contends that the Act itself which is a temporary one has come to an end. Learned Senior Counsel also contends as the said Act itself is a temporary one and it was extended by Act 30 of 1986, and it had expired. Learned Senior Counsel further argues that an order passed under that Act cannot be challenged at this point of time, i.e. nearly after 20 years and as such this writ petition has got to be dismissed on the ground of laches.

8. I have considered the arguments of Mr.B.Kumar, learned counsel appearing for the petitioner, Mr.R.Alagar, the learned Senior Counsel appearing for the third respondent Fit Person and also of the learned Additional Government Pleader for the Department, and have gone through the materials placed before this Court. I am of the view that this writ petition has got to be dismissed on the ground of laches. There is no doubt that Kulandainathaswamy had claimed to be the hereditary trustee when the impugned order came to be passed in the year 1976 and that he died in the year 1981. He never thought of challenging that order and such that order has become final. Act XXIV of 1976 was passed during emergency and under sub-

sec.(2) of Sec.11 of the Act, Executive Officer was appointed for several institutions in Madurai and Ramanathapuram districts by G.O.Ms.No.763, Commercial Taxes and Religious Endowments Department, dated 3.6.1976. One of such institution is the petitioner institution. This Act XXIV of 1976 expired due to efflux of time in the year 1981. Subsequently, an Act was passed in Tamil Nadu Act (XLVI of 1991) and under Sec.61 of the Act XLVI of 1991, non-hereditary trustee ceased to hold office. This Act came into effect during November, 1991. Under Sec.63 of the Act XLVI of 1991, if there is a vacancy occurred under subsec.(1) of Sec.63 within a period of one-year from the date of commencement, shall be filled up by notification specify in this behalf. Even if it is taken that the third respondent is a Fit Person or an Executive Officer, I am of the view that the effect is to be given by the respondents by Sec.61 of Act XLVI of 1991 by appointing non-hereditary trustees as the case of the respondents seems to be that the petitioner is not a non-hereditary trustee. In this case, it is seen that the Executive Officer Fit Person is holding the office till now. I do not think it is possible. So in my view, even though this writ petition has got to be dismissed. On the ground of laches and also on the ground that the petitioner has not proved himself as hereditary trustee, a direction is to issue to the respondents to take action according to Sec.61 of Act 46 of 1991 and try to fill up the vacancies of the trusteeship. In my view, the third respondent herein cannot continue for ever, for managing the affairs of the institution. This writ petition is ordered accordingly. No costs. In view of the order by the writ petition as stated above, Contempt Application No.392 of 1993 is closed.

9. As I have stated above, suitable action should be initiated by the respondents, until Tamil Nadu Act 46 of 1991 I do hope that the petitioner also will given an opportunity to state its objections.

B.S. ---- *Petition dismissed with directions.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *K.M.Natarajan, J.*

A.A.A.O.No.74 of 1984 7th January, 1994.

Maija Ammal ...Appellant
v.

S.P.Maboob Mohammed (died) and others
...Respondents.

Tamil Nadu Debt Relief Act (XL of 1978) - Tamil Nadu Debt Relief Act (XL of 1979) - Relief under - Basis of - Distinction between - Person obtaining decree giving benefit of Act XL of 1978 - Filing application for amendment since Act 1978 was repealed by Act XL of 1979 - If entitled to ask for amendment.

The appellant filed a suit against respondent/defendant on the foot of a mortgage bond and obtained a decree giving benefit under Tamil Nadu Debt Relief Act, 1978. Since that Act was repealed by Act XL of 1979, he filed an application for amendment of the decree under Sec.16 of the Act of 1979 could not be applied to increase their liability. The petition was dismissed and an appeal against that order was also dismissed. In further appeal,

Held: It is made clear that the basis of relief afforded to indebted agriculturist debtors under Tamil Nadu Acts XL of 1978 and XL of 1979 is different. While the provisions of Tamil Nadu Act XL of 1978 enabled a creditor to recover only one half of the debt and one half of the interest thereon and discharged statutorily the balance payable by and recoverable from the debtor, the provisions of Tamil Nadu Act XL of 1979 permitted the recovery of the principal and the interest not in excess of one and a half times the principal. It is only in accordance with the said provision the amendment is now asked for and that has not been properly appreciated by the courts below. In view of the ratio laid down in *Lakshminarayana Reddiar v. T.K.S.Balarama Chettiar*, 95 L.W. 295 and *Gompathy Annal v. Nallamuthu Pillai*, (1989)2 M.L.J. 433, the substantial questions are answered in favour of the appellant. Accordingly, this appeal is allowed. [Para. 3]

Cases referred to:

Lakshminarayana Reddiar v. T.K.S.Balarama

Chettiar, 95 L.W. 295. [Para. 3]

Gompathy Annal v. Nallamuthu Pillai, (1989)2 M.L.J. 433. [Para. 3]

Appeal against the Order of the District Court, East Thanjavur at Nagapattinam, dated 5.3.1981 and made in C.M.A.No.32 of 1980 (I.A.No.626 of 1979 in O.S.No.97 of 1974, dated 21.2.1980 on the file of the Court of the Subordinate Judge, Nagapattinam).

A.Muthukumar for *K.Chandramouli* and *S.Kalyanam*, for Appellant.

S.Rajagopalan, for Respondent Nos.2 to 7.

The Court made the following

ORDER: This appeal is directed against the judgment of the learned District Judge, Nagapattinam in C.M.A.No.32 of 1980 confirming the judgment of the Subordinate Judge, Nagapattinam in I.A.No.626 of 1979 in O.S.No.97 of 1974.

2. The brief facts leading upto this appeal are as follows: The appellant herein filed a suit against the respondent- defendants on the fact of a mortgage bond and obtained a decree giving benefit of the Act 40 of 1978. Since the Act has been repealed by the Act 40 of 1979, he filed an application in I.A.No.626 of 1979 to amend the decree under Sec.16 of the said Act. The first defendant *viz.*, the first respondent opposed the said application and in the counter *inter alia* it is contended that the Act 40 of 1979 cannot be applied to increase the liability of the respondents and it was intended to further scaling down the debt, the increase of debt of 1 1/2 time over the principal amount and there was no question of scaling down under the Act 40 of 1979. Upholding the contention of the respondents the amendment petition was dismissed. Aggrieved by the same he preferred an appeal and he was unsuccessful. Hence, this second appeal. This was admitted on the following substantial questions of law:

1. Whether the courts below are wrong in holding that the liability of the judgment-debtor is sought to be increased under Act 40 of 1979?

2. Whether the courts below are wrong in coming to the conclusion that Sec.8(3) of Act 40 of 1979 is a bar to the maintainability of the application under the provisions of Act 40 of 1979?

3. It is not in dispute that the petitioner/ plaintiff filed a suit on the basis of a mortgage and obtained a decree giving the benefit under the Act 40 of 1978 and it is not also in dispute that he has filed

a petition under Sec.16 of the Act within the time limit of six months for amendment of the decree in accordance with the provisions of the Act 40 of 1979. But, the question is whether the appellant is entitled to the said relief in view of Sec.8(3). In this connection, learned counsel for the appellant drew the attention of this Court to the decision rendered in *Lakshminarayana Reddiar v. T.K.S. Balarama Chettiar*, 95 L.W. 295, wherein it is observed as follows:

"It now remains to consider only two related aspects with reference to Secs.8 and 16 of Tamil Nadu Act 40 of 1979 (Sec.8(3) at first flush would appear to suggest that the debtor ought not to be added with liability in any sum, in excess of the amount, which would have been payable by him, if Tamil Nadu Act 40 of 1979 had been passed. That provision, in my view, cannot be so read as to preserve the rights of a debtor under Tamil Nadu Act 40 of 1978, for, that would plainly conflict with Secs.32(1) and 33(1) of Tamil Nadu Act 40 of 1979. All that Sec.8(3) provides for is that by reason of the application of Sec.8(1) and (2) of Tamil Nadu Act 40 of 1979, the liability of a debtor cannot be increased in excess of the amount that would have been payable by him, if the provisions of Tamil Nadu Act 40 of 1979 were not there. To put differently, this provision simply means that if the liability of a debtor was less than one and half times the amount of principal, whether by way of principal or interest or both, Sec.8(1) or (2) cannot be so applied as to impose a further liability on the debtor upto the limit of one and a half times the amount of principal. Therefore, Sec.8(3) of Tamil Nadu Act 40 of 1979 also cannot be put against the respondent. The only other provisions which may be considered to be applicable on the facts of this case is Sec.16 of Tamil Nadu Act 40 of 1979 which provides for amendment of decrees. That section presupposes the court having passed a decree for the repayment of a debt, in which event, on an application by judgment-debtor or others mentioned therein within six months from the date of publication of Tamil Nadu Act 40 of 1979 in the Tamil Nadu Government Gazette, the decree can be scaled down and amended according to the provisions of Tamil Nadu Act 40 of 1979. In this case, there was no decree at

all with reference to one half of the interest in the suits, O.S.Nos.1910 and 1909 of 1978, because of the statutory discharge under Sec.7(1)(b) of Tamil Nadu Act 40 of 1978, as it then stood. Therefore, in the absence of any decree passed by the court with reference to one half of the claim towards principal and the one half of the interest, Sec.16 of Tamil Nadu Act 40 of 1979, cannot be held applicable to the respondent."

This Court had occasion to consider the above decisions in *Gompathy Ammal v. Nallamuthu Pillai*, (1989)2 M.L.J. 433, wherein it is held as follows:

"I am in entire agreement with the views expressed by the learned Judge in the two decisions, referred to above. Applying the ratio laid down in those cases, it cannot be said that the order passed by the learned appellate authority in allowing the amendment, is either erroneous or illegal so as to warrant interference with the same."

Learned counsel for the respondents only submitted that in those decisions, while considering the amendment of the decree under Sec.16 of Act 40 of 1979 the effect of Sec.8(3), viz. that no increase of the liability could be made, had not been considered and as such the said decisions will not apply. But, I do not find any merit in the said contentions. Even in *Lakshmi Narayana Reddiar v. T.K.S. Balarama Chettiar*, 95 L.W. 295, that point has been clearly dealt with and it has been so stated that Sec.8(3) of the Act 40 of 1979 cannot be put against the respondent as what Sec.8(3) provides for is that by reason of application of Sec.8(1) and (2) of the said Act, the liability of the debtor cannot be increased in excess of the amount payable by him to put different this provision simply means that the liability was less than 1/2 times as stated in Sec.8(1) and (2) so as to impose further liability upto the minimum of 1/2 times the principal. Therefore, Sec.8(3) of the Act also cannot be put against the respondents. Hence, it cannot be said that the effect of Sec.8(3) was not at all considered in those decisions while considering the amendment of the decree passed under Act 40 of 1979 in accordance with Sec.16 of the Act. It is made clear that the basis of relief afforded to indebted agriculturists debtors under Tamil Nadu Acts 40 of 1978 and 40 of 1979 is different. While the provisions of Tamil Nadu Act 40 of 1979

enabled a creditor to recover only one half of the debt due and one half of the interest thereon and discharged statutorily the balance payable by and recoverable from the debtor, the provisions of Tamil Nadu Act 40 of 1979 permitted the recovery of the principal and the interest not in excess of one and a half times the principal. It is only in accordance with the said provision the amendment is now asked for and that has not been properly appreciated by the court below. In view of the ratio laid down in the decisions cited supra the substantial questions are answered in favour of the appellant. Accordingly, this appeal is allowed, the order passed by the court below is set aside and the application I.A.No.626 of 1979 is allowed. There will be no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction]

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.Nos.28 to 31 and 37 to 40 of 1992
25th August, 1993.

The State of Tamil Nadu represented by the Commissioner and Secretary to Government, Education Department, Madras and others

...Appellants

v.

Rajendran and others

...Respondents.

(A) Land Acquisition Act (I of 1894), Sec.4(1) as amended by Act of 1984) - Land Acquisition - Notification under Sec.4(1) published in Official Gazette on 21.11.1984 - Notification published in papers on 13.11.1985 and 20.11.1985 respectively - Published in locality on 29.11.1985 - No attack on motive of acquiring authority - No plea of prejudice caused to land owners whose lands were published

for acquisition - Acquisition, if vitiated by reason of time-gap.

The court is of the view that in the absence of any attack by the petitioners on the motive of the acquiring authority so as to lead to lack of *bona fides* in the proceedings for acquisition of the lands in question and in the absence of any plea of prejudice being caused to them on account of the time-gap between the publication of the notification in the official gazette and the publication of substance of the same in the locality, it is the decision of the Supreme Court in *Deepak Parwa v. Lt. Governor of Delhi*, A.I.R. 1984 S.C. 1721, that the acquisition is vitiated by reason of this time-gap. The time-gap has been properly explained and even if there is no proper explanation for the period between 8.5.1985 and 13.11.1985, it cannot be held to have resulted in breaking the continuity and thereby delinking both the events. It is also not possible to hold that it has caused prejudice to the petitioners.

[Paras. 11 & 15]

(B) Constitution of India (1950), Art.226 - Delay and laches - Land acquisition proceedings - Notification published in Gazette, newspapers and locality - Aggrieved persons filing objections to the notification published under Sec.4(1) and have also participated in the enquiry under Sec.5-A of the Land Acquisition Act.

Nevertheless, they waited in some cases for three years and in another case for five years. In between, it may be pointed out that two writ petitions had been filed by the owners of other lands acquired under the same notification. One matter was taken up in writ appeal. Of course, before that writ appeal was decided these writ petitions came to be filed. Consequently, the petitioners are guilty of laches and as such they are disentitled to seek relief under Art.226 of the Constitution of India. It may be pointed out that land acquisition is made for a public purpose. If it has to be interfered with, the party has to be diligent and has to approach the court without undue delay. [Paras. 16 & 17]

Cases referred to:

Vijayaraghavan v. The State of Tamil Nadu, 1993 Writ L.R. 294. [Paras. 9, 11, 16]

State of Mysore v. V.K.Rangan, A.I.R. 1975 S.C. 2190. [Paras. 9, 16]

Deepak Pahwa v. Lt. Governor of Delhi, A.I.R. 1984 S.C. 1721: (1984)4 S.C.C. 308. [Paras. 10, 12]

Sadar Anjuman Ahmediyya, Muslim Mission v. State, A.I.R. 1980 A.P. 246. [Para. 10]

**Satish Kapur v. State of Haryana*, A.I.R. 1932 P. & H. 276. [Para. 10]

■ *Rattan Singh v. State*, A.I.R. 1976 P. & H. 279. [Para. 10]

Suryanarayana Reddy v. Andhra Pradesh, A.I.R. 1983 A.P. 17: (1982) 2 A.P.L.J. 95: (1982) 2 An.L.T. 55: (1982) 2 An.W.R. 340. [Para. 10]

Mohammed Khaja v. Government of A.P., A.I.R. 1982 N.O.C. 270 (A.P.) [Para. 10]

Sanjivaiah Nagar Depressed and Backward Classes Sangh v. District Collector, Hyderabad, A.I.R. 1983 A.P. 142. [Para. 10]

Nandakumar v. State of Tamil Nadu, 1986 Writ L.R. 164. [Paras. 12, 13]

P.Venkataraman Naidu v. State of Tamil Nadu, 1990 T.L.N.J. 264. [Para. 13]

Government of Tamil Nadu v. S.Jayaraman, 1992 Writ L.R. 332. [Para. 14]

Tamil Nadu State Housing Board v. Shanmughasundara Nadar, 1988 Writ L.R. 55. [Para. 18]

Appeals under clause 15 of the Letters Patent against the common order of S.Ramalingam, J., dated 16.9.1991 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.Nos.6001 of 1990, 14396 of 1988, 15994 of 1988, 15995 of 1988, 14396 of 1988 and 6001 of 1990 respectively on the file of this Court in W.P.Nos.6001 of 1990, 14396 of 1980, 15994 of 1988 and 15995 of 1988, etc.

The Judgment of the Court was delivered by K.A.Swami, C.J.: These writ appeals are preferred against the order dated 16.9.1991 passed by the learned single Judge in W.P.Nos.6001 of 1990, 14396, 15994 and 15995 of 1988. W.A.Nos.28 to 31 of 1992 are by the State of Tamil Nadu and the Sub Collector, Coimbatore against the common order dated 16.9.1991 by the learned single Judge in W.P.Nos.6001 of 1990, 14396, 15994, 15995 of 1988. Whereas W.A.Nos.37 to 40 of 1992 are also preferred against the very same order by V.L.B. Trust, Kuniamuthur, Coimbatore District for whose benefit the acquisition in question is made. All these writ petitions are decided by a common order. Learned single Judge has allowed the writ petitions and quashed the acquisition proceedings. Hence, the State Government and V.L.B. Trust have come up in these writ appeals.

2. In the light of the contentions urged by both sides, the following points arise for consideration:

(i) Whether the time gap between the publication of the notification in the Official Gazette

under Sec.4(1) of the Act on 21.11.1984 and publication of the substance of the said notification in the locality on 29.11.1985 have vitiated the acquisition proceedings?

(ii) Whether the time gap between the two publications has been explained by the two publications has been explained by the acquiring authority?

(iii) Whether the time gap between the two publications has caused any prejudice to the petitioners?

(iv) Whether the petitioners are guilty of laches?

(v) Whether the order of the learned single Judge is liable to be interfered with?

3. Facts necessary for the purpose of considering the contentions urged under the aforesaid points, on both sides are as follows: The State Government published in the Official Gazette dated 21.11.1984 the notification dated 20.11.1984 under Sec.4(1) of the Land Acquisition Act, 1894, as amended in 1984, hereinafter referred to as 'the Act', in G.O.Ms.No.1382, Education Department proposing to acquire an extent of 103.72 acres comprised in various survey numbers situated in Kuniamuthur village, Coimbatore District, for the purpose of construction of a polytechnic, a girls' high school, hostel buildings, quarters, playground, etc. The said notification was published in the 'Daily Thanthi' dated 13.11.1985 and 'The Hindu' dated 20.11.1985. The substance of the notification was published in the locality on 29.11.1985. Persons interested in the lands filed objections. Enquiry under Sec.5-A of the Act was held on 25.4.1986 and 22.9.1986. A report was submitted by the Land Acquisition Officer to the State Government under Sec.5-A of the Act and the same was accepted by the State Government, and a declaration under Sec.6(i) of the Act in G.O.Ms.No.1857, Education Department, dated 18.11.1986 was published in the Gazette on 26.11.1986 and in the newspaper 'Daily Thanthi' on 27.11.1986 and 'Indian Express' on 28.11.1986 a substance of the same was also published in the locality on 28.11.1986.

4. It is also to be noticed that prior to the filing of these writ petitions, one Vijayaraghavan, one of the persons interested in some of the lands acquired under the notifications in question, filed W.P.No.9150 of 1987 challenging both the notification issued under Secs.4(1) and 6(1) of the Act.

It was dismissed on 16.9.1987. In addition to this, there was another W.P.No.5377 of 1987, filed by one Francis questioning the declaration made under Sec.6(1) of the Act. It was also dismissed on 23.9.1987. Vijayaraghavan went up in W.A.No.74 of 1989 and the same was dismissed on 21.12.1990 and the said judgment is reported in *Vijayaraghavan v. The State of Tamil Nadu, 1993 Writ L.R. 294*. The present writ petitions were filed after the afore-said two writ petitions were dismissed. It is necessary to state the dates on which each of these writ petitions was filed. W.P.No.14396 of 1988 was filed on 22.11.1988, W.P.Nos.15994 and 15995 of 1988 were filed on 21.12.1988 and W.P.No.6001 of 1990 was filed on 5.5.1990. We have already pointed out that W.A.Nos.37 to 40 of 1992 are filed by the V.L.B.Trust for whose benefit the acquisition of the lands in question has been made.

5. Learned single Judge has held that there has been a delay in the publication of the substance of the notification in the newspapers and in the locality under Sec.4(1) of the Act and that delay has resulted in delinking of the acquisition proceedings from the publication of the notification under Sec.4(1) in the Official Gazette, therefore, the acquisition proceedings are vitiated. On the ground of laches on the part of the petitioners, it has been held by the learned single Judge that there is no delay on the part of the petitioners in W.P.Nos.14396, 15994 and 15995 of 1988, therefore it is not possible to hold that there is a delay on the part of the petitioners in W.P.No.6001 of 1990 as well. Accordingly, learned single Judge has allowed the writ petitions and quashed the land acquisition proceedings insofar as the petitioners' lands are concerned.

Points (i) to (iii): As these points are interconnected, they are taken out together for determination.

6. The contentions of the learned Government Pleader appearing for the appellants in W.A.Nos.28 to 31 of 1992 and also learned counsel for the appellant in W.A.Nos.37 to 40 of 1992 are as follows:

(i) That the time-gap between the publication of the notification under Sec.4(1) of the Act in the Gazette on 21.11.1984 and the public notice of the substance of the said notification in the locality on 29.11.1985 has been sufficiently explained.

(ii) That this delay or gap of time has also not

caused any prejudice to the petitioners and that in fact it is the contention of learned Government Pleader that no such plea has been raised by the petitioners.

7. On the contrary, it is the contention of Mr.Habibullah Badsha, learned Senior Counsel, that the time gap is so long that both are unlinked as such in law it amounts to non-publication of the substance of the notification issued under Sec.4(1) in the locality, therefore, it must be held that there is non-compliance with the mandatory requirement of causing public notice of the substance of the notification in the locality. Consequently, according to him, the question of demonstrating any prejudice caused to the petitioners does not arise.

8. In support of the rival contentions, learned counsel have placed reliance on various decisions which will be adverted to shortly.

9. The time gap between the two events as already pointed out is about one year. The publication in the official gazette of the notification under Sec.4(1) of the Act was made on 21.11.1984, while the public notice of the substance of the same was given in the locality on 29.11.1985. The explanation offered by the State in this regard is as follows:

"11. The Amended Land Acquisition Act had obtained the assent of the President on 24.9.1984 and was published in the Tamil Nadu Government Gazette on 5.12.1984. During this assent stage, the procedure about the publication of dailies and in the locality has not been streamlined by the Government. Due to the introduction of the amended Act, all of a sudden, the implementation of the publication in the dailies and in the locality proper attention could not be paid in view of large number of Land Acquisition cases pending at Sec.4(1) stage. An errata notification in the above case was also sent to Government for approval and publication on 5.1.1985.

12. The correct procedure to be followed about the publication in the dailies and in the locality was intimated by the District Revenue Officer to the Revenue Divisional Officer, Coimbatore, only in his letter dated 29.4.1985 received on 7.5.1985. The English notification has been translated into Tamil and necessary Tamil publications were sent to District Revenue Officer from the Office of the Revenue

Divisional Officer on 8.5.1985 itself. With reference to the letter No.46366/85-1, of the Director of Information and Public Relations, the Elegant Publicities has published the notification in 'The Hindu', English edition daily on 20.11.1985 and in 'Daily Thanthi' Coimbatore edition on 12.11.1985. Soon after the publication made in the dailies by the Government, necessary locality publication was made on 29.11.1985. There was no wilful intention for the belated publication in the dailies and the reasons were purely due to administrative reasons."

In reply to the averments made in paragraphs 11 and 12 of the counter-affidavit the petitioners in their additional affidavit have stated,

"7. It is most respectfully submitted that the averments in para no.11 of the counter-affidavit do not explain the delay in publication that it could be termed as just and reasonable. It is wrong to state that the Act was amended all of a sudden. The respondents cannot take the plea that proper attention could not be paid in view of a large number of land acquisition cases pending at the 4(1) notification stage and hence they could not implement the publication in the dailies and locality immediately. To say the least, it is an irresponsible statement, there is no justification for the long delay. The requirement regarding publication of the substance of the notification in the locality was there, even before the amendment act came into force. It is not as if the respondents were not aware of the method and manner of the publication of the substance of the notification. It is not proper to states that the manner of publication in the dailies and in the locality had not been streamlined. It is wrong to state that the amended Act came all of a sudden and hence the publication became difficult.

8. It is respectfully submitted that after the 4(1) notification was published in the Gazette, the publication in the dailies and the substance of the notification to be published in the locality should be done within a short time. This has been insisted upon by the Government and the petitioners reliably learn that the Government had instructed the land acquisition authorities not to delay the publication in the Dailies and the locality after the publication of the 4(1)

notification in the Government Gazette. The publications are mandatory requirements and they cannot be flouted according to the whims and fancies the authorities".

A similar explanation offered in the earlier writ petitions where the very same notification was questioned was considered by a Division Bench of this Court in *Vijayaraghavan v. The State of Tamil Nadu*, 1993 Writ L.R. 294 and it was observed as follows:

"So far as the present case is concerned, we find there has been some explanation and that apart nothing has been said or substantiated before us to show any prejudice having been caused before to or suffered by the appellant on that account. Consequently, we see no merit even otherwise in the plea either. Further, we see some force in the objection of the learned Government Pleader on the ground of laches in raising a point of the nature at a later stage relying upon the decision in *State of Mysore v. V.K.Rangan and others*, A.I.R. 1975 S.C. 2190, wherein the Apex Court at paragraph 16 held as follows:

"The notification under Sec.4 was published on 13.4.1987. Objections were filed by the respondent under Sec.54 of the Act. The Deputy Commissioner submitted his report to the Government. The Government overruled the objections. The notification under Sec.6 was published in the Gazette on 19.10.1968. The writ petition challenging the validity of the notification was filed sometime in July or August, 1969. We do not think that the respondent was entitled to challenge the validity of the notification under Sec.4 of the Act as the writ petition challenging the notification was filed after an unreasonable lapse of time. If public notice as required by Sec.4 of the Act was not given and that would *per se* vitiate the notification under Sec.4 the appellant should have challenged its validity within a reasonable time of the publication of the notification. The respondent knew of the notification and filed objections under Sec.5-A of the Act. In these circumstances, we see no reason to accept the submission of counsel."

It may be relevant to notice that one of the explanations offered is that there was an errata publication of the notification on 5.1.1985. It is true that when a large extent of land is acquired for a

particular purpose, any error that is noticed in that notification will have the effect of withholding the entire acquisition proceedings. Therefore, the errata is stated to relate to some other land acquired along with the lands in question under the impugned notification and not of the petitioners, nonetheless, the date of errata notification should also go to the benefit of the State in explaining the delay has occurred in the publication of the substance of the notification in the locality. The period from 5.1.1985 has also been explained. For the subsequent period there is no clear explanation. However, after the notification was published in the dailies, there has not been a delay in causing public notice of the substance of the notification to be given at the convenient places in the locality because it has been done on 29.11.1985, as the notifications were published in 'Daily Thanthi' and 'The Hindu' on 13.11.1985 and 20.11.1985 respectively. Learned single Judge has stressed, and before us learned Senior Counsel appearing for respondents also has emphasised, that there is virtually no explanation for the delay from 8.5.1985 to 13.11.1985 and, therefore, it is contended that Sec.4(1) notification should be held to be void and consequently all further proceedings taken pursuant thereto must also fall to the ground.

10. We must now consider as to whether the delay by itself will render the proceedings void. Learned Government Pleader has placed reliance on the decision in *Deepak Pahwa v. Lt. Governor of Delhi*, A.I.R. 1984 S.C. 1721; (1984) 4 S.C.C. 308, wherein the following propositions have been laid down; it is mandatory to comply with the requirements of Sec.4(1) of the Act which provides that apart from the publication of the notification in the Official Gazette, the same shall have to be published in two newspapers, one in the Vernacular, and another in English and the public notice of substance of that notification shall also be published at the convenient places of the locality where the land is situated. In paragraph 3 of the judgment, it has been held that the publication in the Official Gazette and public notice in the locality are the essential elements of Sec.4(1) and not the simultaneity or immediacy of the publication and the public notice. Paragraph 3 of the judgment reads thus:

"3. It may be noticed at once that Sec.4(1) does not prescribe that public notice of the substance of the notification should be given in

the locality simultaneously with the publication of the notification in the Official Gazette or immediately thereafter. Publication in the Official Gazette and public notice in the locality are two vital steps required to be taken under Sec.4(1) before proceeding to take the next step of entering upon the land under Sec.4(1). The time factor is not a vital element of Sec.4(1) and there is no warrant for reading the words 'simultaneously' or 'immediately thereafter' into Sec.4(1). Publication in the Official Gazette and public notice in the locality are the essential elements of Sec.4(1) and not the simultaneously or immediacy of the publication and the public notice. But since the steps contemplated by Sec.4(2), cannot be undertaken unless publication is made and public notice given as contemplated by Sec.4(1), it is implicit that the publication and the public notice must be contemporaneous though not simultaneous or immediately after one another. Naturally contemporaneity may involve a gap of time and by the very nature of the things, the publication in the Official Gazette and the public notice in the locality must necessarily be separated by a gap of time. This does not mean that the publication and the public notice may be separated by a long interval of time. What is necessary is that the continuity of action should not appear to be broken by a deep gap. If there is publication in the Gazette and if there is public notice in the locality, the requirements of Sec.4(1) must be held to be satisfied unless the two are unlinked from each other by a gap of time so large as may lead one to the *prima facie* conclusion of lack of *bona fides* in the proceedings for acquisition. If the notification and the public notice are separated by such a large, gap of time it may become necessary to probe further to discover if there is any cause for the delay and if the delay has caused prejudice to any one." [*Italics supplied*]

In paragraph 6 of the judgment, it has been further held:

"We are unable to read the observation in *State of Mysore v. Abdul Rajak*, A.I.R. 1973 S.C. 2361, as laying down any general principle that every time-gap between the publication in the Gazette and the public notice in the locality is fatal to the acquisition. Apart from the physical

impossibility of synchronising the publication in the Gazette and the public notice in the locality, one can visualise a variety of circumstances which may bring about a time-gap between the two. There may be a breakdown or band has happened in one of the reported cases in Andhra Pradesh, *Sadar Anjuman Ahmediyya, Muslim Mission v. State*, A.I.R. 1980 A.P. 246 or there may be some other justifiable reason. *This Court did not lay down any general principle that an acquisition would be regarded as void if the notification published in the Official Gazette was not accompanied or immediately followed by the public notice.* What in fact appears to have been said was that a person interested in the property can be regarded to have had notice of the proposed acquisition if both the requirements of Sec.4(1) are complied with whether simultaneously or one after the other. *As we said no invariable rule was laid down that an acquisition would be regarded as void whenever there was a gap of time between the publication in the Gazette and the public notice in the locality.* [Italics supplied]

■ paragraph 7 of the judgment various decisions referred to, and the relevant portion from the decision of a Full Bench of the Andhra Pradesh High Court has been reproduced and it has been specifically approved. Paragraph 7 of the judgment is as under:

"7. We do not think that it is necessary to refer to the decision of the High Courts in detail except to say that we consider *Satish Kapur v. State of Haryana*, A.I.R. 1932 P. & H. 276, *Rattan Singh v. State*, A.I.R. 1976 P. & H. 279, *Suryanarayana Reddy v. Andhra Pradesh*, A.I.R. 1983 A.P. 17; (1982)2 A.P.L.J. 95; (1982)2 An.L.T. 55; (1982)2 An.W.R. 340 and *Mohammed Khaja v. Government of A.P.*, A.I.R. 1982 N.O.C. 270 (A.P.) were wrongly decided and that *Sanjivaiah Nagar Depressed and Backward Classes Sangh v. District Collector, Hyderabad*, A.I.R. 1983 A.P. 142 was rightly decided. In the last mentioned case, there is a reference to several earlier Division Bench judgments and the judgment of the Full Bench which the learned Judge had followed. In particular, the learned single Judge have referred to the following observations of the Andhra Pradesh High Court in *Shahnaz Salima v. Government of A.P.*, (a decision which for some unknown

reason has not been reported in any of the Law Reports):

"There is no warrant for the contention that the publication in the Official Gazette and the publication of the substance of the notification at convenient places in the said locality should be simultaneous and be done precisely at the same time. If that were the intention of the Legislature, it could have said so. Something which is not in the section cannot be imported into it. The publication of the substance of Sec.4(1) notification at convenient places in the locality is required out of anxiety of the Legislature to make it certain that it is brought to the notice of the affected persons. What all that is required is that before anything is done as contemplated by Sub-sec.(2), the substance of Sec.4(1) notification must be published in the locality of the land. Several times it may prove to be a physical impossibility if simultaneous publication is insisted upon. It is not possible to think the Legislature has provided for an impracticable and at the same time unnecessary task. What Sec.4(1) requires is that Sec.4(1) notification must be published in the Official Gazette and its substance at convenient places in the said locality."

We agree with these observations."

Thus, the following propositions emerge from the decision of the Supreme Court: (i) It is mandatory to comply with the provisions of Sec.4(1). (ii) The publication of the notification under Sec.4(1) in the Official Gazette and public notice of the same in the locality need not be simultaneous or immediate and can be contemporaneous as it involves a gap of time, therefore both must necessarily be separated by a gap of time. (iii) The time gap between the publication of the notification in the Official Gazette and public notice of the substance of the notification in the locality does not by itself render the acquisition void. (iv) If the two events are unlinked from each other by a gap of time so large as may lead to the *prima facie* conclusion of lack of *bona fides* in the proceedings for acquisition then it may become necessary to probe further to discover if there is any cause for the delay and if the delay has caused prejudice to anyone.

11. In the instant case, there is a time gap as already pointed out, between the gazette publication of the notification and the public notice of the

substance of the notification in the locality. There is an explanation offered for the delay which, as already referred to, was accepted in *Vijayaraghavan's case*, 1993 Writ L.R. 294, by a Division Bench of this Court, we have also found that there is explanation upto 8.5.1985, and the explanation from 8.5.1985 till 13.11.1985 is not specific, it is only general. If the gap of time is long as laid down by the Supreme Court in *Deepak Parwa's case*, A.I.R. 1984 S.C. 1721: (1984) 4 S.C.C. 308, by itself it does not lead to invalidity of the notification and the court is required to find out whether such a delay is due to lack of *bona fides* in the proceedings and has caused prejudice to any one. In this regard, it may be pointed out that the petitioners have not pleaded lack of *bona fides* on the part of the acquiring authority and even before us the purpose for which the acquisition is made had not been questioned. Therefore, we proceed on the basis that it is not a case in which there is lack of *bona fides* on the part of the acquiring authority. As far as causing prejudice to anyone is concerned, there is no plea in that regard. It is not the petitioner's case that this delay has caused prejudice to them in any manner. We are of the view that in the absence of any attack by the petitioners on the motive of the acquiring authority so as to lead to lack of *bona fides* in the proceedings for acquisition of the lands in question and in the absence of any plea of prejudice being caused to them on account of the time-gap between the publication of the notification in the official gazette and the publication of substance of the same in the locality, it is the decision of the Supreme Court in *Deepak Parwa's case*, A.I.R. 1984 S.C. 1721, that the acquisition is vitiated by reason of this time-gap.

12. We now take up for consideration the other decision relied upon by learned Senior Counsel appearing for the respondents. No doubt, in *Nandakumar v. State of Tamil Nadu*, 1986 Writ L.R. 164, a Division Bench of this Court has referred to the decision of the Supreme Court in *Deepak Parwa's case*, A.I.R. 1984 S.C. 1721, but that was a case in which there was no explanation offered for the time gap between the two events. After referring to the decision in *Deepak Parwa's case*, A.I.R. 1984 S.C. 1721, it was observed:

"...though the publication need not be simultaneous the public notice must be contemporaneous. We have already noticed that Sec.4(1)

notification was published in the Gazette on 7th June, 1978 and the publication in the locality was made only on 19th December, 1978 more than six months later. No counter-affidavit has been filed to show the continuity of action as required in the judgment of the Supreme Court. The learned Additional Government Pleader vaguely suggested that there was an errata published in respect of the same some time on 1st November, 1978 and that was the reason for the delay. We have perused the land acquisition file produced by the learned Additional Government Pleader. The errata related to one or other of the boundaries of 4 or 5 survey numbers and not any deletion or omission of any property. Nothing prevented the Government from publishing the notification in the locality immediately after publication in the Gazette. Even after the alleged errata published on 1st November, 1978 there was a long gap of more than one month and 19 days in the issue of public notice. We are satisfied that the continuity of action was broken by a deep gap. We are not satisfied that the delay in the publication in the locality was caused by any *bona fide* reason"

Thus, that was a case in which no explanation whatsoever was offered by the State Government for the time gap that had occurred between the publication of Sec.4(1) notification and the public notice of the substance of the same in the locality. In addition to this, the propositions laid down in *Deepak Parwa's case*, A.I.R. 1984 S.C. 1721, that delay by itself will not render the notification void. That if it is shown that the gap of time is so large as to lead to the *prima facie* conclusion of lack of *bona fides* in the proceedings for acquisition, it would be necessary to probe further to discover if there is any cause for the delay and such delay has caused prejudice to any one. These aspects had not been referred to in that decision. Hence, we are of the view that the said decision is distinguishable on the facts of that case.

13. In *P. Venkatarathinam Naidu v. State of Tamil Nadu*, 1990 T.L.N.J. 264, the decision in *Deepak Parwa's case*, A.I.R. 1984 S.C. 1721, was also referred to. In this case also, no counter affidavit was filed offering any explanation which if offered, could have been tested to find out its tenability and also as to why continuity of action was not kept up, and what were the factors that prevented

the respondents from adhering to the continuity process. That being so, this decision also tends on the same footing as the one rendered in *Nandakumar v. State of Tamil Nadu*, 1986 Writ L.R. 164, about which we have already pointed out that it is distinguishable on facts.

14. In *Government of Tamil Nadu v. S. Jayaraman*, 1992 Writ L.R. 332, the question raised before us, not arise for consideration. It may be pointed out that in that case, the learned single Judge held that for the purpose of determining whether the declaration under Sec.6 of the Act had been made within the time prescribed under the Act, the period was to be computed from the date. Sec.4(1) notification was published in the Official Gazette and not from the date it was last published. On that basis, it was held by the learned single Judge that the declaration made under Sec.6(1) was beyond time as such the acquisition proceedings were invalid. The Division Bench, however, took the view that the time was to be computed from the last of the dates of such publication and the giving of such public notice as stated in Sec.4(1) of the Act. Accordingly, it was held that the declaration under Sec.6 was well within time. The question as to whether the gap of time between the publication of notification under Sec.4(1) in the gazette, and the public notice of the substance of same in the locality would render the acquisition invalid, did not arise for consideration in that case. Therefore, we are of the view that the observation contained in paragraph 16 of the judgment cannot be held to be the ratio of the said decision. It is an *obiter dictum* as it did not arise for decision as such it was not required for the purpose of the decision. In addition, it has not been laid down in that case that if the gap of time is more than two months, the acquisition will be invalid. It is only stated that if the time gap exceeds two months, the acquisition proceeding is liable to be questioned. Therefore, it is not possible to read the said observation as laying down a proposition that the acquisition will be invalid if the time gap between the publication of Sec.4(1) notification in the Official Gazette and causing public notice of the substance of the same at convenient places of the locality, exceeds two months.

15. We are of the view that in the instant case, as already pointed out, the time-gap has been properly explained and even if there is no proper explanation for the period between 8.5.1985 and

13.11.1985, it cannot be held to have resulted in breaking the continuity and thereby delinking both the events. It is also not possible to hold that it has caused prejudice to the petitioners. If fact it is not their case that any prejudice is caused to them. Further, it cannot also be said that the proceedings of acquisition lack in *bona fides*. Accordingly, points (i) and (iii) are answered in the negative and point no.(ii) is answered partly in the affirmative and partly in the negative as pointed out above.

16. Point No.(iv) laches learned Government Pleader has been much stress on it. According to him, W.P.No.6001 of 1990 has been filed in the year 1990 whereas the other three writ petitions have been filed in the year 1988. If the date of publication of Sec.4(1) notification viz. 29.11.1985 is taken into account in one case there is a delay of five years and in other case there is a delay of three years. It is also contended that even if the declaration made under Sec.6(1) of the Act is taken into consideration, the same having been published in the locality on 28.11.1986, there is no explanation for the delay in filing the writ petitions in 1988 and 1990. In support of the plea that the petitioners are not entitled to any relief as they are guilty of laches, learned Government Pleader has placed reliance on the decision in *State of Mysore v. V.K.Rangan and others*, A.I.R. 1975 S.C. 2190, wherein at paragraph 16 it has been laid down that when the notification under Sec.6 was published in the Gazette on 19.10.1968 and the writ petition challenging the validity of the notification was filed sometime in July or August, 1969, the respondent was not entitled to challenge the notification under Sec.4 of the Act, as the same was filed after an unreasonable lapse of time. We are of the view that the proposition laid down in that case is squarely applicable to the facts of the case on hand. It is not as if the petitioners were not aware of the acquisition proceedings, for, they have filed objections to the notification published under Sec.4(1), and have also participated in the enquiry under Sec.5-A of the Act. Nevertheless, they waited in some cases for three years and in another case for five years. In between, it may be pointed out that two writ petitions had been filed by the owners of other lands acquired under the same notification. One matter was taken up in writ appeal. Ofcourse, before that writ appeal was decided these writ petitions came to be filed. In

addition to this there is no explanation for this long delay. Hence, we are of the view that the petitioners are not guilty of laches in approaching this Court. It is to be noted that in *Vijayaraghavan's case*, 1993 Writ L.R. 294, referred to above, the petitioners who approached the court in the year 1985 itself were found to be guilty of laches. Consequently, the petitioners are guilty of laches and as such they are disentitled to seek relief under Art.226 of the Constitution of India.

17. It may be pointed out that land acquisition is made for a public purpose. If it has to be interfered with, the party has to be diligent and has to approach the court without undue delay.

18. Of course, learned Government Pleader has also placed reliance on the decision in *Tamil Nadu State Housing Board v. Shanmugasundara Nadar*, 1988 Writ L.R. 55, in which it has been stated:

"In our view the proper occasion to raise a challenge to the invalidity of the proceedings under the Land Acquisition Act on the ground that the provisions of Sec.4 have not been complied with, is before the proceedings of the enquiry under Sec.5-A of the Act are completed and declaration under Sec.6 is made. In such a case, if the defect is found that defect can be remedied and the proceeding can be restarted".

With great respect we find ourselves difficult to agree with the aforesaid proposition because it is open to the State even after Sec.5-A enquiry, to drop the proceedings. Therefore, the mere fact that the aggrieved party does not approach this Court challenging Sec.4(1) notification before Sec.5-A enquiry and approaches this Court under Art.226 of the Constitution without undue delay after the declaration is made under Sec.6 of the Act, there will be no justification to put him out of court on the ground of laches. However, it is not necessary to consider this aspect of the matter as stated in that decision, except stating that we find it difficult to agree with the said proposition. Accordingly, point No.(iv) is answered in the affirmative.

19. In the light of the findings recorded on points (i) to (iv), point No.(v) has to be necessarily answered in the affirmative. It is accordingly answered in the affirmative.

20. For the reasons stated above, we pass the following order. The order of the learned single Judge has to be interfered with. Accordingly, the writ appeals are allowed. The order of the learned

single Judge in W.P.Nos.14396, 15994 and 15995 of 1988 and 6001 of 1990 dated 16.9.1991 is set aside and the writ petitions are dismissed. There will be no order as to costs.

B.S.

Appeals allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Bakthavatsalam, J.

W.P.No.19833 of 1993 19th November, 1993

Sri Kumaragurubara Swamikal Art College, Arunandi Nagar, Srivaikundam represented by its Correspondent, Prof.P.Mutharasu ...Petitioner v.

The Manonmaniyam Sundaranar University represented by its Registrar, Tirunelveli and others
...Respondents.

Education - Admission to seats in I M.Sc. Physics and I M.Sc. Chemistry in denominational college - 6 seats in each course filled on basis of adding 25 marks for performance in an interview to test the candidates knowledge of Saiva Siddhanta - If illegal - Admission of such students not approved by University - If proper.

It cannot be disputed by the first respondent University that the provisions of the Tamil Nadu Private Colleges (Regulation) Act, 1976 are not applicable to the petitioner-college. The court is of the view that though the interview system adopted by the petitioner-college cannot be said to be illegal, yet prescribing 25 marks for interview to assess the knowledge of the candidates in 'Saiva Siddantha' seems to be against the law laid down by the Supreme Court in *St. Stephen's College v. University of Delhi*, A.I.R. 1992 S.C. 1630,

R.Chitralekha v. State of Mysore, (1964)6 S.C.R. 368, *A.Periakaruppan v. State of Tamil Nadu*, (1971)2 S.C.R. 430, *Miss Nisha Maghu v. State of Jammu and Kashmir*, (1980)4 S.C.C. 95, *Ajay Hasra v. Khalid Mujib Seshravaridi*, (1981)2 S.C.R. 79, *Lila Dhar v. State of Rajasthan*, 1982 S.C.R. 320 and *Koshal Kumar Gupta v. State of Jammu and Kashmir*, (1984)3 S.C.R. 607. The court is of the view that the students who were called for interview and admitted into the petitioner-college should not be penalised for the mistake committed by the petitioner-college in this case in prescribing a higher percentage of marks for interview to assess the knowledge of the students in the 'Saiva Siddantha'. No other statute or regulation of the University is contravened. All the students who were admitted had secured more marks than the marks prescribed by the University in the guidelines. It is also to be seen that no candidate who has been denied a seat has challenged the admission made in the petitioner-college. As such the impugned order of the respondent University is set aside. [Paras. 10, 14 and 15]

Cases referred to:

St.Stephen's College v. University of Delhi, A.I.R. 1992 S.C. 1630: (1992)1 S.C.C. 558. [Paras. 2, 3, 6, 13]
Unnikrishnan v. State of A.P., (1993)1 S.C.C. 645. [Paras. 3, 14]
St.John's Teachers Training Institute, (For Women), Madurai v. State of Tamil Nadu, (1993)3 S.C.C. 595. [Para. 7]
Sidhrajibhai Sabbai v. State of Gujarat, A.I.R. 1963 S.C. 540: 1962 K.L.T. 135: (1963)2 S.C.A. 394. [Para. 7]
Azeez Bashav. Union of India, A.I.R. 1968 S.C. 663: (1968)1 S.C.A. 357: (1968)2 S.C.J. 299. [Paras. 7, 12]
Shahal H.Musalliar v. State of Kerala, (1993)4 S.C.C. 112. [Paras. 7, 14]
T.M.A.Pai Foundation and others (I) v. State of Tamil Nadu, (1993)4 S.C.C. 276. [Paras. 7, 13]
Srinivas (Minor) v. The University of Madras, 1993 Writ L.R. 1. [Paras. 8, 15]
S.P.Mitta v. Union of India, A.I.R. 1983 S.C. 1: (1983)1 S.C.C. 51: (1983)1 S.C.J. 45: (1983)1 S.C.R. 729. [Para. 12]
R.Chitralekha v. State of Mysore, A.I.R. 1964 S.C. 1823: (1964)6 S.C.R. 368. [Para. 13]
A.Periakaruppan v. State of Tamil Nadu, A.I.R. 1971 S.C. 2303: (1971)2 S.C.R. 430: (1971)2 S.C.J.

222: (1971)2 An.W.R. (S.C.) 65: (1971)2 M.L.J. (S.C.) 65. [Para. 13]
Miss Nishi Raghu v. State of Jammu and Kashmir, (1980)4 S.C.C. 95. [Para. 13]
Ajay Hasra v. Khalid Mujib Seshravaridi, (1981)2 S.C.R. 79: A.I.R. 1981 S.C. 487: (1981)1 Lab.L.J. 106: (1981)1 S.C.C. 722: (1980)3 Ser.L.R. 467: (1981)2 S.C.R. 79. [Para. 13]
Lila Dhar v. State of Rajasthan, (1982)1 S.C.R. 320. [Para. 13]
Koshal Kumar Gupta v. State of Jammu and Kashmir, (1984)3 S.C.R. 407. [Para. 13]
Ashok Chand Singhvi v. Jodhpur University, A.I.R. 1989 S.C. 823: (1989)1 J.T. 177: (1989)1 S.C.C. 399. [Para. 15]
Rajendra Prasad Mathur v. Karnataka University, A.I.R. 1986 S.C. 1448. [Para. 15]
A.Sudha v. University of Mysore, A.I.R. 1987 S.C. 2305. [Para. 15]
Naiffa v. Central Board of Secondary Education, New Delhi, A.I.R. 1992 Mad. 52. [Para. 15]
Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the 1st respondent passed in his proceedings code MSV/R/93, dated 29.10.1993 and quash the same. So as to enable the 1st year M.Sc., Physics and M.Sc., Chemistry students of the petitioner-college to attend the examination and complete their course.
R.Gandhi, Senior Counsel for *N.Paul Vasanthakumar*, *K.Ravichandra Babu* and *T.S.Sivagnanam*, for Petitioner.
K.Chandru, for *Mr.K.Yeshood Vardhan*, for Respondent No.1.
G.Subramanian, Senior Counsel for *P.Selvaraj*, for impleading party, Respondent Nos.4 and 5.
Saraswathi Prasad, Government Advocate, for Respondent Nos.2, 3 and 6.
The Court made the following
ORDER: The petitioner-college challenges the proceedings of the first respondent-University by which the University informed the College that the admission of the students to I M.Sc., Physics and I M.Sc., Chemistry for the academic year 1993-94 is not approved by the Syndicate since it has been done on the basis of adding 25 marks for their performance in an interview to test their knowledge of Saiva Siddantha and such a

prescription is against admission rules laid down by the Government and the University. The proceedings further stated that it is also resolved not to admit the said students for examinations. It is also stated that the College is permitted to fill up the vacancies caused by the cancellation of the abovesaid admissions by fresh admissions on the basis of merit and rules of reservation.

2. The petitioner alleges in the affidavit filed in support of the writ petition, that the petitioner-college was established in the year 1961 and is being administered by Sri Kasi Mutt, Thirupanandal and Sri La Sri Kasivasi Muthukumaraswami Thambiran Swamigal is the head of the Mutt. The petitioner also alleges that Kasi Mutt is a Saivaite Religious Denominational Minority Institution under Art. 26 of the Constitution of India and that the said Kasi Mutt has been established and is administering several Educational Institutions, one Kasivasi Swaminatha Swamigal Senthamil College at Tirupanandal, Sri Kumaragurubara Swamigal Matriculation School and other middle schools at Tiruloki, Tirupanandal etc., apart from the petitioner-college. It is also stated that the educational agency of the petitioner-college filed a suit in O.S.No.18 of 1985 before the Sub Court, Kumbakonam for declaration, declaring its institution as a denominational minority educational institution and that the provisions of the Tamil Nadu Private Colleges (Regulation Act) are not applicable to its colleges, including the petitioner-college. It is also stated that a decree was passed in favour of the petitioner by judgment dated 12.8.1985 granting declaration and then an appeal has also been filed by the State in A.S.No.62 of 1986 before the District Court, Thanjavur West, Thanjavur and it was dismissed by judgment dated 23.2.1990. The said judgment and decree had become final. As such, it is stated that the petitioner-college is a denominational minority institution declared by the competent civil court. It is also alleged in the affidavit that the Madurai-Kamaraj University under whose jurisdiction the petitioner-college was functioning, granted affiliation to the petitioner-college to M.Sc., Physics from 1985-86 and M.Sc. Chemistry from 1988-89, and that after the establishment of the first respondent University by virtue of the provisions of the Manonmaniam Sundaranar University Act, 1990 (Act No.31 of 1990), the petitioner-college has come under the purview of the first respondent-University. It is

also alleged in the affidavit that the Madurai University Teachers Association, which is called 'MUTA' used to make false allegations against the petitioner management and started giving trouble to the Management. It is also pointed out that 'MUTA' also sent frivolous applications to the respondent-University with regard to the admission of M.Sc., Physics and M.Sc., Chemistry for the present academic year. It is also stated that for the first year M.Sc., Physics and M.Sc., Chemistry course, 12 seats in each course are sanctioned to the petitioner-college and the 1st respondent by proceedings dated 16.6.1993, stated to adhere to the norms prescribed by the University while making admission to various post-graduate courses. It is pointed out that the candidate for admission to M.Sc., degree course, candidates should have secured at least 55% marks in Part III of B.Sc., in the particular subject and in case of S.C./S.T. Candidates minimum marks may be reduced from 55 to 45. It is also pointed out that by communication dated 8.5.1993, the first respondent-University has stated that with reference to admission of students in any college, except minority, the admission should be strictly on merit basis subject to the rule of reservation and physically handicapped candidates. It is also alleged that the petitioner-college being declared minority college is empowered to admit students according to its faith, and that the only requirement is not to select any student who does not have the minimum prescribed marks of 55% in B.Sc., degree. It is also alleged in the affidavit that out of 12 seats permitted to the petitioner-college for each subject in M.Sc., and that the petitioner has selected 50% of seats purely on merits. It is also alleged that in the minority quota, the petitioner management conducted an interview to assess the knowledge of Saiva Siddantha for 25 marks and college candidates were selected. So the petitioner alleges that all the candidates under merit quota in M.Sc., Physics and Chemistry are admitted purely on merits basis and that the seats under minority quota were filled up after conducting an interview with academic marks and all the selected candidates are admittedly having more than 55% marks in their B.Sc., subject. It is also stated that the last date for admission of students was 31.8.1993 and that the selection list was duly intimated to the respondents after the completion of selection. It is also stated, that being, so the first respondent-

University at the instance of MUTA orders an enquiry by constituting a commission consisting of three members and the commission before completion of admission on 13.8.1993, visited the college and noted that two candidates from S.C. were not admitted in M.Sc., Physics and M.Sc., Chemistry. It is specifically pointed out that the said inspection was conducted before the completion of admission. It is also alleged in the affidavit that on the basis of the said inspection report, the first respondent issued a show-cause notice to the petitioner calling upon the petitioner to explain as to why the admissions are not made strictly in accordance with merit and also threatening to cancel the admissions made, if no explanation is offered. It is stated that after getting a copy of the enquiry report, sent an explanation dated 24.9.1993, stating that the petitioner-college is a denominational minority college and it is entitled to admit students upto 50% as management quota and 50% alone is bound to be filled up strictly on merit. It is also pointed out that in the respondents without conducting an enquiry properly of verifying the actual facts passed the impugned order dated 29.10.1993 cancelling the admission of I M.Sc., Physics and I M.Sc., Chemistry for the year 1993-94 alleging that the management has violated the rules laid down by the Government and the University. It is also alleged that a reading of the order will disclose that the respondents have proceeded as if the petitioner-college is a non-minority college when the civil court has declared that the petitioner-college is a denominational minority college. It is also pointed out the affidavit that no candidate is admitted in M.Sc., course who has less than the minimum marks prescribed by the University and as such the respondents are not empowered to cancel the admission of Post Graduate courses of the petitioner-college. It is also pointed out that all the 24 candidates in Post Graduate course in I M.Sc. Physics and I M.Sc., Chemistry had paid the examination fees for the first semester examination commencing from 8.11.1993 and that by virtue of the impugned order, the students are unable to sit for the first semester examination. It is also pointed out that the petitioner-college is entitled to follow its own procedure for admission upto 50% as held by the Supreme Court in *St. Stephen's College v. University of Delhi, A.I.R. 1992 S.C. 1630*; (1992) 1 S.C.C. 558 and that the

impugned order is in violation of Art.30(1) of the Constitution of India. It is further pointed that the second respondent has no jurisdiction to cancel the admission under the provisions of the Manonmaniyam Sundaranar University Act and that the impugned order has been passed without jurisdiction.

3. A counter-affidavit has been filed on behalf of the first respondent stating that the declaration obtained by the petitioner in the civil court is that Sri Kasi Mutt is a religious denomination and that being a religious denomination certain provisions of Tamil Nadu Private Colleges (Regulation) Act, 1976 would not apply to the said Mutt and that there is no declaration that the provisions of the Manonmaniyam Sundaranar University Act, 1990 should not apply to the petitioner institution. It is also pointed out that the petitioner institution was originally affiliated to the Madurai Kamaraj University, and that by Act, 31 of 1990, mentioned above, it stands affiliated to the first respondent-University. It is also stated under Sec.4 of the Manonmaniyam Sundaranar University Act, 1990 (hereinafter referred to as the 'Act') the University has prescribed conditions for affiliation. The counter-affidavit refers to the decision in *Unnikrishnan v. State of A.P.*, (1993) 1 S.C.C. 645, in which the Supreme court has directed that private educational institutions in the matter of admission of students will have to follow the rule of merit subject to the rule of reservation alone, that it is understood to be a condition for the grant of aid and as such the first respondent directed all the colleges to make admissions on the basis of merit subject to the rule of reservation and the said direction will equally apply to the petitioner-college. It is also pointed out in the counter-affidavit that in respect of some colleges complaints were received from public parents and from students that the admission norms had been violated. It is also pointed out in the counter-affidavit that the first respondent University appointed an inspection committee to go into the issue of the deviations and violations of the norms prescribed by the University. It is also stated that the petitioner-college receives cent percent aid from the Government and the Inspection Committee visited the college, after due notice, and in the report it is stated that though the last date for receipt of application forms was 19.7.1993, a communication was sent by the petitioner-college

to all the Hindu students on 3.8.1993 calling upon them to attend an interview at a place called Kalairkoil. It is also stated that the Principal and Secretary conducted an oral test for 25 marks and applicants appear to have been questioned on Saiva Siddhanta. It is also stated that the details regarding faith in Saiva Siddhanta was not asked in the application forms, nor was it stated in the prospectus that 50% of the seats would be reserved for those following Saiva Siddhanta. It is also pointed out that in the absence of mechanism to identify such persons led to two members of the Admissions Committee objecting to such a course, the Principal went ahead with allotment of 50% seats to M.Sc., Physics and Chemistry courses on the basis of academic performance and marks obtained in the interview. It is also pointed out that the inspection commission received complaints from the second year M.Sc, Physics and Chemistry Students that they had paid capitation fee ranging from Rs.9,000 to Rs.15,000 in the previous year at Tiruppanandal Muti and only after that they were given seats. It is also stated that the commission could not meet the second year students as the classes were not functioning then. It is also stated that after the receipt of the report of the commission, the respondent University issued a show cause notice dated 16.9.1993. to the principal of the college asking his explanations. It is also stated that the principal sent a letter dated 21.9.1993. asking for the copies of the annexures and also sent a reply letter dated 28.9.1993 followed by another letter dated 1.10.1993. It is also stated that a meeting of the University Syndicate was summoned on 25.10.1993. and the subject was placed before the Syndicate with all relevant records on the subject and therein it was decided that the admissions made on the basis of allotment of 25 marks for the performance in the interview to test the knowledge of "Saiva Siddhanta" was not acceptable as it was against the admission norms and it further resolved not to accept the admissions of the students. It is also pointed out that the declaration issued by the civil court in favour of petitioner-college will not enable it to claim protection under Art.30 of the Constitution, and that the protection under Art.30 is given only to a religious minority. It is also stated that even assuming that the religious denomination is also entitled to the benefit of Art.30 of the Constitution, the question whether the minority

institution can have its own method of selection was considered in *St. Stephen's College v. University of Delhi*, A I.R. 1992 S.C. 1930: (1992)1 S.C.C. 558. It is also stated that the Supreme Court has held that the minority institution had power to admit students belonging to that minority to the extent of 50% of total seats. It is also pointed out that the view that the minority Institution can adopt its own selection procedure had been disagreed by five Judges bench of the Supreme Court and the said issue has been referred to a larger Bench. It is also stated that it has been held by the Supreme Court that the University can stipulate that the students including the minority students should be drawn from the common merit list and that even minority community candidates must be admitted on the basis of *inter se* merit from the same list, that the said requirement was held to be a regulation in the interest of fairness and maintenance of standards and as such the University can stipulate that admission should be made only on the basis of merit. It is also pointed out that assuming without admitting, the petitioner-college is entitled to the benefits under Art.30, it can admit students belonging to that minority community alone to the extent of 50% i.e., the candidates who profess and practise Saiva Siddhanta. It is also stated that the application form did not contain any column which requires the students to indicate such practice of "Saiva Siddhanta" and that in the affidavit it has been stated that the interview was conducted to assess the knowledge of 'Saiva Siddhanta' and 25 marks were allotted for the interview. It is also stated that the petitioner-college called for the candidates belonging to Hindu Religion, for the oral interview at its mutt office and that for ascertaining as to how they belonged to Hindu religion, no proof was called for by the petitioner-college. It is also pointed out in the counter-affidavit that the fact that the petitioner-college called for the students belonging to Hindu religion alone was admitted, that at the same time it is claimed in the affidavit that Saiva Siddhanta was a separate religion and as such when Saiva Siddhanta is a separate religion, calling students belonging to Hindu religion was erroneous and that the stand of the petitioner-college is self-contradictory. It is also pointed out in the counter-affidavit that the petitioner-college had not admitted students in any of the previous years on the basis of such a procedure,

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that even this year it has been adopted only for the P.G. course and as such students who have secured high marks in the academic examinations have been deprived of seats in the 50% quota filled up by the petitioner management. It is also stated that allotting 25 marks for the interview is violative of law laid down by the Supreme Court in *Unnikrishnan v. State of A.P.*, (1993) 1 S.C.C. 645. It is also pointed out that the declaration granted by the Civil Court is only that Sri Kasi Mutt is a religious denomination within the meaning of Art.26 of the Constitution, that no such declaration was granted under Art.30 of the Constitution as required under Tamil Nadu Private Colleges (Regulation) Act, 1976 and as such to say that the petitioner-college is a denominational minority institution would be incorrect. The allegation made by the petitioner that the Inspection Commission was set up only at the instance of MUTA is denied in the counter. It is also pointed out that the Commission was set up not only for the petitioner-college but also for several colleges on the basis of complaints received from parents, students as well as the teaching staff. It is also stated that the petitioner-college receives 100% grant from the Government, that it is bound to follow the rule of merit in respect of admission to students, that the admission of students to the extent of 50% by the minority can only be students belonging to the minority and as such the procedure adopted by the college is arbitrary and illegal, as the students did not belong to the religious denomination. It is also stated in the counter-affidavit that the students have completed one semester cannot clothe them with any right and that the admissions made contrary to law cannot be sustained. It is also stated that the Supreme Court has held that the minority institutions can prefer their own community candidates upto the extent prescribed by the State which cannot exceed 50% of total seats and that the petitioner-college, even though not a minority college, has not admitted 50% of the students on that basis. It is also stated that the selection of students to the extent of 50% by the petitioner management on the basis of performance in the examination as well as in the interview is totally illegal and arbitrary, and that if the students are permitted to write the examinations, great prejudice will be caused.

4. Originally, the State of Tamil Nadu was not impleaded as party-respondent and it has been

impleaded as fourth respondent by order dated 15.11.1993. in W.M.P.No.31419 of 1993.

5. Two students, who have been admitted in the petitioner-college, filed W.M.P.No.31292 of 1993 in W.P.No.19833 of 1993 praying to implead them as party-respondents, and it has been ordered on 15.11.1993. It is pointed out in the affidavit filed in support of the petitioner that the students were not given any notice before passing of the impugned order, cancelling their admissions, that all the students admitted are having more than 55% of marks as prescribed by the University and that the petitioner-college selected the students after assessing their knowledge in Saiva Siddantha as the college is a denominational minority college. It is also stated that the respondent University has no power to cancel the admission of students, that no student who was denied admission had challenged his non-selection and that the respondent University has passed the order with *mala fide* intention. It is also pointed out that the impleading-respondents and the students of the petitioner-college having not been served with any notice, the principles of natural justice have been denied and as such the impugned order is liable to be set aside.

6. Mr.R.Gandhi, the learned senior counsel appearing for the petitioner-college contends that in so far as this writ petition is concerned, six seats each in I M.Sc., Physics and I M.Sc., Chemistry are in dispute, that with regard to the said admission made by the petitioner-college, no candidate who has applied for the said course and denied a seat, has come up before this Court and as such the impugned order passed by the first respondent-University is illegal. The learned senior counsel points out that a declaration in the civil court has been obtained by Sri Kasi Mutt declaring it as denominational minority and the said judgment and decree has been confirmed in appeal in A.S.No.62 of 1986, dated 23.2.1990 on the file of the District Judge, West Thanjavur, Thanjavur and that it had become final, since the State has not preferred any appeal and as such the provisions of the Tamil Nadu Private Colleges (Regulation) Act, 1976 will not apply as matter stands to-day. The learned senior counsel further refers to the judgment of Swamidurai, J. in W.P.No.19419 of 1990 dated 3.9.1991 in which the learned Judge has held that it will apply to all colleges which were managed by mutt. Learned Senior counsel

also refers to the decision in *St. Stephen's College v. University of Delhi*, A.I.R. 1992 S.C. 1630: (1992)1 S.C.C. 558, especially paragraph 64, and contends that the petitioner-college has got the right to select the students for 50% of the seats who belong to religious minority denomination and that the University has no power to cancel the admission. Learned senior counsel also points out Sec.24 of the Manonmaniam Sundaranar University Act and contends that there is no provision under the Act to cancel the admission. Learned senior counsel specially points out that all the students, who have got admission, had secured more marks than the minimum marks prescribed by the University and no other regulation is violated and as such when all the students have completed one semester, it is not open to the respondent-University to pass the resolution was not to approve the admission and also asking the college to select a fresh set of students, virtually canceling the admissions made already.

7. Mr.K.Chandru, the learned counsel appearing for the respondent-University, vehemently contends that the petitioner-college can select students only purely on merits and that even assuming that it is a minority institution can admit students it can be made only *inter se* merit. It is also pointed out by Mr.K.Chandru, the learned counsel for the respondent-University that the declaration granted by the civil court for Sri Kasi Mutt is not one under Art.30 of the Constitution of India and that it is only to the effect that it is only the religious denomination under Art 26 of the Constitution of India. Learned counsel also points out that fixing 25 marks for interview is against the principle laid down by the Supreme Court in various decisions and on this ground alone, the admission has got to be disapproved. That apart, the learned counsel contends that the decree obtained by the petitioner is a nullity and it can be challenged in other proceedings and relies upon the decision in *St. John's Teachers Training Institute, (For Women), Madurai v. State of Tamil Nadu*, (1993)3 S.C.C. 595. The learned counsel also points out the decisions in *Siddhrajhat Sabha v. State of Gujarat*, A.I.R. 1963 S.C. 540: 1962 K.L.T. 135: (1963)2 S.C.A. 394 and also in *Azeez Bahsa v. Union of India*, A.I.R. 1968 S.C. 663: (1968)1 S.C.A. 357: (1968)2 S.C.J. 299 and contends that the law laid down by the Supreme Court with regard to the right of the minority institution

which claims the right under Art.36 of the Constitution. Learned counsel also refers to the decisions in *Shahal H.Musalliar v. State of Kerala*, (1993)4 S.C.C. 112. and also in *T.M.A.Pai Foundation and others (I) v. State of Karnataka*, (1993)4 S.C.C. 276, wherein the Supreme Court has clarified the position with regard to admission into medical institutions. Learned counsel also points out the decision in *St. John's Teachers Training Institute, (For Women), Madurai v. State of Tamil Nadu*, (1993)3 S.C.C. 595, especially paragraph 21, to substantiate his contention that the petitioner's claim has got to be rejected, as the admission has been made illegally.

8. Mr.G Subramaniam, the learned senior counsel appearing for the students, who have impleaded themselves as party respondents, contends that the decree passed by the civil court in favour of the petitioner-college had become final, and in fact in the said matter Teachers' Association in Madurai Kamaraj University wanted to implead itself as party-respondent and it was rejected, and when it came up before this Court in civil revision petition, the said plea was rejected. According to the learned senior counsel, in so far as the decree of the civil court declaring Sri Kasi Mutt as a religious denominational minority stands, the petitioner-college has got the right of admission for 50% of its own choice. Learned senior counsel also points out that no candidate, who has been denied seat, challenges the admission, when there were about 100 applicants for the courses. Learned senior counsel contends that it shows that the non-selected candidates have not been aggrieved, that they have not questioned the norms prescribed by the petitioner-college and as such the impugned order cannot stand. It is also pointed out that the students, who have been admitted into the petitioner-college, were not given any notice in the sense the effect of the impugned order is to cancel all the seats and fill up by fresh candidates and as such a right which had been accrued to the students/impleading respondents, had been taken away without issuing notice to them. It is also pointed out by the learned senior counsel that the students who were selected, were not aware of the norms prescribed by the respondent-University, and as such they should not be penalised for the mistake committed by the petitioner management and relies upon the judgment of this Court in *Srinivas (Minor) and three others v.*

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9. I have considered the arguments of Mr. R. Gandhi, the learned senior counsel appearing for the petitioner-college, Mr. K. Chandru, the learned counsel appearing for the respondent-University and of Mr. G. Subramaniam, the learned senior counsel appearing for the students-impleading respondents and of the learned Additional Government Pleader for the State. I have also gone through the materials produced before this Court.

10. The short point that arises for consideration in this writ petition is whether the admission for 50% of seats filled up by the petitioner-college i.e., six seats in I M.Sc., Physics and 6 seats in I M.Sc., Chemistry is correct and is according to law. There cannot be any dispute that Sri-La-Sri Kasivasi Muthukumaraswami Thambiran Swamigal Avargal, Head of Sri Kasi Mutt, Tiruppanandal had filed a suit in O.S.No.18 of 1985, on the file of the District Munsif, Kumbakonam, praying for a declaration and that it had been decreed in favour of the plaintiff, i.e., Sri Kasi Mutt, declaring that Sri Kasi Mutt is a religious denomination and the colleges viz., (1) Sri K.V.S.S.Kallorri at Tiruppanandal and (2) Sri Kumaragurubara Swamigal Arts college at Srivaikundam being denominational institutions, the provisions of the Tamil Nadu Private College's Act, will not be applicable. On appeal in A.S.No.62 of 1986, it was confirmed by the first appellate court by judgment dated 23.2.1990. So, it cannot be disputed by the first respondent-University that the provisions of the Tamil Nadu Private Colleges (Regulation) Act, 1976 are not applicable to the petitioner-college, in so far as the judgment of the first appellate court in A.S.No.62 of 1986 is concerned it had become final. Learned Government Advocate appearing for the State also informs this Court that no appeal had been preferred against the judgment and decree of the District Court, West Thanjavur, Thanjavur in A.S.No.62 of 1986, mentioned above.

11. The next question to be considered is whether the petitioner-college can be said to be a minority college. A reading of the judgment of the first appellate court, in A.S.No.62 of 1986, mentioned above, clearly shows that a right has been claimed by the Head of the Sri Kasi Mutt both under Art.26 and under Art.30 of the Constitution of India and it has been considered by both the learned District Munsif, Kumbakonam, and also by the learned

District Judge, West Thanjavur, Thanjavur, as mentioned above. Whether 'Saiva Siddantha' can be said to be a 'religion' or not, is a question, which in my view, need not be decided in this case.

12. I think that it will be apt to refer to the decision of the Supreme Court in *S.P.Mitta v. Union of India, A.I.R. 1983 S.C. 1: (1983)1 S.C.C. 51: (1983)1 S.C.J. 45: (1983)1 S.C.R. 729*, in which it has been held as follows:

"...The words "religious denomination" on Art.26 of the Constitution must take their colour from the word 'religion' and if this be so, the expression "religious denomination" must also satisfy three conditions:

- (1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is a common faith;
- (2) Common organisation; and
- (3) designation by a distinctive name..."

The question whether Art.26 will apply to an educational institution though there is a specific provision under Art.30 of the Constitution was raised in *Azeez Basha v. Union of India, A.I.R. 1968 S.C. 662: (1968)1 S.C.A. 357: (1968)2 S.C.J. 299*, wherein the Supreme Court has observed at page 674 as follows:

"... The next argument is based on Art.26 of the Constitution. That Article provides that every religious denomination or any section thereof shall have the right (a) to establish and maintain institutions for religious and charitable purposes.... (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law. A question was raised whether Art.26 would take in its sweep educational institutions on the ground that such institutions are institutions for charitable purposes. It was urged that Art.26 will not apply to educational institutions for there is specific provision in Art.30(1) with respect to educational institutions and therefore institutions for charitable purposes in Cl.(c) of Art.26 refer to institutions other than educational ones. There is much to be said in favour of this contention. But we do not propose to decide this question for present purposes. We shall assume that educational institutions would also come within Art.26(a) as institutions for charitable purposes. Even so we fail to see how Art.26 helps the petitioners.

Clause (a) of that Article gives the right to every religious denomination and the Muslim minority may for present purposes be assumed to be a religious denomination within the meaning of Art.26 to establish and maintain institutions for religious and charitable purposes. What we have said with respect to Art.30(1) which gives right to minorities to establish and administer educational institutions of their choice applies equally to Cl.(c) of Art.26 and therefore we are of opinion that the words "establish and maintain" must be read conjunctively and it is only institutions which a religious denomination establishes which it can claim to maintain. It is not necessary to go into all the implications of the word "maintain"; it is enough for the present purposes to say that the right to maintain institutions for religious and charitable purposes would include the right to administer them. But the right under Cl.(a) of Art.26 will only arise where the institution is established by a religious denomination and it is in that event only that it can claim to maintain it. As we have clearly held, the Aligarh University was not established by the Muslim minority and therefore no question arises of its right to maintain it within the meaning of Cl.(a) of Art.26...."

As such, I do not think it is necessary for me to issue this issue at this stage, in this case.

13. There cannot be any dispute that all the students, who were admitted in the P.G. courses have obtained more than the marks prescribed for such admission. It is also an admitted fact that no other candidate, who applied for admission and denied seat, has challenged the admission made by the petitioner-college. As I have already stated it is only the respondent-University, on the ground that the petitioner-college had 'violated the norms in admitting the students, denied for approving the said admissions. It is not the case of the University and other regulation or statute is violated. It has been done mainly on the ground that 25 marks had been fixed in the interview on the subject "Saiva Siddantha". In *St. Stephen's College v. University of Delhi*, A.I.R. 1992 S.C. 1630: (1992)1 S.C.C. 558, a question arose as to whether the admission solely based on the marks obtained in the qualifying examination and the marks secured in the interview can be said to be illegal, or in other words, the procedure can be said to be arbitrary. In

the abovementioned case, the Supreme Court has held that the impugned directives of the University to select students on the uniform basis of marks secured in the qualifying examinations would deny the college therein to admit students belonging to Christian community. The Supreme Court went into the question as to whether the admissions programme of a college is a device to manipulate the merits and not a scientific test to assess performance of candidates. In that case, the Supreme Court examined the college admission in that case and came to the conclusion that the college admission programme therein is a valid one. While considering the oral interview, the Supreme Court has observed as follows: (at page 1655)

"...The oral interview as a supplementary test and not as exclusive test for assessing the suitability of candidates for college admission has been recognized by this Court. But at the same time, to avoid arbitrariness in the selection it has been repeatedly held that there shall not be allocation of high percentage of marks for oral interview test. Where candidate's personality is yet to develop, it has been emphasised that greater weight has per force to be given to performance in the written examination and the importance to be attached to the interview test must be minimal. The court has generally indicated that interview marks should not be more than 15 per cent of the total marks. (See: *R.Chutralekha v. State of Mysore*, A.I.R. 1964 S.C. 1823: (1964)6 S.C.R. 368, *A.Periakaruppan v. State of Tamil Nadu*, A.I.R. 1971 S.C. 2303: (1971)2 S.C.R. 430: (1971)2 S.C.J. 222: (1971)2 An.W.R. (S.C.) 65: (1971)2 M.L.J. (S.C.) 65, *Miss Nishi Raghu v. State of Jammu and Kashmir*, (1980)4 S.C.C. 95, *Ajay Hasra v. Khalid Mujib Sesraide*, (1981)2 S.C.R. 79: A.I.R. 1981 S.C. 487: (1981)1 Lab.L.J. 106: (1981)1 S.C.C. 722: (1980)3 Serv.L.R. 467: (1981)2 S.C.R. 79, *Lila Dhar v. State of Rajasthan*, (1982)1 S.C.R. 320 and *Koshal Kumar Gupta v. State of Jammu and Kashmir*, (1984)3 S.C.R. 407.

There is nothing on record to suggest that the interview conducted by the selection committee was contrary to the principles laid down by this Court in the aforesaid decisions. We see neither any arbitrariness nor any vice or lack of scientific basis in the interview or in the

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selection. The interview confers no wide discretion to the selection committee to pick and choose any candidate of their choice. They have to select the best among those who are called for interview and the discretion is narrowly limited to select one out of every 4 or 5. In these premises, we would refer to the choice and discretion of the selection committee so long as they act properly and not arbitrarily and act within the recognised principles..."

If this test, propounded by the Supreme Court in the abovementioned decision is applied to the facts of this case, though it cannot be disputed that the candidates who have got admission had secured more marks than the marks prescribed for such selection, yet, fixing 25 marks for the performance of interview to assess the knowledge of the candidates in "*Saiva Siddantha*" seems to be irregular and not according to law. In the abovementioned decision, the Supreme Court has held that the interview marks should not be more than 15 marks. On the facts of this case, it has not been done so. It is true that the abovementioned decision of the Supreme Court has been referred to a larger Bench of the Supreme Court in *T.M.A.Pai Foundation and others (I) v. State of Karnataka*, (1993)4 S.C.C. 286, in which it has been held as follows:

"...With regard to the third question, we think, we must briefly indicate the reasons for reference to the larger Bench. In *St. Stephen's College v. University of Delhi*, A.I.R. 1992 S.C. 1630: (1992)1 S.C.C. 558, it is held that it is not permissible for the State or the affiliating University to provide that admissions to Minority Educational Institutions should also be on the basis of merit as determined in a joint/common entrance test and that the minority Educational Institution too must draw its students from the common pool on the basis of merit. We entertain serious reservations with respect to the said holding. So long as the Minority Educational Institution is permitted to draw students belonging to that minority to the extent of 50% seats even by going down the merit list, we see no reason why the State/affiliating University cannot stipulate that the general students as well as minority students must all be drawn only from the common merit pool and that even the minority community students must also be admitted on the basis of

inter se merit determined on the basis of common/joint entrance test. Art.30 in our opinion, does not clothe a Minority Educational Institution with the power to adopt its own method of selection of students. It is not a part of the minority character of the institution. The said requirement is but a piece of regulation which the State/affiliating University can prescribe in the interest of fairness and maintenance of standards..."

14. It cannot also be disputed that the scheme framed in *Unnikrishnan v. State of A.P.*, (1993)1 S.C.C. 645, will not apply to the facts of this case, because the Supreme Court in that case has confined the scheme only to the professional colleges as stated in paragraph 207 of the said judgment. It is also seen that in *Shahal H. Musalliar v. State of Kerala*, (1993)4 S.C.C. 112, which is an off-shoot of the decision in *Unnikrishnan v. State of A.P.*, (1993)1 S.C.C. 645, no orders or no directions, about the minority institutions were made. In the abovementioned case, the Supreme Court has referred to an earlier order made on 14.5.1993, under which it is stated that fifty per cent of the total intake may be regulated by minority institutions to admit candidates belonging to the particular religious or linguistic minority, and however, the selection shall be made strictly on the basis of merit among the candidates seeking admission to such institutions. It has been also stated that such merit shall be determined on the basis of the academic performance at the qualifying examination; or on the basis of any objective test that the institution might itself apply to determine such relative and competing merits, or on the basis of performance of the results of the selecting tests that the State Government may itself hold for selecting candidates for admission into technical colleges in the State. This order has been further modified in *Shahal H. Musalliar v. State of Kerala*, (1993)4 S.C.C. 112. Considering the issue as a whole, I am of the view that though the interview system adopted by the petitioner-college cannot be said to be illegal, yet prescribing 25 marks for interview to assess the knowledge of the candidates in "*Saiva Siddantha*" seems to be against the law laid down by the Supreme Court, in the above mentioned cases.

15. When students are admitted into the petitioner-college and they have almost completed the first semester, what is to be done at this stage,

is the next question to be decided. The Supreme Court had an occasion to deal with almost a similar situation in *Ashok Chand Singhvi v. Jodhpur University*, A.I.R. 1989 S.C. 823: (1989)1 J.T. 177: (1989)1 S.C.C. 299, wherein at page 826 has held as follows:

".....Assuming that the appellant was admitted through mistake, the appellant not being at fault, it is difficult to sustain the order withholding the admission of the appellant..."

In *Rajendra Prasad Mathur v. Karnataka University*, A.I.R. 1986 S.C. 1448, the appellants therein were admitted to certain private engineering colleges for the B.E. degree course, although they were not eligible for admission. In that case, this Court dismissed the appeals preferred by the students whose admissions were subsequently cancelled and the order of cancellation was upheld by the High Court. At the same time, the Supreme Court took the view that the fault lay with the engineering colleges which admitted the appellants and that there was no reason why the appellants should suffer for the sins of the management of the engineering colleges. Accordingly, the Supreme Court allowed the appellants to continue their studies in the respective engineering colleges in which they were granted admission. The same principle which weighed with the Supreme Court in that case should also be applied to the instant case. The students who got admission were not at fault and I do not see why they should be penalised for the mistake committed by the petitioner-college. In the case in *Sudha v. University of Mysore*, A.I.R. 1987 S.C. 2305, the appellant therein was admitted into M.B.B.S. course, after passing B.Sc., even though she had not secured 50% marks in Physics, Chemistry and Biology group which is against the provisions of Karnataka Medical Colleges (Selection of Candidates for Admission to 1st M.B.B.S.) Rules, 1985). Though the Supreme Court dismissed the appeal filed by the student, yet, following the decision in *Rajendra Prasad Mathur v. Karnataka University*, A.I.R. 1986 S.C. 1448, allowed the student/appellant therein to prosecute her studies in M.B.B.S., holding that it was *prima facie*, the fault of the principal therein and the student was quite innocent. All these decisions, mentioned above, were considered by this Court in *Naiffa v. Central Board of Secondary Education, New Delhi*, A.I.R. 1992 Mad. 52 and *Srinivas (Minor) and three others*

v. The University of Madras, 1993 Writ L.R. 1, which the latter one is relied on by the learned senior counsel appearing for the impleading respondents/students. Following the abovementioned decisions, I am of the view that the students, who were called for interview and admitted into the petitioner-college, should not be penalised for the mistake committed by the petitioner-college in this case, in prescribing a higher percentage of marks for interview, to assess the knowledge of the students in the "*Saiva Siddantha*". No other statute or regulation of the University is contravened. That apart, as rightly pointed out by Mr.G.Subramaniam, the learned senior counsel appearing for the impleading respondents-students, all students who were admitted had secured more marks than the marks prescribed by the University in the guidelines. It is also to be seen that no candidate, who has been denied a seat, has challenged the admission made in the petitioner-college. As such, the impugned order of the respondent University is set aside, the writ petition shall stand allowed and the respondent University is directed to approve the admission made by the petitioner-college, *i.e.*, six seats in I M.Sc., Physics and six seats in I M.Sc., Chemistry, totalling 12 seats, which is in question within one month from to-day. However, there will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Venkataswami, J.

C.R.P.Nos.2234 of 1991 and 2195 of 1993

21st December, 1993.

S.V.S.Davey Sons, Madras ...Petitioner
v.

**Liberty Dry Cleaners under the name Board,
Garment Cleaners, Madras.** ...Respondent.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) - Partnership Act (IX of 1932), Sec.47 - Partnership firm obtaining order of eviction - Subsequent dissolution of firm - Premises allotted to one of the partners - Execution of decree - If can be continued by the firm.

Sec.47 of the Indian Partnership Act enables the partners notwithstanding the dissolution to continue the unfinished proceedings in the name of the firm. The partition deed *inter alia* states that all proceedings commenced before the dissolution shall be continued in the same way until the firm is finally wound up. That being the position, it cannot be said that the petitioner firm cannot execute the decree granted in favour of the firm after its dissolution. [Para. 14]

Cases Referred to:

Motilal v. Sarup Chand, A.I.R. 1937 Bom. 81. [Paras. 6, 12]

Saligram Ruplal Khanna v. Kanwar Rajnath, (1975)1 S.C.R. 358. [Paras. 6, 13]

Firm Ganpat Ram Rajkumar v. Kalu Ram, A.I.R. 1989 S.C. 2285. [Paras. 6, 15]

V.Shanmughan v. M/s.Carona Sahu Co. Ltd., (1991)1 L.W. 349. [Para. 6]

V.Shanmugha Mudaliar v. IX Assistant Judge, City Civil Court, Madras, (1993)2 M.L.J. 160. [Paras. 6, 18]

Syed Shafie v. Asmath Basha, (1989)1 M.L.J. 193. [Paras. 7, 21]

Mohan Ram v. Sundararamier, 1960 M.W.N. 389: A.I.R. 1960 Mad. 377. [Paras. 7, 20]

Vedanayagam v. Janaki Ammal, (1980)1 M.L.J. 226. [Paras. 7, 22]

R.Mohamood v. Ebrahim Saifuddin and Company, A.I.R. 1962 Mad. 3: 94 L.W. 387. [Paras. 7, 23]

Petition under Art.227 of the Constitution of India, praying the High Court to revise the Order of the Court of the Small Causes (X Judge), Madras, dated 12.4.91 and made in (i) E.P.No.638 of 1990 in R.C.O.P.No.2439 of 1974, and (ii) M.P.No.1052 of 1990 in E.P.No.638 of 1990 in H.R.C.No.2439

of 1974, respectively.

M.N.Padmanabhan, for *M/s.M.Santhanam and Krishnam Devey*, for Petitioner.

G.Subramaniam, Senior Counsel for *Sridhar*, for Respondent.

The Court made the following

ORDER: These two civil revision petitions under Art.227 of the Constitution of India arise out of R.C.O.P.No.2439 of 1974, on the file of the Xth Judge, Court of Small Causes, Madras.

2. Brief facts are the following:

The petitioner-firm filed R.C.O.P.No.2439 of 1974, for eviction of the respondent, on the grounds of additional accommodation, conversion and acts of nuisance. The learned Rent Controller ordered eviction on all the grounds. The respondent tenant preferred an appeal, and the order of eviction was set aside. The petitioner/landlord, aggrieved by the dismissal of the eviction petition by the Appellate Authority, preferred a revision petition in this Court in C.R.P.No.2048 of 1978. This Court allowed the said civil revision petition and ordered eviction on the ground of nuisance. The tenant/respondent preferred an appeal to the Supreme Court and the Supreme Court, in Civil Appeal No.79 of 1980, dismissed the said appeal, by judgment dated 12.7.1990 and granted time till 31.1.1991 to vacate the premises, on condition of the respondent filing in undertaking in the Supreme Court within four weeks from 12.7.1990. That it shall not induct any other person in the suit premises and shall handover vacant and peaceful possession of the demised premises to the landlord on or before 31.1.1991. The Supreme Court also further held that on the failure of the tenant filing such an undertaking within the stipulated time, the decree shall become executable forthwith. It is common ground that the respondent/tenant did not file the undertaking and consequently the decree for eviction became executable on and from 12.8.1990. As the tenant/respondent did not file the undertaking as directed by the Supreme Court, the petitioner filed E.P.No.638 of 1990, praying the executing court to issue warrants for delivery of vacant possession of veranda and two rooms in the front in premises bearing old Door Number 57, New Door Number 15, Sir Theyagaraja Road, T.Nagar, Madras-600017. When that execution petition was pending, the respondent/tenant filed an application, namely M.P.No.1052 of 1990, purporting to be one under Sec.47 of the Civil Procedure Code, contending that the individual partners of the respondent-firm should have been brought on record, and,

since the petitioner-firm has already transferred its ownership of the premises in question to one of its partners, namely, Harihar Davey, after dissolution, the decree cannot be executed by the decree-holder-firm, which is no longer in existence.

3. The executing court rejected the first contention of the respondent herein, holding that in spite of the petitioners demand for the names and addresses of the partners of the respondent-tenant (firm) during the pendency of the R.C.O.P. neither the names of the partners were given nor whispered in the counter statement that their's was a partnership concern, and, therefore, they are estopped from raising that plea now. However, the executing court accepted the second contention of the respondent tenant and held that the decree cannot be executed by the firm. Consequently to the order passed in M.P.No.1052 of 1990, the executing court dismissed the E.P. filed by the petitioner by an one line order'. The petitioner preferred a revision under Art.227 of the Constitution of India, questioning the correctness of the order of the executing court dismissing E.P.No.638 of 1990 and preferred an appeal to the appellate authority in R.C.A.No.438 of 1991, on the file of the VIIIth Judge, Court of Small Causes, Madras, against allowing M.P.No.1052 of 1990.

4. When C.R.P.No.2234 of 1991 filed against the order in E.P.No.638 of 1990 came up for final disposal, after hearing learned counsel on both sides for some time, it was felt that the appeal filed by the petitioner before the Appellate Authority (VIIIth Judge, Court of Small Causes, Madras) in R.C.A.No.438 of 1991 must be transferred to this Court and heard along with C.R.P.No.234 of 1991. Learned counsel on both sides agreed for that course. Accordingly, by order dated 23.7.1993, direction was given to the appellate authority to send all the papers in R.C.A.No.438 of 1991. On receipt of the papers in R.C.A.No.438 of 1991, it was numbered as C.R.P.No.2195 of 1993, and, by consent of learned counsel on both sides, C.R.P.No.2195 of 1993 was heard along with C.R.P.No.2234 of 1991.

5. Before going into the questions of law advanced before me, I must state that C.R.P.No.2234 of 1991 was allowed *ex parte* and subsequently the *ex parte* order was set aside on the ground that notice was not properly served on the respondent. At the time of final hearing of both these civil revision petitions, learned counsel for the petitioner and the learned Senior Counsel for the respondent appeared and advanced arguments.

6. Mr.M.N.Padmanabhan, learned counsel appearing for the petitioner, submitted that the court below went wrong in holding that the petitioner firm was dissolved during the pendency of the civil revision petition in this Court, and, as per the partition entered into among the partners, the premises in question was allotted to one Harihar Davey and the said Harihar Davey should have been brought on record to continue the proceedings and the order obtained in this Court in C.R.P.No.2048 of 1978 was by suppressing the dissolution of petitioner's partnership firm. He also submitted that the view taken by the court below on the scope of Sec.47 of the Indian Partnership Act, was not correct. His further submission was that a transferee of a decree or a subsequent purchaser of a property can continue the execution proceedings and, therefore, the view taken by the court below, that the decree cannot be executed, was not correct. According to the learned counsel, under Sec.47 of the Indian Partnership Act, unfinished proceedings can be continued in the name of the co-owner, and the contrary view taken by the court below cannot be sustained. It was further contended that the executing court cannot go behind decree, and in particular, in this case, the respondent having failed to file an undertaking as directed by the Supreme Court, cannot be permitted to file an Application under Sec.47 of the Civil Procedure Code. Lastly, he contended that Art.227 of the Constitution of India should be invoked to avail abuse of process of court. In support of his contentions Mr.M.N.Padmanabhan placed reliance on the following decisions: *Motilal v. Sarup Chand*, A.I.R. 1937 Bom. 81, *Saligram Ruplal Khanna v. Kanwar Rajnath*, (1975)1 S.C.R. 358, *Firm Ganpat Ram Rajkumar v. Kalu Ram*, A.I.R. 1989 S.C. 2285, *V.Shannmugham and another v. Mls.Carona Sahu Co. Ltd.*, (1991)1 L.W. 349 and *V.Shannmugha Mudaliar v. IX Assistant Judge, City Civil Court, Madras*, (1993)2 M.L.J. 160.

7. Mr.G.Subramaniam, learned Senior Counsel appearing for the respondent, submitted that the view taken by the court below is unassailable, and the failure of the petitioner to inform this Court when the civil revision petition was disposed of, about the dissolution of the firm was fatal to the petitioner further proceeding with the matter. He also submitted that Art.227 of the Constitution of India cannot be invoked merely because the court below has committed an error of law. According to the learned senior counsel, the contention that a subsequent purchaser of the property can

continue the eviction proceedings by executing the eviction order is contrary to a decision of this Court in *Syed Shafee v. Asmath Basha*, (1989)1 M.L.J. 193. In support of his contentions, he placed reliance on some mere decisions also. They are: *Mohan Ram v. Sundararamier*, 1960 M.W.N. 389; A.I.R. 1960 Mad. 377, *Vedanayagam v. Janaki Ammal*, (1980)1 M.L.J. 226 and *R. Mohamood v. Ebrahimi Saifuddin and Company*, A.I.R. 1962 Mad. 3: 94 L.W. 387.

8. I have considered the rival submissions.

9. Before dealing with the questions of law, I would like to state that this is a case of clear abuse of process of court by the respondent-tenant. The petitioner-landlord, who obtained an order of eviction as early as on 28.10.1976, is still knocking at the doors of the court for getting vacant possession of the premises in question, in spite of the judgment of the Supreme Court.

10. The facts are not in dispute. The eviction order was passed on 28.10.1976. Appeal against the eviction order was allowed on 17.1.1978. Dissolution of the petitioner's partnership firm took place on 31.3.1979. The civil revision petition (C.R.P.No.2048 of 1978) was allowed by this Court, granting an order of eviction on the ground of nuisance, on 26.10.1979. A partition deed was entered into on 30.11.1979, and the same was registered on 7.12.1979. The registration was completed on 20.12.1979. The respondent-tenant filed special leave petition before the Supreme Court on 11.1.1980. The Supreme Court dismissed the appeal preferred by the tenant on 12.7.1990.

11. It is in evidence that notwithstanding the dissolution, the respondent-tenant was paying rents in the name of the partnership firm, and the cheques were encashed in the account maintained in the name of the petitioner's partnership firm. In the partition deed, the suit premises was allotted to Harihar Davey, and the other partners have agreed to continue the proceedings till the allottees gets possession. It is also not in dispute that there is no winding up of the firm. That being the position, whether Sec.47 of the Indian Partnership Act will come to the rescue of the petitioner, will have to be considered.

12. In *Motilal v. Sarup Chand*, A.I.R. 1937 Bom. 81, a learned single Judge of that High Court, on the scope of Sec.47 of the Partnership Act, held as follows:

"Though the dissolution of a firm causes a dissolution of the partnership between the partners, the partnership still subsists, but merely for the purpose of winding up its business and adjusting the rights of the partners *inter se*, and for this purpose the authority of the partners to bind the firm, and all their other mutual rights and obligations, continue notwithstanding the dissolution. The power of each partner, however, extends only so far as it is necessary to wind up the affairs of the firm and to complete transactions already begun. If a debt is owing to a firm, payment by the debtor to any one of the partners extinguishes the claim of all the partners and discharges the debtor, even though a particular partner of a third person is appointed to collect the debts owing to the firm, and whether the debtor is aware of such appointment or not. Any partner of a dissolved firm can therefore recover payment of a debt due to the firm. He can effectually release the debtor and also give a valid receipt for the debt. But neither the release nor the receipt will be binding on his co-partners if the receipt is given, or the releasing partner acts, in fraud of his co-partners and in collusion with the debtor. It is not a necessary act in the winding up of a dissolved firm of a partner to create a 'novatio' in respect of debt owing to the firm. That is not recovering a debt, but really continuing it through somebody else as the debtor. His partners may previously consent to it or subsequently ratify or acquiesce in it; otherwise it is not binding upon them. But even assuming for the sake of argument that the making of a 'novatio' is a necessary act in the winding up, it will still not be binding upon the co-partners, if it is tainted by fraud or collusion. So, a partner cannot, on his own authority, bind his co-partners by allowing moneys due by one firm to be paid by another firm with which his co-partners have no concern."

13. In *Saligram Ruplal Khanna v. Kanwar Rajnath*, (1975)1 S.C.R. 358, their Lordship of the Supreme Court, on the scope of Sec.47 of the Indian Partnership Act, held as follows:

"According to Sec.47 of the Indian Partnership Act after the dissolution of the firm the authority of each partner to bind the firm and the other mutual rights and obligations of the

partners continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of dissolution but not otherwise. The word 'transaction' in Sec.47 before not merely to a commercial transaction of purchase and sale but would include also all other matters relating to the affairs of the partnership. The completion of a transaction would cover also the taking of necessary steps in connection with the adjudication on a dispute to which the firm before its dissolution was a party. In the instant case after dissolution, the partnership subsisted merely for the purpose of completing pending transactions, winding up the business and adjusting the rights of partners and for these purposes and these only the authority, rights and delegations of the partners continued."

14. From the above decisions, it can be seen that the dissolution of a partnership firm will not liable the partnership continuing action in all cases initiated before dissolution. In this case, we have noticed that the eviction order was obtained before dissolution, and this Court confirmed the order of eviction, passed by the Rent Controller by reversing the judgment of the appellate authority. Further, we have noticed that the rents were paid in the name of the partnership firm, and that shows that there was no winding up pursuant to the dissolution. Apart from that, Sec.47 of the Indian Partnership Act enables the partners notwithstanding the dissolution to continue the unfinished proceedings in the name of the firm. Further, paragraph 12 of the partition deed dated 30.11.1979. *Inter alia* states that all proceedings commenced before the dissolution shall be continued in the same way until the firm is finally wound up. That being the position, it cannot be said that the petitioner cannot execute the decree granted in favour of the firm.

15. In *Firm Ganpat Ram Rajkumar v. Kalu Ram*, A.I.R. 1989 S.C. 2285, their Lordships have considered the effect of a direction by the court to give an undertaking while granting time to the tenant to vacate the premises. Their Lordships have held as follows:

"....Where an order of eviction passed against a firm was confirmed by the Supreme Court and it was ordered that the order of eviction should not be executed for a period of six

months on firm's filing usual undertaking in the court and the order was not complied with inasmuch as no such undertaking was given nor the premises were vacated by the firm, it was held that the firm and its partners were bound to comply with the order of Supreme Court and the order cannot be defeated by the sons and grandsons of the partners of the firm by filing a suit for permanent injunction against landlords and one of the partners restraining them from ejecting the said plaintiffs and by obtaining order of temporary injunction in that suit. The plaintiffs in the said suit must be held to have deliberately not objected to Supreme Court passing the order and thereby allowed the firm to mislead the court. Though, contempt is a serious matter and it interferes with the right of these who are found guilty of contempt, no court should allow any party to mislead the court and thereby frustrate its order. Thus, in such a case, assuming that the firm and its partners could not be found guilty of violation any undertaking as there was none, in the facts and circumstances of the case the court should ensure compliance with its order and see that vacant and peaceful possession is given to the landlord in the interest of justice. It was further observed by the Supreme Court that save as aforesaid there would be no other order on the petition for contempt."

16. The above extract shows that the executing court should ensure compliance of the order of the Supreme Court and see that vacant and peaceful possession is given to the landlord in the interest of justice.

17. In this case, the order of the Supreme Court reads as follows:

"1. That the appeal above-mentioned be and is hereby dismissed, but the appellant herein be and is hereby allowed time to vacate the premises in dispute till 31st January, 1991 subject to appellant herein filing in this Court an undertaking within four weeks from this the 12th day of July, 1990 to the following effect:

(i) That the appellant herein shall not induct any other person in the suit premises and shall handover vacant and peaceful possession of the said premises to the respondent-landlord herein on or before the 31st day of January, 1991.

(ii) That the appellant herein shall pay to the

respondent-landlord herein arrears of rent, if any, within one month from this the 12th July, 1990 and shall pay to the respondent-landlord future compensation for the use and occupation of the suit premises month by month before the 10th of every month;

2. That in the event of the appellant herein failing to comply with any one or more of the conditions stated above or if the undertaking is not filed as required within the stipulated time the decree for eviction shall become executable forthwith."

18. In *V. Shannughu Mudaliar v. IX Assistant Judge, City Civil Court, Madras*, (1993) 2 M.L.J. 160, Srinivasan, J. has considered the scope of Art. 227 of the Constitution of India and after referring to number of judgments of various High Courts and Supreme Court, learned Judge has observed that Art. 227 must be invoked where there was a clear abuse of the process of court.

19. The discussion made so far is sufficient to come to a conclusion that the order of the court below cannot be sustained in holding that the decree for eviction cannot be executed, and the respondent/tenant has abused the process of the court in not obeying the order of the Supreme Court, while getting time for vacating the premises. Therefore, this is a fit case for exercising the jurisdiction under Art. 227 of the Constitution of India. The cases relied on by the learned Senior Counsel for the respondent are not apposite to the facts of this case.

20. The reliance placed by Mr. G. Subramaniam on the decision reported in *Mohan Ram v. Sundararamier*, 1960 M.W.N. 382; A.I.R. 1960 Mad. 377 is of no help as in that case, the question referred to the Full Bench and the answer given by the learned Judges are to the effect that under certain exceptional circumstances, an executing court can go behind the decree and refuse to execute a decree which is both opposed to public policy and to enacted law. That is not the situation here as could be seen from the fact narrated above.

21. The next case relied on by the learned Senior Counsel was, *Syed Shafie v. Asmath Basha*, (1989) 1 M.L.J. 193. Here again, a learned single Judge of this Court has held that in proceedings under Rent Control Act, the purchaser of the suit premises must be brought on record and that the criminal landlord cannot continue the proceedings without doing so. The learned Judge also held that

subsequent events must be taken note of. On the facts of this case, the case cited above is again of no help.

22. On the scope of Sec. 47 of the Code of Civil Procedure the case relied on by the learned senior counsel is the one reported in *Vedanayagam v. Janaki Ammal*, (1980) 1 M.L.J. 226. In that case, Ratnam, J. has observed as follows:

"...The entrustment of the powers of execution to the Rent Controller and the conferment of all the powers of a civil court on him with reference to such execution would take in all the provisions of O. 21 of the Code of Civil Procedure as well as of Sec. 47."

Here, the application under Sec. 47 of the Civil Procedure Code was not dismissed on the ground that no such application will lie, but on merits. Therefore, that decision also does not apply to the facts of this case.

23. Lastly, learned Senior Counsel placed reliance on the decision reported in *R. Mohamood v. Ebrahim Saifuddin and Company*, A.I.R. 1962 Mad. 3: 94 L.W. 387, wherein, Mohan, J., as the learned Judge then was, has held that under Art. 226 of the Constitution of India, this Court can call for a finding from the lower authority instead of taking evidence in relation to factual matters. No such circumstance arises here.

24. In view of the discussion made above, it is clear that the respondent/tenant has abused the process of the court, and also in view of the fact that Sec. 47 of the Indian Partnership Act, has not been properly appreciated by the court below, I hold that the order of the court below in M.P.No.1052 of 1990 cannot be sustained. Accordingly, C.R.P.No.2195 of 1993 is allowed. No costs.

25. Consequent to the order of the court below in M.P.No.1052 of 1990, the Execution petition itself was dismissed by an 'one line order' after referring to the order in M.P.No.1052 of 1990. As the order passed in M.P.No.1052 of 1990 is set aside, the order dismissing the execution petition is also set aside, and the court below is directed to restore E.P.No.638 of 1990 on its file and dispose of the same within six weeks from the date of receipt of a copy of this order, and report to this Court about the disposal of the said execution petition without fail. C.R.P.No.2234 of 1991 is allowed as indicated above. No costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

App.No.301 of 1981 23rd December, 1993.

V.Srinivasa Chettiar and others ...Appellants
v.

G.Selvanambi and others ...Respondents.

(A) Tamil Nadu Hindu Religious and Charitable Endowments Act, Secs.6(18) and 6(20) - Caste people performing worship - Whether temple is private or public.

There is an admission that worship is done at least by the caste or Jathi to which P.W.1 belongs. If that is so, since that caste would amount to a section of the Hindu community it can be inferred that poojas are performed by atleast a section of the Hindu community as of right. [Para. 8]

The court below erred in concluding that the scrutiny of the original trust deed would go to show that there was no public temple. In the present case there is no good reason to hold that suit temple was a private one. [Para. 10]

(B) Evidence Act (I of 1872), Secs.60 and 187 - Detailed examination-in-chief - Cross-examination only on aspect of prior enmity - Whether evidence is interested.

For all the depositions in the chief examination there is no specific cross-examination excepting suggesting enmity against the plaintiff. Likewise for a similar detailed deposition by D.W.5, there was no specific cross-examination on the different details and enmity against the plaintiff was suggested. In the above circumstances, the court below is not right in describing the entire evidence of all the witnesses examined on the side of the defendants as interested, particularly when there is no specific cross-examination on each of the details given by the D.W.'s in the chief examination regarding the public character of the temple. [Para. 9]

Cases referred to:

Ramaswamy Naidu v. Commissioner, H.R. and C.E., Madras, (1974)2 M.L.J. 133. [Paras. 3, 6]
Chennammal v. Commissioner, H.R. and C.E., Madras, (1973)2 M.L.J. 442. [Paras. 3, 6, 11]
Commissioner, H.R. and C.E., Madras v. Kalyanasundara Mudaliar, (1957)2 M.L.J. 463. [Paras.

3, 6]

T.V.Mahalanga Iyer v. State of Madras, A.I.R. 1980 S.C. 2036. [Paras. 3, 6]

Gopalan v. Commissioner, H.R. and C.E., Madras, (1973)1 M.L.J. 43. [Para. 4]

Deoki Nandan v. Murlidhar, (1957)1 M.L.J. (S.C.) 28: (1957)1 An.W.R. (S.C.) 28: 1957 S.C.J. 75: A.I.R. 1957 S.C. 133. [Paras. 4, 6]

Miss C.Sheela for P.T.Selvam, for Appellants.

G.Vasudevan, for R.T.Gopalakrishnan, for Respondent No.1.

P.M.Bhaskaran, Additional Government Pleader, for Respondent No.2.

The Court delivered the following

JUDGMENT: Defendants 5 to 8 are the appellants in this appeal against the decree in O.S.No.906 of 1978 on the file of Subordinate Judge's court, Tiruchirapalli, setting aside the order dated 16.10.1976 of the 1st defendant 2nd respondent herein, viz., the Commissioner, Hindu Religious and Charitable Endowments, Madras and declaring that the suit trust is not a religious institution" under the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as 'the Act'), but that it is only a private trust of the plaintiff-1st respondent's family. Originally the 1st respondent filed C.A.No.6 of 1974 on the file of the Deputy Commissioner, H.R. & C.E., Trichy, under Sec.63(a) of the Act for declaring that the suit Trust is not a religious institution under the Act. But, that application was dismissed by order dated 28.8.1975 (marked as Ex.B-2 in the suit) by the Deputy Commissioner, holding that the suit trust was only a religious institution. Thereafter, the 1st respondent preferred an appeal in A.P.No.73 of 1976 before the 2nd respondent-Commissioner and by order dated 16.10.1976 (marked as Ex.A-13 in the suit) the Commissioner only confirmed the order of the Deputy Commissioner and dismissed the appeal. Hence the present suit was filed under Sec.70 of the Act for setting aside the order of the said Commissioner and for declaring that the trust is a private trust. The suit having been decreed as prayed for, the trial court holding that the suit trust was not a religious institution, the appeal has been preferred by defendants 5 to 8.

2. The 2nd defendant-3rd respondent is the Fit Person appointed by the Commissioner and 3rd defendant-4th respondent is a paternal grandson of one of the original three trustees to the said

trust. It may also be pointed out here that the plaintiff himself is the maternal grandson of another original trustee of the said Trust. Admittedly, originally there was a Sabha founded by one Ramanujadasar and he dedicated the suit properties which were got by him partly by way of purchase and partly by way of donations under the trust deed Ex.A-1 dated-11.5.1930, whereby he appointed three trustees by name (1) Nallasamy Chettiar, (2) Venkatarama Chettiar, and (3) Veeraraghava Chettiar. It is these trustees who are referred to as original trustees earlier.

3. Now, while the plea of the plaintiff is that the said suit trust is only a private trust and would not come under the definition of the term 'temple' under Sec.6(2) of the Act and consequently not a religious institution as defined under Sec.6(18) of the Act, the plea of the appellants as well as the 1st defendant is that it is a temple and consequently a religious institution. Therefore, in this appeal it has only to be seen which of these two contentions is correct and whether the decision of the court below that it is a private trust and not a religious institution is correct. The 1st defendant though did not prefer an appeal, supported the appellants and both the learned counsel for the appellants and the learned counsel for the 2nd respondent made the same arguments. The said arguments are as follows: The recital in Ex.A-1 itself shows that the dedication made therein is not for any specified individuals, but only for the Hindu Community as a whole or at least a section thereof, in which case, the trust would only be a public trust. In this connection the decision in *Deoki Nandan v. Murlidhar*, (1957) 1 M.L.J. (S.C.) 28; (1957) 1 A.W.R. (S.C.) 28; 1957 S.C.J. 75; A.I.R. 1957 S.C. 133, is relied on. Further, even the court below has held that idols of Navalarsamigal and Sri Kannabiran were worshipped by the people and D.Ws. 2 to 5 have stated that people from various places would come and worship the deities. The decisions in *Ramaswamy Naidu v. Commissioner, H.R. and C.E., Madras*, (1974) 2 M.L.J. 133, *Chennammal v. Commissioner, H.R. and C.E., Madras*, (1973) 2 M.L.J. 442, *Commissioner, H.R. and C.E., Madras v. Kalyanasundara Mudaliar*, (1957) 2 M.L.J. 463 and *T.V. Mahalinga Iyer v. State of Madras*, A.I.R. 1980 S.C. 2036 are also relied on. It is also pointed out that the endowment was for continued performance of poojas not only to the abovesaid Navalarsamigal, but also to Sri Kannabiran. It is

also pointed out that the Archakas are paid and the public also contributed for the endowment. The relevant pleadings and evidence were also relied on. It is also pointed out that the only witness examined on the side of the plaintiff is not the plaintiff, but only the 3rd defendant. On the other hand, the defendants have examined as many as five witnesses to prove their case.

4. On the other hand, the learned counsel for the 1st respondent-plaintiff made the following submissions: There is no evidence that as of right, the public worshipped in the suit sabha. It is also in evidence that there is no Gopuram, Kalasam, Kodimaram, Vaganam, Undial and Dwajastjambam. There is also no public subscription. The trustees appointed in Ex.A-1 and their descendants alone are in management continuously. The worship of Navalar only shows that there was guru pooja and no importance has been given for the worship of Sri Kannabiran. There is also no express dedication for any temple in favour of the idols. He also relied on the decision in *Gopalan v. Commissioner, H.R. and C.E., Madras*, (1973) 1 M.L.J. 43. The five witnesses examined on the side of the defendants were only interested witnesses as held by the court below and they were not independent witnesses and not one among the alleged public worshippers.

5. I have considered the rival submissions. Even at the outset I must point out that though the plaintiff has filed the suit he has not even chosen to examine himself as one of the witnesses on his side. Though initially the learned counsel for the 1st respondent-plaintiff stated that he was only young and that is why he was not examined, I find that he was as old as 37 years when the suit was filed and there is not even any explanation why he was not examined. In fact, P.W. 1 the 3rd defendant deposed that the plaintiff was in town and he had also come to court. But, yet, he did not even choose to give any explanation as to why the plaintiff was not examined.

6. Before going into the relevant pleadings, and the evidence recorded, I may set out the definition of the term 'religious institution' as found in Sec.6(18) of the Act. According to the said definition, 'religious institution' means "a math, temple or specific endowment". In turn, the term 'temple' is defined under Sec.6(20) of the Act. According to the said definition, 'temple' means a place by whatever designation known, used as a place of

public religious worship, and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of public religious worship. It has been held in *Commissioner, H.R. and C.E., Madras v. Kalyanasundara Mudaliar*, (1957)2 M.L.J. 463, with reference to the corresponding similar definition of the term 'temple under the old Madras Hindu Religious Endowments Act, 1927 that firstly the place in question should be used as a place of public religious worship and secondly that it must be dedicated to or for the benefit of or used as of right by Hindu Community or any section thereof. It has also been held in *Chennammal v. Commissioner, H.R. and C.E., Madras*, (1973)2 M.L.J. 442 as follows:

"The distinction between a public and a private trust and temple has been elaborately considered by the Supreme Court in *Deoki Nandan v. Murlidhar*, (1957)1 M.L.J. (S.C.) 28: (1957)1 An.W.R. (S.C.) 28: 1957 S.C.J. 75: A.I.R. 1957 S.C. 133. It was held in that decision that the distinction between a private and a public trust was that whereas in the former the beneficiaries were specific individuals. In the latter they were the general public, or a class thereof and that the true beneficiaries of a religious endowment were the worshippers and the test to decide whether an endowment was public or private was to ascertain whether it was the intention of the founder that specified individuals were to have the right of worship at the shrine or the general public or any section thereof. The main characteristic of a public temple is that it is intended for the use of the public or a section thereof. On the other hand private temples are intended for the worship by the members of the family of the donor exclusively. In the case of a public temple the public would be entitled to worship therein as a matter of right while in the case of a private temple such worship by persons other than the founder's family would be by the sufferance of the latter."

No doubt in the abovesaid decision on facts, the court held that the temple in question was only a private temple. It has been held in *Ramaswamy Naidu v. Commissioner, H.R. and C.E., Madras*, (1974)2 M.L.J. 133, that where it is clear that by long usage and acceptance the public were visiting a temple and performing poojas therein and par-

ticipating in the processions and daily poojas, that by itself would raise a very strong presumption against the private character of the temple. Further, it has also been held in *T.V. Mahalinga Iyer v. State of Madras*, A.I.R. 1980 S.C. 2036 thus:-

"It is undisputed law that as far as Tamil Nadu is concerned, there is an initial presumption that a temple is a public one, it being up to the party who claims that it is a private temple, to establish that fact affirmatively. Of course, this initial presumption must be rebutted by clinching testimony and the crucial question is as to whether the public worship in the temple as of right. Ordinarily, there may not be direct evidence regarding the exercise of such right and inference used to be drawn from a wealth of circumstances....."

The dedication to the public need not be by a deed and may be spelt out of the circumstances present. The right of the public to worship again is a matter of inference."

7. In the light of the decisions referred to above, I shall now try to deal with the relevant pleadings and evidence. Even initially I may point out one passage in the plaint itself. In paragraph 14 of the plaint, it is alleged as follows:

"The occasion if any for the public to participate in the functions of the sabha are, occasions of the celebration of the birthday Thirunatchatram of the said Guru which is after all on annual celebration. The nature of celebrations or mode of participation by the members of the public will in no way probabilise that the sabha is a religious institution much less are dedicated to the public."

Thus, even in the plaint, an admission to this effect is there, viz., the public participated annually in the celebration of the birthday Thirunatchatram of the abovesaid Guru.

8. This part, though P.W.1 deposed in chief-examination thus:

"பொது ஜனங்கள் வந்து ஆராதனை செய்யமாட்டார்கள்.... சபாவுக்குள் பொதுமக்கள் நுழைய முடியாது.. நாங்கள் இஷ்டப்பட்டால் உண்டு. நாங்கள் தடுக்கலாம்."

he deposed in cross-examination thus:

"கீழ் புறத்தின் வழியாக சாமியை வெளியே கொண்டு செல்வோம். மேளம் நாதஸ்வரத்துடன் சாமியை சுற்றிக் கொண்டு செல்வோம். பொதுமக்கள் தெருவிலிருந்து டாப்பர்கள். சாமியை Podesal லில் வைத்துக் கொண்டு

செல்வோம்... பங்குனி மாதம் கேட்டை நட்சத்திரத்தில் பூஜை செய்வோம். முதல் 10 நாள் நாலாயிரத்திலுள்ள பிசுபத்தம் ஒதுவார்கள். எங்கள் ஜாதியில் செய்வார்கள்... முதலில் கும்பாபிஷேகம் செய்தது நேரடியாகத் தெரியாது... பொது மக்கள் அந்த கோவிலுக்கு போகமாட்டார்கள் என்று அடிக்கடி சொல்வார்கள்... (Emphasis Supplied)

சாமிசை வெளியே கொண்டு செல்லும்பொழுது எங்கள் ஜாதிக்காரர்கள் நின்று யார்ப்பார்கள்”.

From one of the above passages, it can be safely said that in so far as the alleged non-participation by public in the worship is concerned, the evidence given is only hearsay evidence. At any rate, there is admission by P.W.1 that worship is done atleast by the caste or *Jathi* to which P.W.1 belongs. If that is so, since that caste would amount to a section of a Hindu community, it can be inferred that poojas are performed by atleast a section of the Hindu community, as of right. That apart, even though P.W.1 initially deposed that with reference to the abovesaid idol of Kannabiran there was no *predhishtai* or consecration, he later deposed as follows:

“எக். ஏ. 1ல் கண்ட வாசகங்கள் உண்மை. எக். ஏ. 1ல் “பிரதிஷ்டை செய்து” என்று எழுதியுள்ளது சரியானது.”

So, it is clear that his earlier deposition was not true. Further, he also deposed in cross-examination thus:

“கண்ணபிரான் மூலவர், உற்சவர் இருக்கிறார்கள். கண்ணபிரான் தின்ற கோலத்தில் இருக்கிறார்... கப்பக் கிரகத்தில் சாமி வைத்திருக்கும்... எங்கள் குல தெய்வம் அல்லித்துறை கிராமத்தில் உள்ள அங்காளம்மன். நாவலர் கட்டிடத்தில் அங்காளம்மன் இல்லை. இது எங்கள் குல தெய்வத்தின் கட்டிடம்... சுற்றிலுள்ள பிரகாரம் இல்லை. இப்பிரகாரம் சாமிசை சுற்றிலுள்ள கேடயம் இருக்கிறது. சப்பம் இருக்கிறது. உடைத்து விட்டது... மணி இல்லாமல் பூஜை நடக்கும். சாமிக்கு வருஷத்தில் ஒரு நாள் அபிஷேகம் உண்டு.

9. Further, on the side of the defendants as many as five witnesses have been examined. The 2nd defendant, the fit person has given evidence as D.W.4 and the 5th defendant has been examined as D.W.2. D.W.3 is the Archakar of the temple ever since 1950. D.W.4 is also the headman of the village. He has deposed as follows:

“நான் போய் தரிசனம் செய்வதை யாரும் ஆட்சேபணை செய்ததில்லை... மத்தியானமும் சாயங்காலமும் பூஜை

உண்டு. அர்ச்சகர் 30 வருஷமாக இருக்கிறார். அர்ச்சகருக்கு சம்பளம் உண்டு... கோகுலாம்பி, பொங்கல், ஸ்ரீ ராம நவமி உற்சவம் நடக்கும்... எங்கள் ஊர்க்காரர்களும் வெளிப்புர்க் காரர்களும் வருவார்கள்... ஆட்சேபணை இல்லை... சுவாமியை ஊர்வலம் சுற்றுவது உண்டு... தோளில் தூக்கிப் போவார்கள். கிராமத்து ஜனங்கள் தூக்கிப் போவார்கள்”

For all these depositions in the chief-examination, there is no specific cross-examination, excepting suggesting his enmity against the plaintiff. Likewise for a similar detailed deposition by D.W.5, who was aged about 60 years, there was no specific cross-examination on the different details given by D.W.5 and enmity against the plaintiff was suggested. In the above circumstances, I do not think that the court below is right in describing the entire evidence of all the witnesses examined on the side of the defendants as interested, particularly when there is no specific cross-examination on each of the details given by D.Ws. in their chief examination regarding the public character of the temple.

10. Further, from Ex.A-1 the original trust deed, certainly it cannot be said that the trust is for the benefit of the specified individuals. Further, even out of the three trustees appointed under Ex.A-1, even though according to the learned counsel for the 1st respondent, two of them were related to each other, the other was not related to the remaining two trustees. Further, in Ex.A-1 itself it is mentioned that the superstructure put up over the first item site under Ex.A-1 was put up out of the financial assistance given by several persons. It is also provided there that the appointed trustees have no right to alienate the properties given under Ex.A-1. It is also provided there that out of the income of its properties, poojas have to be conducted for ever. The relevant passage therein is as follows:

“இதன்படியில் கண்ட சொத்துக்களிலும் இனி இதற்காக ஏற்படும் சொத்துக்களிலும் வரும் மாலும் வரும் படியைக் கொண்டு மேற்படி சுவாமிகளின் கைகளியும் தவிர வேறு எவ்வித வினியோகங்களும் செய்யக்கூடாது.”

The court below erred in concluding that the scrutiny of Ex.A-1 would go to show that there was no public temple.

11. No doubt in the above referred to *Chennamnal v. Commissioner, H.R. and C.E., Madras, (1973) 2 M.L.J. 442*, it is observed that the mere fact that

outsiders are allowed to worship in a temple cannot necessarily mean that the temple was dedicated to the public as no Hindu will ever prohibit strangers from offering worship to the deity enshrined in his private temple. But, in the present case, in view of the abovesaid other features, there is no good reason to hold that the said temple was a private one. The features pointed out above would only show that the suit temple was only a public temple and dedication for public religious worship could be inferred from the above referred to features.

12. In the result, the judgment and decree of the court below are set aside and the suit is dismissed. Accordingly, the appeal is allowed. However, in the circumstances of the case, there will be no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Ratnam, J.

C.R.P.No.2 of 1985 6th January, 1994.

Mohanaram Chettiar ...Petitioner
v.
K.V.Santhanam and another ...Respondents.

Civil Procedure Code (V of 1908), O.34, Rule 5 - Suit to enforce security bond - Final decree passed - Property subjected to security - Brought to sale and purchased by auction purchaser - Posted for confirmation of sale on 10.4.1972 - Numerous proceedings under provisions of Code and Debt Relief Acts - One of judgment-debtors died - Son of deceased filing petition to set aside sale - Claiming to have

paid decree amount to decree-holder and deposited amounts towards profits and poundage to auction purchaser - High Court setting aside confirmation of sale in favour of auction purchaser - Deposit, if in consonance with O.34, Rule 5.

It is seen that in this case, even if as a result of the earlier unsuccessful proceedings taken out by the 1st respondent and others, the court auction sale in favour of the petitioner should be regarded as having been confirmed, such confirmation had been clearly set at naught by the decision in *Neelambal v. Mohanaram Chettiar*, (1984) 2 M.L.J. 264. This would, therefore, be a case where though the sale had been confirmed earlier, such confirmation had been set aside and that too at a point of time when the application under O.34, Rule 5 of the Code filed by the 1st respondent was pending. The resulting position, therefore, is that the court sale had remained unconfirmed as the earlier confirmation had been set aside and the application for setting aside the court sale under O.34, Rule 5 of the Code was already there in regard to an unconfirmed court sale, consequently, the deposit made by the 1st respondent was in consonance with the requirements of O.34, Rule 5 of the Code.

[Para 7]

Cases referred to:

Subramanja v. Ramaswami, A.I.R. 1937 Mad. 560.

[Para. 6]

Neelambal v. Mohanaram Chettiar, (1980) 2 M.L.J.

1. [Para. 6]

Neelambal v. Mohanaram Chettiar, (1984) 2 M.L.J.

264. [Paras. 6, 7]

Sevagam Chettiar v. Narayana Raja, (1984) 2 M.L.J.

55. [Paras. 8, 9]

N.Krishnamurthy v. L.M.R.R.M.Ramasamy Chettiar, 1991 T.L.N.J. 247. [Para. 8]

Periyakkal v. Dakshayani, A.I.R. 1983 S.C. 428.

[Paras. 10, 11]

Hukum Chand v. Bansilal, A.I.R. 1968 S.C. 86;

(1988) 1 S.C.W.R. 76; (1986) 1 An.L.T. 147; (1968) 2

S.C.J. 32; (1967) 3 S.C.R. 695. [Para. 11]

Petition under Sec.115 of Act V of 1908 praying

the High Court to revise the order of the Court of

the Subordinate Judge, Chidambaram, dated

1.10.1984 and made in E.A.No.280 of 1981 in

E.P.No.24 of 1970 in O.S.No.54 of 1968.

V.Raghavachari, for Petitioner.

S.Ramamurthi, for Respondent No.1.

The Court made the following

ORDER: This civil revision petition has been

preferred by the auction purchaser in execution of the decree in O.S.No.54 of 1968, Sub Court, Chidambaram, against the order passed in E.A.No.280 of 1981 allowing the application filed by the 1st respondent herein under O.34, Rule 5, Code of Civil Procedure (hereinafter referred to as the Code) praying that the court auction sale in favour of the petitioner in 6.3.1972 should be set aside.

2. Briefly stated, the circumstances, under which the 1st respondent preferred E.A.No.280 of 1981 are as follows:

In O.S.No.54 of 1968, instituted by the 2nd respondent herein against K.S.Venkatarama Iyer and Ramanatha Iyer, as Mangers of the Joint Hindu family, to enforce a security bond dated 20.7.1966 executed by them, a preliminary decree was passed on 7.11.1968, which was also followed by a final decree on 10.11.1969. In execution of the decree so obtained, the 2nd respondent brought the property subjected to security to sale in E.P.No.24 of 1970 in O.S.No.54 of 1968. During the pendency of the execution proceedings, Venkatarama Iyer died on 17.9.1970 and the 1st respondent herein and others were brought on record as his legal representatives. Subsequently in E.P.No.24 of 1970, the property secured was purchased by the petitioner on 6.3.1972 and for confirmation of the sale, it was posted to 10.4.1972. Thereafter, numerous proceedings were taken under the provisions of the Code as well as these under the Debt Relief Acts and it is not necessary to notice all those proceedings in detail, except two of them, as would be noticed later. According to the case of the 1st respondent as the sons of deceased Venkatarama Iyer, who was impleaded in the course of the execution proceedings also, he is entitled to redeem the property sold in court auction on 6.3.1972, as the sale had remained unconfirmed. Stating that he had paid a sum of Rs.30,000 to the 2nd respondent/decree holder and he had also agreed to record full satisfaction of the decree, the 1st respondent claimed that the court sale in favour of the petitioner is liable to be set aside under the provisions of O.34, Rule 5 of the Code, as he had also deposited a sum of Rs.1,816 into court towards profits and poundage to the petitioner.

3. The application so made, was resisted by the petitioner on the ground that the prior proceedings unsuccessfully taken by the 1st respondent

resulted in an automatic confirmation of the sale held in his favour on 6.3.1972 and the application purporting to be under O.34, Rule 5 of the Code was not maintainable. The payment by the 1st respondent to the 2nd respondent/decree holder was also disputed. Claiming that he had become the absolute owner of the property purchased in court auction, the petitioner stated that the provisions of O.34, Rule 5 of the Code were inapplicable. It was also pleaded that as per the provisions of O.34, Rule 5 of the Code, the amount as envisaged thereunder must be deposited into court as a condition precedent. In an additional counter filed by the petitioner a dispute was raised regarding the correctness of the amounts stated to have been paid by the 1st respondent and he reiterated that the dismissal of the earlier proceedings to set aside the sale, resulting in the confirmation of the court sale, would preclude the 1st respondent from seeking relief under O.34, Rule 5 of the Code.

4. On a consideration of the rival claims so put forward, the learned Subordinate Judge found that the 1st respondent had deposited the entire amount of Rs.47,180 payable in accordance with the orders passed in E.A.No.338 of 1984. Considering the entitlement of the 1st respondent to the relief of setting aside the court sale prayed for, the learned Subordinate Judge found that as a result of the several earlier proceedings, the court sale in favour of the petitioner, had remained unconfirmed and that as the 1st respondent had deposited the correct amount as per the provisions of O.34, Rule 5 of the Code, the sale in favour of the petitioner, deserved to be set aside the correctness of which is questioned in this civil revision petition.

5. Learned counsel for the petitioner first contended that as a result of the earlier unsuccessful proceedings taken by the 1st respondent and others to set at naught the court sale under the provisions of the Code, the court sale in favour of the petitioner must be deemed to have been automatically confirmed without even a need for the court to pass an order to that effect and under those circumstances, the application under O.34, Rule 5 of the Code, filed by the 1st respondent on 24.12.1981, could not have been entertained. Reference in this connection was also made to the observations of some decisions to the effect that the confirmation of a court sale is more or less automatic and need not even be prayed for.

6. On the other hand, learned counsel for the 1st respondent, drawing attention to the provisions of O.21, Rule 92 of the Code and relying upon the decision reported in *Subramania v. Ramaswami*, A.I.R. 1937 Mad. 560, contended that O.21, Rule 92 of the Code contemplates the passing of an order of confirmation, on the passing of which, the sale becomes absolute and not the lapse of 30 days that confirms the sale but the passing of an order, which cannot be passed within 30 days. In addition, referring to the prior proceedings in this very case, which had culminated in *Neelambal v. Mohanarama Chettiar*, (1980) 2 M.L.J. 1 and *Neelambal v. Mohanarama Chettiar*, (1984) 2 M.L.J. 264, learned counsel further submitted that whatever might have been the effect of the failure of the steps earlier taken by the 1st respondent to have the court sale in favour of the petitioner set aside, the confirmation was set aside on 20.7.1983 by the order passed by this Court in *Neelambal v. Mohanarama Chettiar*, (1984) 2 M.L.J. 264 and as the application filed by the 1st respondent under O.34, Rule 5 of the Code, was already pending and the confirmation of the sale had also been set aside, the theory of automatic confirmation of the sale did not have any application whatever.

7. In order to appreciate the aforesaid contention, it would be necessary to make a brief reference to the result of the proceedings earlier taken on two occasions, as stated earlier. In *Neelambal v. Mohanarama Chettiar*, (1980) 2 M.L.J. 1, this Court remitted the proceedings taken out in E.A.Nos.14 and 33 of 1979 in O.S.No.54 of 1968 under Secs.19 and 16 of Tamil Nadu Act 38 of 1972, on the ground that it would be necessary to investigate whether the petitioner therein was entitled to claim the benefits of the provisions of the Act, referred to earlier. Again, in *Neelambal v. Mohanarama Chettiar*, (1984) 2 M.L.J. 264, with reference to the very court sale in favour of the petitioner herein, it was held that when other proceedings claiming benefits under Debt Relief Act were pending, which may result in affecting the rights of parties even to execute the decree, it would not be appropriate to proceed to confirm the sale and in that view, the confirmation of the sale in favour of the petitioner also was set aside on 27.3.1983. It is thus seen that in this case, even if as a result of the earlier unsuccessful proceedings taken out by the 1st respondent and others, the court auction sale in favour of the petitioner, should be regarded as

having been confirmed, such confirmation had been clearly set at naught by the decision in *Neelambal v. Mohanarama Chettiar*, (1984) 2 M.L.J. 264. This would, therefore, be a case where, though the sale had been confirmed earlier, such confirmation had been set aside and that too at a point of time when the application under O.34, Rule 5 of the Code filed by the 1st respondent was pending. The resulting position, therefore, is that the court sale had remained unconfirmed, as the earlier confirmation had been set aside and the application for setting aside the court sale under O.34, Rule 5 of the Code was already there in regard to an unconfirmed court sale. In view of the adjudication in *Neelambal v. Mohanarama Chettiar*, (1984) 2 M.L.J. 264, there to the effect that the confirmation of the sale was set aside, it is unnecessary to consider the other question whether there could be an automatic confirmation with reference to the provisions of O.21, Rule 92 of the Code or not. Thus, on the facts and circumstances of this case, the sale remained unconfirmed and the application filed by the 1st respondent under O.34, Rule 5 of the Code was also there and therefore, there is no substance in the contention of the learned counsel for the petitioner that the application under O.34, Rule 5, was not entertainable, as the sale had already been confirmed.

8. Learned counsel for the petitioner next contended referring to the provisions of O.34, Rule 5 of the Code that the entire amount payable in terms of O.34, Rule 5 of the Code had not been deposited into court prior to the filing of the application and therefore, that application could not have been entertained and dealt with. On the other hand, learned counsel for the 1st respondent pointed out that all that is contemplated by O.34, Rule 5 of the Code is that the entire amount should be deposited before confirmation and not necessarily before or at the time of the filing of the application under O.34, Rule 5 of the Code and relied on the decision reported in *Sevagan Chettiar v. Narayana Raja*, (1984) 2 M.L.J. 55 and *N.Krishnamurthy v. L.M.R.R.M.Ramasamy Chettiar*, 1991 T.L.N.J. 247.

9. From the record of proceedings, it is seen that no objection had been raised in regard to the correctness of the amount deposited by the 1st respondent in the application taken out by him under O.34, Rule 5 of the Code. Whether the amount so deposited, should have been either

prior to the filing of the application or at the time of the filing of the application, requires to be considered. In this case, apart from the amounts earlier deposited, pursuant to the order passed in E.A.No.338 of 1984, a challan for deposit was issued at the 1st respondent and he had deposited the amount at a point of time, when the sale had not been confirmed, though after the filing of the application under O.34, Rule 5 of the Code on 24.12.1981. It is in this connection, an unreported judgment of a Division Bench consisting of Lionel Leach, C.J. and Krishna Rao, J. in *K.Subramania Iyer v. K.Chidambaranatha Mudaliar (decd.) and others, C.M.A.No.717 of 1941 dated 9.12.1942*, is relevant. There the decree holder bought the property for Rs.1,341 and the total amount required to be deposited under O.34, Rule 5 of the Code, was Rs.1,465.15.0; but the judgment-debtor deposited only Rs.1,369.7.3. From the judgment, it is seen that the total amount required had later been deposited. Considering this, the Division Bench pointed out that the amount due under the decree was Rs.1,369.7.3, which was paid and the balance of the decretal amount also having been paid into court, the application filed under O.34, Rule 5 of the Code, should be allowed. From the facts of this case, it appears that though a larger sum should have been deposited even initially, but was not, and that had been made good later, that would suffice to fulfil the requirements of O.34, Rule 5 of the Code. Apart from this in *Sevagam Chettiar v. Narayana Raja, (1984)2 M.L.J. 55*, another Division Bench while dealing with an argument that there ought to have been an actual deposit of the amounts under O.34, Rule 5 of the Code before the application is filed, pointed out that so long as there is no confirmation of sale in the eye of law, time is available for the judgment-debtor to make the deposit and the process of deposit could be worked out until the confirmation of the sale reaches finality. Depositing into court is not a matter of course and the Civil Rules of Practice lay down processual aspect and the submission that actual deposit must precede the very filing of the application, cannot be countenanced, was the view taken by the Division Bench. It was pointed out that all that is necessary is that there must be a deposit and that deposit should be made before the confirmation of the sale. In this case, as pointed out earlier, the sale had remained unconfirmed as a result of the adjudication in *Neelambal v.*

Mohanarama Chettiar, (1984)2 M.L.J. 264, and the sale had not been confirmed and consequently, the deposit made by the 1st respondent was in consonance with the requirements of O.34, Rule 5 of the Code. Indeed in *N.Krishnamurthy v. L.M.A.R.M.Ramasamy Chettiar, 1991 T.L.N.J. 247*, it was held that even pending a revision petition, arising out of the proceedings to set aside the court sale, there could be no objection to the judgment-debtor seeking permission to invoke the provisions of O.34, Rule 5 of the Code and the permission prayed for, had also been granted. This is again on the footing that having regard to the pendency of the proceedings to set aside the court sale, the confirmation is set at naught enabling the judgment-debtor to have recourse to the provisions of O.34, Rule 5 of the Code. The first contention of learned counsel for the petitioner cannot therefore, be accepted.

10. Lastly, learned counsel for the petitioner relying upon *Hukum Chand v. Bansilal, A.I.R. 1968 S.C. 86; (1988)1 S.C.W.R. 76; (1986)1 An.L.T. 147; (1968)2 S.C.J. 32; (1967)3 S.C.R. 695*, contended that there was no question of extending the time for depositing the amount under O.34, Rule 5 and Sec.148 of the Code, is inapplicable and again reiterated that there was an automatic confirmation of the court sale in favour of the petitioner. In answer to this, learned counsel for the 1st respondent pointed out that at no point of time there was any request made by the 1st respondent praying for extension of time to deposit the amount and as the amount could be deposited any time prior to the confirmation of the court sale, as laid down in *Sevagam Chettiar v. Narayana Raja, (1984)2 M.L.J. 55*, the contention put forward, cannot be accepted, particularly in view of the decision in *Periyakkal v. Dakshayani, A.I.R. 1983 S.C. 428*, explaining the decision in *Hukumchand v. Bansilal, A.I.R. 1968 S.C. 86*.

11. A careful consideration of the record of proceedings does not disclose that there was at any point of time any request made for extension of time invoking the provisions of Sec.148 of the Code. It is seen that the 1st respondent had approached the court for the issue of a challan in E.A.No.338 of 1984 and after obtaining the challan, had also deposited the entire amount as per the provisions of O.34, Rule 5 of the Code. A faint submission was attempted to be made by learned counsel for the petitioner to the effect that

notice in E.A.No.338 of 1984 had not been given. Even under the Civil Rules of Practice, ordinarily, notice is given after the deposit is made and not always before. There is, therefore, no substance in the feeble submission of learned counsel for the petitioner. In any event, it is seen that the petitioner has not pointedly raised any objection in this regard either before the court below or even here and the petitioner cannot claim to have been subjected to any serious prejudice or injury on this account. Further, in the decision reported in *Periyakkal v. Dakshayani*, A.I.R. 1983 S.C. 428, the scope of the decision in *Hukum Chand v. Bansilal*, A.I.R. 1968 S.C. 86: (1968)1 S.C.W.R. 76: (1968)1 An.L.T. 147: (1968)2 S.C.J. 32: (1967)3 S.C.R. 695, had been clearly explained, as follows:

"In *Hukum Chand v. Bansilal*, A.I.R. 1968 S.C. 86: (1968)1 S.C.W.R. 76: (1968)1 An.L.T. 147: (1968)2 S.C.J. 32: (1967)3 S.C.R. 695, the real question which was considered was, if a mortgaged property was sold in execution of a mortgaged decree and if the application to set aside the sale under O.21, Rule 90 was dismissed, but time was granted by consent of parties for depositing the decretal amount etc., could time be extended for depositing the decretal amount etc. to avert the confirmation of sale under O.34, Rule 5, except with the consent of the parties. The answer was 'no'. The court said on the dismissal of an application under O.21, Rule 90, confirmation of sale under O.21, Rule 92 had to follow as a matter of course. O.34, Rule 5 merely permitted the deposit to be made at any time before the confirmation of the sale and there could be no question of extending the time for such deposit. If parties agreed to have the confirmation of sale postponed, further postponement would be possible by agreement of parties only. The court would have no say in the matter. Sec.148, C.P.C., would have no application."

At page 430, the Supreme Court observed thus: "In the case before us, the situation is totally different. Unlike the case of *Hukum Chand v. Bansilal*, A.I.R. 1968 S.C. 86: (1968)1 S.C.W.R. 76: (1968)1 An.L.T. 147: (1968)2 S.C.J. 32: (1967)3 S.C.R. 695, where there was a statutory compulsion to confirm the sale on the dismissal of the application under O.21, Rule

90 and therefore, postponement and further postponement of the confirmation of the sale could only be by the consent of the parties, in the case before us, there was no statutory compulsion to dismiss the application under O.21, Rule 90 in the absence of an agreement between the parties. The court would have then decided the appeal arising out of the application on the merits. The parties, however, entered into a compromise and invited the court to make an order in terms of compromise which the court did. The time for deposit stipulated by the parties because the time allowed by the court and this gave the court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True, the court would not rewrite a contract between the parties, but the court would relieve against a forfeiture clause. And, where the contract of the parties has merged in the order of the court, court's freedom to act to further the ends of justice would surely not stand curtailed. Nothing said in *Hukum Chand's case*, A.I.R. 1968 S.C. 86: (1968)1 S.C.W.R. 76: (1968)1 An.L.T. 147: (1968)2 S.C.J. 32: (1967)3 S.C.R. 695, militates against this view."

In view of the aforesaid observations explaining the scope of the decision in *Hukum Chand's case*, A.I.R. 1968 S.C. 86: (1968)1 S.C.W.R. 76: (1968)1 An.L.T. 147: (1968)2 S.C.J. 32: (1967)3 S.C.R. 695, there is no question of any extension of time to the prejudice of the petitioner, as claimed by the learned counsel for the petitioner and under those circumstances, this contention has also no substance. No other point was urged. Consequently, the civil revision petition is dismissed with costs of the 1st respondent.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thanikkachalam, J.*

C.R.P.No.3105 of 1986 and C.M.P.No.15018 of 1986
5th January, 1994.

N.V.Jagannathan ...Petitioner
v.
Mrs.Amrut Gowri and another ...Respondents.

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.10(4)(ii) - Applicability of - Requisites for.*

In order that the provisions of Sec.10(4)(ii) of the Tamil Nadu Buildings (Lease and Rent Control) Act may apply, the requisites to be specified are: There must be letting. It must be for the use of as an educational institution and the building must still be used for the purpose and further the institution should be one that has been recognised by the Government or any authority empowered by the Government in that behalf and lastly such recognition must continue at the relevant date. The Government means the State Government.

[Paras. 7 & 8]

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act XXIII of 1973), Sec.10(3)(a)(iii) - Landlord filing petitions for eviction - Requirement to carry on his business - Proof - Element of bona fide - Held to be proved.*

In order to obtain an order of eviction under Sec.10(3)(a)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act, the landlord must not only prove that he is carrying on his business in a rented premises and he is not having or occupying a premises of his own in the City of Madras, but also prove the element of *bona fide*, as contemplated under Sec.10(3)(e) of the Act as pointed out by the Supreme Court in the case of *Hameedia Hardware Stores v. Mohan Lal Sowcar*, (1988)2 L.W. 1.

[Para. 11]

Case referred to:

Hameedia Hardware Stores v. Mohan Lal Sowcar, (1988)2 L.W. 1. [Para. 11]

N.Krishnamithra for *Ms.Sumathi Shankar*, for Petitioner.

R.M.Krishna Raju, for Respondents.

The Court made the following

ORDER: The landlord is the petitioner herein. The petition for eviction was filed under Sec.10(3)(i) and (iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by Act, 23 of 1973 (hereinafter referred to as the Act). According to the landlord, he purchased the petition premises under a sale deed dated 24.6.1983. The petition premises was let out for the purpose of residence to the tenant. Thereafter, the tenant without consent of the landlord utilised the petition premises for non-residential purpose. The landlord by a letter dated 27.6.1983 intimated the tenant that he purchased the petition premises. The tenant accepted the tenancy and paid the rent to the subsequent purchaser, who is the petitioner in the eviction petition. On 2.6.1977 the landlord sent a notice to the tenant stating that the tenant without the consent of the landlord is using the premises for conducting a school under the name and style of 'Kalaimagal English School'. Thereafter, on 3.7.1983 the landlord sent a notice to the tenant requesting him to hand over the petition premises for the purpose of residence. The tenant sent a reply on 24.7.1983. In the said reply, the tenant stated that the school which is being conducted in the petition premises is affiliated and recognised by the Government and therefore, the landlord is not entitled to ask for possession. In the said reply the tenant also stated that he has spent a sum of Rs.21,000 for putting up additional construction. According to the landlord, he is residing in a rented premises in West Mambalam and paying a monthly rent of Rs.350. The landlord therefore stated that he is not having any other premises of his own in the City of Madras. The landlord also stated that the petition premises is required *bona fide* for conducting his business, which he is doing in a rented premises at No.5, Karunanidhi 1st Cross Street, West Mambalam.

2 The tenant filed a counter stating that Kalaimagal Convent was started at No.17, Sivan Koil Street, Power House, Kodambakkam, Madras 24 in the year 1962. The first respondent in the eviction petition is the Correspondent of the said School. Thereafter, in the year 1967, the premises at No.50, Bajanaik Koil Street, Sulaimedu was used for the purpose of conducting the branch. So also in the year 1968, the branch school was opened. From 1972 onwards the second respondent in the

eviction petition has become another Correspondent to the abovesaid schools. It is not correct to state that the petition premises was let out for residential purpose. The prior owner of the petition premises did not raise any objection for conducting the school in the petition premises. The petition premises was let out for non-residential purpose. Even the subsequent purchaser the present landlord knew that the petition premises was being used for non-residential purpose. Kalaimagal Higher Secondary School is a recognised school by the Government of Tamil Nadu. The school, which is in the petition premises is a branch of the main school called Kalaimagal Secondary School. It is not correct to state that the landlord is conducting his business in a rented premises as alleged by him. Eviction cannot be asked both for the purpose of residential and non-residential. The tenant incurred an expenditure of Rs.21,000 by putting up additional construction in the petition premises. It is therefore, the petition for eviction filed by the landlord is liable to be dismissed. Jagannathan was examined as P.W.1. Gunasekaran was examined as R.W.1. The landlord filed 10 documents and the tenant filed one document. Considering the facts arising in this case, the Rent Controller came to the conclusion that the petition premises was let out for non-residential purpose. The Rent Controller further held that the landlord failed to establish his *bona fide* in requiring the petition premises under Sec.10(3)(a)(iii) of the Act. The Rent Controller also held that the school conducted in the petition premises is recognised by the Government. For all these reasons, the petition filed by the landlord was dismissed. On appeal, the Rent Control Appellate Authority also held that the petition premises was let out for non-residential purpose and therefore, the landlord cannot ask for eviction under Sec.10(3)(a)(i) of the Act. The Appellate Authority further held that in view of the provisions contained in Sec.10(4)(ii) of the Act, the petition filed by the landlord is not maintainable. However, the Rent Control Appellate Authority accepted that there is *bona fide* on the part of the landlord is requiring the petition premises, under Sec.10(3)(a)(iii) of the Act. Accordingly, the order passed by the Rent Controller was confirmed by the Rent Control Appellate Authority.

3. Aggrieved, the landlord is in revision before this Court. The learned counsel appearing for the

landlord submitted as under: Both the authorities below concurrently came to the conclusion that the petition premises was let out for non-residential purpose. The landlord is conducting his business in the rented premises. He is not having or in occupation of any other non-residential premises of his own in the City of Madras. Therefore, he required the petition premises *bona fide* under Sec.10(3)(a)(iii) of the Act. Even according to the learned Rent Control Appellate Authority, the requirement of the landlord of the petition premises under Sec.10(3)(a)(iii) of the Act is *bona fide*. Though affiliation was granted to the Kalaimagal Higher Secondary School, affiliation was not granted to its branch school now being conducted at the petition premises. The branch school, cannot be considered as a feeder to the main school. Exs.P-5 and P-6 would clearly go to show that the affiliation is not granted to the branch school. Affiliation is granted only for the school which is conducting IX, X and XI standards. In the petition premises, IX, X and XI standards are not conducted. Since the branch school is not an affiliated institution, protection under Sec.10(4)(ii) of the Act cannot be extended to the tenants-respondents herein. C.M.P.No.15018 of 1986 was filed for permission to receive additional document. The additional document is a public document. Therefore, further tests over the said document are not necessary. The additional document could not be produced before the authorities below, since the petitioner herein was unable to obtain the same in time. The letter dated 24.9.1986 written by the Regional Officer Central Board of Secondary Education, Saidapet, Madras would clearly go to show that affiliation was granted only to Kalaimagal Higher Secondary School situated at 48, Rajeswari Road, Rajaram Methanagar, Madras-29. Therefore, the branch school cannot plead the benefit of affiliation granted by the Central Board of Secondary Education. For all these reasons, it was pleaded that the order passed by the authorities below is liable to be set aside and eviction may be ordered under Sec.10(3)(a)(iii) of the Act.

4. On the other hand, the learned Counsel appearing for the respondents-tenants submitted as under: The additional document filed by the landlord cannot be entertained at this stage without testing the veracity of the said document. The premises was originally let out for non-residential

purpose by the prior owner. The school was being conducted in the petition premises even on the date when it was purchased by the present landlord. The present landlord used to receive the rent having known the fact that the petition premises is being utilised for non-residential purpose. The tenant incurred an expenditure of Rs.21,000 for putting up an additional construction. The landlord failed to establish his *bona fide* in requiring the petition premises under Sec.10(3)(a)(iii) of the Act. The affiliation granted in favour of the main school will hold good for the branch school also. The branch school is being conducted in the petition premises as a feeder school for the main school conducted under the name and style of Kalaimagal Higher Secondary School. Both the authorities below concurrently came to the conclusion that the landlord is not entitled to an order of eviction in view of the exemption as contemplated under Sec.10(4)(ii) of the Act. It is only after considering Exs.P-5 and P-6, the authorities below came to the conclusion that the petition for eviction is not maintainable in view of the provisions contained in Sec.10(4)(ii) of the Act. Since the conclusions arrived at by the authorities below are concurrent, it was pleaded that no interference is called for. I have heard the rival submissions.

5. Two points that arise for consideration in this revision are: (1) Whether the tenant is entitled to the protection given under Sec.10(4)(ii) of the Act, and (2) Whether the landlord established his *bona fide* in requiring the petition premises under Sec.10(3)(iii) of the Act. The landlord purchased the petition premises situated at No.41, 7th Street, Sulaimedu, Madras-94 by a sale deed dated 23.6.1983. The sale deed was registered on 24.6.1983. The tenant in the premises attorned the tenancy in favour of the subsequent purchaser, who is the present landlord. According to the landlord, the petition premises was originally let out by his vendor for residential purpose, and the tenant without the consent of the landlord is running the kinder garden school under the name and style of Kalaimagal English School in the petition premises. After the purchase the landlord issued a notice on 3.7.1983 indicating that the premises let out for residential purpose is being used for running a school. The landlord also stated that he is living in a rented premises and he purchased the petition premises for the purpose of his personal

occupation. The tenant sent a reply on 22.7.1983 refuting the allegations contained in the notice issued by the landlord. According to the tenant, even the prior landlord permitted the tenant to use the premises for running the school. It was also stated that the tenant has put up an additional construction by incurring an expenditure of Rs.21,000. According to the landlord, he made enquiries with the Central Board of Secondary Education. The Regional Office of the Board is situated at Saidapet, Madras. They provided a list of schools affiliated to the Board of Tamil Nadu. In the said list item No.84, indicated that Kalaimagal English School, Kalyanapuram, Madras-24 is the institution affiliated to the Central Board of Secondary Education. The hand book of affiliation of institutions published by the Central Board of Education indicated that affiliation is not extended to branches run by any institution and if there is no affiliation, the grant is not extended to that institution. The landlord also found that no grant is given to Kalaimagal Kinder Garden School. Therefore, according to the landlord, the protection under Sec.10(2)(iii) of the Act would not be applicable to the facts of this case. On the other hand, it is the case of the tenant that affiliation was granted to the main school Kalaimagal Higher Secondary School and the school, which is being conducted in the petition premises is a feeder school for the main school. Therefore, according to the tenant, the affiliation granted to the main school would also hold good for the branch school. According to the tenant, a separate affiliation is not necessary for the branch school. The tenant submitted that all the branches are functioning as feeding centres for the principal school in power house road, Kodambakkam and the entire administration of its branches is controlled by the principal school. The first respondent in the eviction petition was the correspondent for all the branches since he was the correspondent for principal school. From 1972 the second respondent is the correspondent for all the schools including the principal school. The original landlord was fully aware of the fact that the petition premises was used for running the school. Even after the purchase the present landlord did not raise any objection for conducting the school in the petition premises. Since the original landlord permitted the tenant to run the school in the petition premises, further permission from the

subsequent purchaser is not necessary. The kindergarten school in the petition premises is only a branch and feeding school for the main school and it has no independent existence or administration. Therefore, by virtue of Sec. 10(4)(ii) of the Act, the landlord's application for owner's occupation cannot be sustained since the school enjoys protection under the abovesaid provisions under Sec. 10(4)(1) of the Act.

6. Under the provisions of Sec. 10(4)(ii) of the Act, no order for eviction shall be passed under sub-sec. (3) in respect of any building which has been let for use as an educational institution and is actually being used as such, provided that the institution has been recognised by the Government or any authority empowered by them in this behalf so long as such a recognition continues.

7. In order that the provisions of Sec. 10(4)(ii) may apply, the requisites to be specified are: There must be letting. It must be for the use of as an educational institution and the building must still be used for the purpose and further the institution should be one that has been recognised by the Government or any authority empowered by the Government in that behalf and lastly such recognition must continue at the relevant date.

8. Sec. 11 of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 (Tamil Nadu Act 24 of 1974) deals with recognition of Private schools. Sec. 11 of the above said Act states as under:

"Recognition of private school: (1) on receipt of an application by:

(a) any private school in respect of which permission has been or is deemed to have been granted under Sec. 6; or

(b) any minority school;

the competent authority may, after satisfying itself, that proper arrangements have been made for the maintenance of academic standard in the school, that the provisions of this Act are complied with and that the prescribed conditions have been satisfied, grant a certificate, recognising the private school for the purpose of this Act.

(2) The certificate under Sub-sec. (1) shall be granted within such period as may be prescribed, "According to Sec. 2, Clause 4 of the abovesaid Act, Government means the State Government. Even according to the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, Government means State Government

under Sec. 2(5) of the Act. In the present case, the private school run by the tenant is not recognised by the State Government or any authority empowered by them in this behalf. According to the tenant, the school in the petition premises is affiliated to the Central Board of Secondary Education. A copy of list of schools affiliated to the Board under All India Scheme by the Central Board of Secondary Education was filed as Ex.P-5. The Manual of Rules and Regulations relating to Central Board of Secondary Education is marked as Ex.P-6. As already pointed out, item No. 84 in the above said list indicated that Kalaimagal English School, Kalyanapuram, Choolaimedu, Madras-94 is the institution affiliated to the Central Board of Education. The school now running in the petition premises under the name and style of Kalaimagal English School does not find a place in the abovesaid list. According to the tenant, since the main principal school was affiliated, the affiliation could hold good for the branch school which is being conducted in the section premises also. The landlord filed a petition premises also. The landlord filed a petition C.M.P.No. 15018 of 1986 before this Court for receiving additional document. This was opposed by the learned counsel appearing for the tenant. According to the learned counsel for the tenant, the additional document should not be permitted to be filed at this stage. The learned counsel further submitted if the document is admitted at this stage, opportunity must be given to the tenant to test the veracity of this document. I have heard the learned counsel appearing on both sides on this aspect. The additional document sought to be filed before this Court is a letter written by the Regional Officer Central Board of Secondary Education at No. 26, South Mada Street, Srinagar Colony, Saidapet, Madras-15 to the landlord N.V. Jagannathan. In the said letter it is stated as under:

"With reference to your letter cited on the subject I am to state that *Kalaimagal English School* situated at No. 41, 7th street, Sowrashtira Nagar, Choolaimedu, Madras-94 is not affiliated to the *Central Board of Secondary Education, New Delhi*. However, *Kalaimagal Higher Secondary School* situated at 48, Rajeswari Road, Rajaram Methanagar,

Madras-600 029 is affiliated to Central Board of Secondary Education, New Delhi. Thus according to Kalaimagal English School situated at No.41, 7th Street, Sowrashttra Nagar, Choolaimedu, Madras-94. This document is a public document. Therefore, further proof is not necessary to test the veracity of the same. Therefore, C.M.P.No.15018 of 1986 is allowed, and the landlord is permitted to file this document as additional evidence in the present case."

9. Further, in the petition premises the tenant is conducting only Kinder Garden School. Rule 3 of Rules for affiliation under Chapter VI in the Manual of Rules and Regulations of Central Board of Higher Secondary Education states as under:

"No institution shall be affiliated or continue to be affiliated by the Board unless the middle section of the school (excepting Government Schools) if it has any, recognised by the Education Department of the State except in cases where the syllabus of the middle classes is approved by the Chairman of the Board".

According to Rule 5(b) of the Rules for affiliation, "no institution shall be affiliated or continue to be affiliated unless it complies with the following requirements, viz. that the middle and primary sections of the school except Government schools continue to be affiliated by the Education Department of the State/ Union Territory concerned or as provided in para 3 above".

We have already seen that in the letter dated 24.7.1986 the Regional Officer of the Central Board of Secondary Education has clearly stated that Kalaimagal English School situate at No.41, 7th Street, Sowrashttra Nagar, Choolaimedu, Madras-94 is not affiliated to the Central Board of Secondary Education, New Delhi. Therefore, the learned counsel appearing for the tenant cannot contend that the affiliation granted to the main principal school would also hold good for the primary school now being conducted in the petition premises. In view of the above said factual position, it is not open to the counsel for the tenant to submit that the tenant is entitled to the protection under Sec.10(4)(ii) of the Act. The authorities below failed to consider the facts arising on this aspect in proper prospective. Therefore, the findings rendered by the authorities below on this aspect is liable to be set aside. In that

view of the matter, I hold that the tenant is not entitled to ask for protection under Sec.10(4)(ii) of the Act in respect of the petition premises.

10. Now what remains to be considered whether the landlord is entitled to an order of eviction under Sec.10(3)(a)(i) or under Sec.10(3)(a)(iii) of the Act. According to the landlord, he purchased the petition premises for the purpose of his residence. He is residing in a rented premises on a monthly rent of Rs.350 in West Mambalam area. He also stated that he is not having any other premises of his own in the City of Madras. These facts were not controverted by the tenant. The landlord further submitted that he is also carrying on his business in a rented premises at No.5, First Cross Karunanidhi Street, West Mambalam and he is not having any other non-residential premises of his own in the City of Madras. According to him, if the Rent Controller comes to the conclusion that the petition premises was let out for non-residential purpose, he required the petition premises *bona fide* under Sec.10(3)(a)(iii) of the Act. Therefore, eviction was sought for both under Secs.10(3)(a)(i) and 10(3)(a)(iii) of the Act.

11. It is the case of the landlord that petition premises was let out for residential purpose and it is the tenant, who converted the use of the petition premises to that of a non-residential one. On the other hand, the tenant contended that ever since the premises was let out, it was being used for running a school. The prior landlord knew that the tenant was running a school in the petition premises. No objection was made. Even after the purchase, the present landlord accepted the tenancy and used to receive the rent without any demur. Therefore, the present landlord also knew that the tenant is using the premises for running a school. Therefore, at this stage according to the tenant, it is not open to the landlord to state that the petition premises was let out for residential purpose. Both the authorities below considering the facts arising on this aspect, concurrently came to the conclusion that the petition premises was let out for non-residential purpose and the tenant did not change or convert the use of the building from a residential one to what of non-residential one. Therefore, the authorities below proceeded on the assumption that the petition premises was let out for non-residential purpose and the landlord cannot ask for eviction under Sec.10(3)(a)(i) of the Act. Now we have to consider whether the

landlord required the petition premises *bona fide* under Sec.10(3)(a)(iii) of the Act. In the rent control proceedings, it is not necessary for the landlord to issue a notice prior to the filing of the petition. The petition for eviction was filed both under Sec.10(3)(a)(i) and under Sec.10(3)(a)(iii) of the Act. The tenant did not controvert the version put forward by the landlord that he is doing his business in a rented premises. The landlord filed documents to show that he was conducting the business in a rented premises as an agent in selling scent materials. This was also not controverted by the tenant. Since the authorities below concentrated much on rendering a finding with regard to the protection claimed under Sec.10(4)(ii) of the Act, no proper finding was rendered on the question of requiring the petition premises *bona fide* under Sec.10(3)(a)(iii) of the Act. Before the Rent Controller, the landlord filed ten documents. Those documents are not sufficient to render a finding that the landlord is carrying on his business on the date of filing the petition. Further, in order to obtain an order of eviction under Sec.10(3)(a)(iii) of the Act, the landlord must not only prove that he is carrying on his business in a rented premises, and he is not having or occupying a premises of his own in the City of Madras but also prove the element of *bona fide* as contemplated under Sec.10(3)(e) of the Act as pointed out by the Supreme Court in the case of *Hameedia Hardware Stores v. Mohan Lal Sowcar*, (1988) 2 L.W.1. In the present case, neither the landlord produced any particulars in establishing his *bona fide* under Sec. 10(3)(a)(iii) of the Act nor the authorities below rendered any finding on this aspect. Under such circumstances, I consider that the proper course would be to remit back the petition for eviction filed under Sec.10(3)(a)(iii) of the Act for fresh disposal. Accordingly, I set aside the order passed by the authorities below both under Sec.10(4)(ii) and Sec.10(3)(a)(iii) of the Act and remit back the petition for eviction to the file of the Rent Controller with the direction to dispose of the petition for eviction filed under Sec.10(3)(a)(iii) of the Act afresh in accordance with law after giving an opportunity of being heard to both the parties untrammelled by the findings given herein above. The parties are at liberty to adduce evidence both oral and documentary in order to substantiated their respective case. In that view of the matter, the petition filed under

Sec.10(3)(a)(iii) of the Act alone is remitted back for fresh disposal.

12. In the result, the revision is allowed and the petition for eviction is remitted back for fresh disposal as indicated above. There will be no order as to costs. The Rent Controller is directed to dispose of this petition within three months from the date of receipt of this order.

B.S.

Revision allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan and Thangamani, JJ.*

App.No.447 of 1982

15th September, 1993.

M/s.National Insurance Company Limited, Coimbatore

...Appellant

v.

The Lakshmi Vilas Bank Limited a registered Banking Company represented by its Power of Attorney Agent, A.B.Ramoji and others

...Respondents.

Insurance law - Marine Insurance - Policy issued for period from 27.4.1977 to 26.4.1978 - Containing Institute Standard TLO, Clause (Hulls) - Stating that vessel if sold or transferred to new management, liability of Insurance company will lapse - Policy for subsequent period from 27.4.1978 to 26.4.1979 - Standard TLO Clause alleged to have been attached to the policy - But not actually attached - Clause, if can be treated as part of contract - Contract, if can be construed in favour of company - Premium collected on 26.10.1978 and 25.1.1979 - Company deemed to have proceeded on footing that policy was alive and in force - When trawler was leased out and when it sank of 11.12.1978 - Clause 5, if can be invoked.

The plaintiff-bank sanctioned a loan of Rs.1,80,000 to the defendants 1 to 5 for the purchase of a trawler for fishful trade. There was a condition that the trawler should be insured. It was accordingly insured with the 6th defendant-appellant. The first policy was for the period 27.4.1977 to 26.4.1978. There was clause 5 of ISTLO (Hulls) making the contract void in case there was a transfer of the trawler. The next policy for the period 27.4.1978 to 26.4.1979 did not have such a clause attached to it. The trawler was sunk on 11.12.1978. The plaintiff sued all the defendants. The sixth defendant/appellant contended that on the date on which the trawler sank, the policy was already void as the defendants 1 to 5 had leased the trawler to one Balu Shanmugam even on 11.9.1978. The trial court negatived the contention and decreed the suit. In appeal, the appellant took the same line of argument. On behalf of the respondents, it was pointed out that the appellant proceeded on the footing that the contract was subsisting on the date the lease was executed as on date trawler was sunk by accepting premia on 26.10.1978 and 25.1.1979.

Held, if the policy had merely stated that 'subject to usual TLO Clause and warranties', the position would have been different. But, in the present case, the policy states that the TLO Clause and the warranties as per schedule are attached. If they are not so attached, then the appellant cannot claim that they should be treated as part of the contract. Applying the rule enunciated in *General Assurance Society Ltd. v. Chandmull Jain and another*, A.I.R. 1966 S.C. 1644, to the present case, the contract must be construed only against the appellant inasmuch as the policy to the party is not accompanied by the TLO Clause or warranties as per the schedule. Learned counsel for the respondents also draws the court's attention to the fact that the appellant-company was receiving insurance premiums both after the date of the lease deed and after the date of the accident on which the trawler got sunk. Ex.A-12 shows that premium was collected on 26.10.1978 and Ex.A-33 shows that premium was collected on 25.1.1979. That proves that the appellant proceeded on the footing that the policy was alive and in force at the time when the trawler got sunk. Hence, the appellant cannot invoke clause 5 of ISTLO Clause.

[Paras. 17, 18 & 19]

Case referred to:

General Assurance Society Limited v. Chandmull Jain and another, A.I.R. 1966 S.C. 1644: (1966)36 C.C. 468: (1966)2 Com.L.J. 1: (1966)2 S.C.J. 101: (1966)2 S.C.A. 219. [Para. 16]

Appeal against the decree of the Court of the Subordinate Judge, Salem, dated 9.3.1982 in O.S.No.345 of 1980.

The Judgment of the Court was delivered by Srinivasan, J.: The 6th defendant is the suit is the appellant. The suit is for the recovery of a sum of Rs.2,31,709.25. The plaintiff is the banking company. The first defendant is a partnership firm. Defendants 2 to 5 are partners of the firm. Defendants 2 to 5 applied for loan to the plaintiff bank for purchase of a trawler for fishing trade. The plaintiff bank sanctioned a loan of Rs.1,80,000 by its order dated 31.1.1977. The defendants executed a letter of hypothecation on 11.3.1977 in respect of the trawler in favour of the bank. It was also stipulated as a condition that defendants 1 to 5 shall insure the trawler with the Insurance company. Accordingly, the trawler was insured with the 6th defendant. The first policy was for the period 27.4.1977 to 26.4.1978. After the expiry of the first policy, the second policy, which was in renewal of the first policy, was for the period 27.4.1978 to 26.4.1979. The first defendant was never regular in payments of the monthly instalments towards the discharge of loan and there was a balance of Rs.2,31,709.25 including interest. The plaintiff was informed that the trawler was sunk on 11.12.1978 and the 5th defendant was also informed of it. As the trawler is insured with the 6th defendant, the plaintiff has filed the suit against all the defendants contending that the 6th defendant is also liable.

2. It is not necessary to set out the defence raised by defendants 1 to 5, as they have not preferred any appeal against the decree passed against them. The 6th defendant filed a written statement disputing its liability on the following grounds: (1) The policy specifically provided permission to ply within port limits only during prohibited periods of monsoon, viz., 1st November to 31st January on Tamil Nadu coasts and the port limits extend only upto 6 fathoms, but the boat sank at a place called "Arichakadal" and, therefore, the 6th defendant cannot be made liable for the loss of the boat as it had entered the prohibited area. (2) The first defendant had leased the boat to one Balu Shanmugam under an agreement dated 11.9.1978

and handed over possession of the vessel to the said lessee. As the vessel was not in the possession and control of the first defendant on the date on which the boat sank, the policy became void under clause 5 of ISTLO Clause (Hulls). Thus, the policy lapsed and was not in force on 11.12.1978. (3) The owners of the boat had not taken reasonable steps to recover and protect the property as is the custom and usage. (4) The vessel was deliberately sunk in the high seas in order to make a fraudulent claim on the defendant.

3. The trial court negatived the defence raised by defendants 1 to 5 and found them liable to meet the suit claim. On the contentions raised by the 6th defendant, the trial court held that there was no evidence to prove that the boat entered prohibited areas and got sunk in such area. It was also found that the case of the 6th defendant that the boat was sunk deliberately with a fraudulent intention for making a claim as against the insurance company was not proved. The trial court also held that clause 5 of ISTLO Clause would not apply in the case of a lease, as the first defendant continued to have interest in the boat, which was an insurable interest. Consequently, the trial court granted a decree in favour of the plaintiff as prayed for.

4. In this appeal by the 6th defendant, three of the contentions raised in the court below are repeated. Learned counsel for the appellant submits that during the prohibited period, the boat went outside the port limits and, therefore, the insurance company cannot be made liable. Secondly it is argued that the boat was wantonly and deliberately sunk by the parties with a view to make a claim against the insurance company, as they were not in a position to discharge the loan due to the plaintiff bank. Thirdly it is contended that on them first defendant entering into a lease transaction with a third party Bala Shanmugam, the policy got lapsed by virtue of clause 5 of ISTLO and the appellant cannot be made liable for any amount.

5. The first two contentions are factual. They depend on the evidence on record. There is no satisfactory evidence in support of the case put forward by the appellant. The appellant relied upon a report submitted by a private detective agency appointed by itself for the purpose of investigating the matter. The report is marked as Ex.B-2. The Chief Detective of the said agency by name Harris has been examined as D.W.1. He has

no personal knowledge of the matters spoken to by him. He relied only on his report, which is said to be based on the statement made by certain persons. The persons who are said to have given statements before D.W.1 at the time of investigation have not been examined. There is no acceptable evidence before court to show that Arichakadal. Where the boat sunk was in the prohibited area. There is some ambiguity in the relevant clause, but it is not necessary for us to rely on that circumstances. However, we will point out the same. The clauses on which reliance is placed by the appellant read as follows:

"Trading Warranty: 1. Warranted fishing vessels employment limited to coasts of Tamil Nadu, Pondicherry, Kerala & Andhra. (Sic.)
2. Vessel not to ply beyond 50 miles into the sea from shore.

Relaxation in Trading Warranty: 1. In consideration of payment of additional premium at 1.50% of the sum insured fishing port limits during prohibited period on Coasts of Tamil Nadu and Pondicherry and Andhra from 1st November to 31st January and Kerala from 1st June to 15th August (both days inclusive) are hereby allowed."

It is doubtful whether the clauses intended to prohibit the plying of the trawler into certain areas after stipulating an additional premium. If an additional premium is stipulated, the insurer must be permitted to travel more areas than what was originally permitted. But, the clauses read otherwise. However, there is nothing in evidence to explain the ambiguity.

6. Suffice it for us to point out that the evidence in record is wholly insufficient to accept the case on the appellant that when the boat sunk, it was in the prohibited area. Nor is there anything to show that Arichakadal is beyond the stipulated distance. In the circumstances, we affirm the finding of the trial court, that it is not proved that the boat was in the prohibited areas.

7. On the other question as to whether the parties deliberately sunk the trawler, again there is no evidence. Excepting some suggestions made in the cross-examination, which have been denied, there is nothing worthy of acceptance to substantiate the case of the appellant. Hence, we confirm the finding of the trial court on that question also.

8. Learned counsel for the appellant laid considerable stress on the contention that in view of the

execution of the lease deed dated 11.9.1978 under Ex.B-1, the policy got lapsed. As stated earlier, there was a policy for the period 27.4.1977 to 26.4.1978. That is marked as Ex.A-3. The next policy is for the subsequent period 27.4.1978 to 26.4.1979. That is marked as Ex.A-4. The policy which was in force at the time when the boat got sunk was Ex.A-4. In the court below, the contention was that clause 5 of the Institute Standard T.L.O. Clause (Hulls) would apply and as per the said clause, the policy got lapsed. The clause reads thus:

"If the vessel is sold or transferred to new management then unless the underwriters agree in writing to continue the insurance this policy shall become cancelled from the time of sale or transfer, unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases, such cancellation shall, if required, be suspended until arrival at final port of discharge if with cargo, or at part of destination if in ballast. A *pro rata* daily return of premium shall be made. This clause shall prevail notwithstanding any provision whether written, typed or printed in the policy inconsistent therewith."

Arguments were advanced by learned counsel for the appellant on the question of interpretation of the clause as to whether the expression 'transfer' used in the clause would include a lease. According to the appellant, the expression used is 'sold or transferred to new management' and that would undoubtedly include a lease. He has also referred to the evidence on record to the effect that after the execution of the lease deed, the entire management was with the lessee and defendants 1 to 5 were not in possession or control of the trawler. 9. When learned counsel for defendants 1 to 3 commenced his arguments, he submitted that the ISTLO Clause or warranties were not attached to Ex.A-4. He pointed out that the document marked as Ex.A-4 does not contain either the ISTLO Clause or the warranties, while they find a place in Ex.A-3. According to him, when the ISTLO Clause is not attached to the policy, which is the relevant policy to be considered by the court, the appellant cannot claim that the clause would apply to the present case and the policy got lapsed. It is contended that the contract of insurance under Ex.A-4 does not contain any exclusion clause and the appellant will consequently be liable for paying

the amount claimed.

10. In the trial court, the parties proceeded as if ISTLO Clause would apply to the relevant policy. No question was raised in the trial Court, either in the pleadings or at the time of arguments as to applicability of the said clause. It is raised for the first time in this Court. But the question has to be decided on the evidence already available and, therefore, we have permitted the respondents to raise the question. The documents which are marked as exhibits are before us. We find as a fact that Ex.A-4 does not contain either ISTLO Clause or the warranties, while both are attached to Ex.A-3. We must also point out that the two documents which are marked as exhibits are only xerox copies of the original policies. The originals have not been produced before court. None of the parties though fit to call for the original. The parties proceeded on the footing that the documents which were produced before court were true copies of the original and they did not contain any errors.

11. When learned counsel for the respondents relied on the absence of ISTLO Clause and the warranties in Ex.A-4, learned counsel for the appellant prayed for an opportunity to produce the office copies of the relevant policies maintained in the office of the appellant. We directed all the three parties *viz.*, the plaintiff bank, the appellant-insurance company and defendants 1 to 5 produce the copies respectively available with them so that the facts can be ascertained correctly. The plaintiff's counsel has reported that no document is available with the plaintiff bank and whatever was available with them had been filed into the Court, which are marked as exhibits.

12. Learned counsel for the appellant has produced typed copies of the policies retained in the office of the appellant. Along with it, an affidavit sworn to by a senior Assistant in the appellant-company has been filed. In that affidavit it is stated that the deponent was the person who prepared the policy in question in accordance with the directions given by the then Branch Manager Mr.T.G.Lakshmanan. It is necessary to extract paragraphs 4 to 7:

"4. I state that as stated earlier, in accordance with the directions given by the then Manager I had prepared the original policy No.945/4100002 and the normal practice in the preparation of policy is that the original will be

prepared and from that original two copies will be prepared of which one will be sent to the Regional Office and the other will be kept by the office which prepares the policy.

5. With reference to the printed forms that are attached to the original policy, in the office copy, there will be merely reference to the attached clauses and the same would be attached only to the original policy.

6. Whatever clauses were prepared for the first time for the policy, a copy will be kept along with the duplicate.

7. So far as the present policy is concerned, along with the original policy, TLO Clause, strike clause, off-season risk and SRCC clauses were attached. Since they are printed forms, a copy of the same was not kept along with the office copy. For the first time, instalment clause was prepared and we have kept the copy of the said annexure only along with the office copy since that was the only clause prepared afresh. All other clauses including the T.L.O. clause, were attached to the original policy and given to the first respondent herein."

13. The copies which are produced before us by the appellant are not copies of the policy as such. They are only notes of the relevant details which are set out in the policy. They mention the policy number, the date, the value of the trawler and the amount of premium. It is also mentioned that strike clause, instalment payment clause and T.L.O. clause are attached. It is further stated that warranties as per schedule are attached. Copy of the said clauses or the warranties are not kept with the copy of the document which is not produced before us. As set out in the affidavit, it is stated that the appellant company will only maintain the details of the policy issued and it will not keep copies of the said clauses or warranties attached to the notes maintained. However, it is averred in the affidavit that printed forms containing the T.L.O. clauses and the warranties were attached to the original policy and given to the first respondent.

14. Respondents 2 to 5 have produced the copies which were forwarded to them by the plaintiff bank after the policy was issued. They have also filed an affidavit sworn to by the third respondent. It is stated in that affidavit that the documents now produced before Court are those which were sent to them by the bank. They produced copies of the policy for the year 27.4.1977 to 26.4.1978 and

for the year 27.4. 1978 to 26.4.1979. The copies produced by them are identical with Exs.A-3 and A-4.

15. It is contended by learned counsel for the respondents that even in the typed set of papers furnished by the appellants for use in the appeal, the copies of Exs.A-3 and A-4 are included and those copies show that the T.L.O. clause as well as the warranties are not attached to Ex.A-4 while they are attached to Ex.A-3. Having regard to these facts, we must decide whether the policy for the year 27.4.1978 to 26. 4.1979 contained the T.L.O. clause and the warranties. Though it is mentioned that T.L.O. Clause and Warranties as per the schedule are attached, they are not actually attached to the policy issued under Ex.A-4. The appellant has failed to prove that along with the policy for the year 27.4.1978 to 26.4.1979 the T.L.O. Clause and Warranties as per schedule were sent to the party. There is no reason to doubt that the copies produced by the respondents along with their affidavit are not the copies which were received by them from the bank when the policy was effected. There is no suggestion that the documents which are marked as Exs.A-3 and A-4 in the trial Court have been tampered with. In those circumstances, we have to proceed on the footing that Ex.A-3 and Ex.A-4 represent the true copies of the policies which were actually effected at the relevant time. No doubt there was no contention before the trial court that the T.L.O. Clause was not attached to Ex.A-4. But, obviously, the parties took it for granted that all the papers attached to Ex.A-3, would also have been attached to Ex.A-4. It is only on that basis arguments would appear to have been advanced before the trial court. The court has also not taken care to look into Ex.A-4. In fact in paragraph 10 which contains the relevant discussion, the following passage is significant:

"Ex.A-3 is the photostat copy of the Insurance policy issued by the 6th defendant in respect of the Trawler in question covering the period between 27.4.1977 and 26.4.1978. Ex.A-4 is the photostat copy of the policy of Insurance company in respect of the said vessel covering the period between 27.4.1978 and 26.4.1979. In Ex.A-3 certain warranties, terms and conditions forming part of the policy are incorporated."

That passage shows that the trial court looked into

Ex.A-3 and found that warranties and terms and conditions forming part of the policy were incorporated. The trial court does not say that such incorporation was found in Ex.A-4 also. Obviously, the trial court proceeded on the footing that whatever was part of Ex.A-3 would be part of Ex.A-4 also.

16. Learned counsel for the appellant contends that the T.L.O. Clause and warranties are usually attached to Marine Insurance policies and the court must proceed on the footing that they form part of the contract represented by Ex.A-4. Reliance is placed upon the judgment of the Supreme Court in *General Assurance Society Limited v. Chandmull Jain and another*, A.I.R. 1965 S.C. 1644: (1966) 2 S.L.J. 101; (1966) 2 Comp.L.J. 1; (1966) 36 C.C. 468; (1966) 2 S.C.A. 219. In that case, the insurance company accepted the proposals and issued cover notes. The cover notes referred to the policy to be issued. The question was whether a clause in the policy was applicable. The court answered it in the affirmative holding that there was incorporation by reference. The court said:

"(11) A contract of insurance is a species of commercial transactions and there is a well-established commercial practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery. A cover note is a temporary and limited agreement. It may be self-contained or it may incorporate by reference the terms and conditions of the future policy. When the cover note incorporates the policy in the manner, it does not have to recite the terms and conditions, but merely to refer to a particular standard policy. If the proposal is for a standard policy and the cover note refers to it, the assured is taken to have accepted the terms of that policy. The reference to the policy and its terms and conditions may be expressed in the proposal of the cover note or even in the letter of acceptance including the cover note. The incorporation of the terms and conditions of the policy may also arise from a combination of reference in two or more documents passing between the parties. Documents like the proposal, cover note and the policy are commercial documents and to interpret them commercial habits and practice cannot altogether be ignored. During the time the cover note operates, the relations of the

parties are governed by its terms and conditions, if any, but more usually by the terms and conditions of the policy bargained for and to be issued. When this happens the terms of the policy are incipient, but after the period of temporary cover, the relations are governed only by the terms and conditions of the policy unless insurance is declined in the meantime. Delay in issuing the policy makes no difference. The relations even then are governed by the future policy if the cover notes give sufficient indication that it would be so."

17. Learned counsel for the appellant relies on the above passage and submits that the T.L.O. Clause as well as the warranties form part of the insurance contracts and the court must treat them as terms of the policy under Ex.A-4 also. We are unable to accept this contention. If the policy had merely stated that 'subject to the usual T.L.O. Clause and warranties' the position would have been different. But, in the present case, the policy states that the T.L.O. Clause and the warranties as per schedule are attached. If they are not so attached, then the appellant cannot claim that they should be treated as part of the contract. In the above ruling of the Supreme Court it is also said:

"In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of *uberima fides*, i.e., good faith on the part of the assured and that *contract is likely to be construed contra proferentem that is against the company in case of ambiguity or doubt.*" [Italics ours]

18. Applying the said rule in the present case, the contract must be construed only against the appellant inasmuch as the policy to the party is not accompanied by the T.L.O. Clause or warranties as per the schedule. He reliance can be placed on Ex.A-3 as the said policy has come to an end on 16.4.1978. The only policy which is relevant is the policy that was in force between 27.4.1978 and 26.4.1979.

19. Learned counsel for the respondents also draws our attention to the fact that the appellant company was receiving insurance premiums, both after the date of the lease deed and after the date of the accident on which the trawler got sunk. Ex.A-12 shows that premium was collected on 26.10.1978 and Ex.A-33 shows that premium was collected on 25.1.1979. That proves that the appellant

proceeded on the footing that the policy was alive and in force at the time when the trawler got sunk. Hence, the appellant cannot invoke clause 5 of ISTLO Clause.

20. In the view we have taken on the facts of the case, we are not making any reference to the various rulings cited by learned counsel on both sides on the question whether a lease would be a transfer to the new management within the meaning of clause 5.

21. The decree passed by the trial court is well-founded and the appeal is dismissed. In the circumstances of the case, there will be no order as to costs.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thanikkachalam, J.*

C.R.P.No.1818 of 1986 21st December, 1993.

Antony sami ...Petitioner
v.

Arulanandam Pillai and another ...Respondents.

(A) Civil Procedure Code (V of 1908), O.21, Rule 34 and O.43, Rule 1(i) - Suit for specific performance of contract of sale decreed - Execution petition filed - Court ordering in decree that defendant should measure and demarcate boundaries for 13 grounds and 491 sq.ft. in property described therein before certain date - And decreeholder should deposit the price and then sale deed should be executed by defendant failing which court should execute sale deed - Order if appealable - Question of jurisdiction of appellate court, if can be raised in revision before High Court.

The execution petition was filed under O.21, Rule

34, C.P.C., praying to direct the defendant-judgment-debtor to execute a sale deed as per the draft sale deed produced in the court and in default to cause the execution of the sale deed by the court itself since the entire sale consideration had already been deposited in court. O.21, Rule 34, says that where the execution petition is for the execution of a decree or for the endorsement of negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the court. According to the provisions contained in O.43, Rule 1(i), on an order passed on the objection to the draft of a document or of an endorsement an appeal will lie. In the present case, the execution petition was filed with a draft sale deed under O.21, Rule 34(i), Civil Procedure Code. The judgment-debtor raised an objection with regard to the draft sale deed filed by the decree-holder. On such objection, an order was passed by the execution court. Therefore, only an appeal will lie against the order passed by the execution court. Further, the point of jurisdiction must be raised in the initial stage. That was not done in the instant case. Hence, the contention put forward by the petitioner herein viz., the appellate court has no jurisdiction to entertain an appeal cannot be accepted. [Para. 7]

(B) Civil Procedure Code (V of 1908), O.21, Rule 34 - Suit for specific performance of contract of sale - Decreed - Time given till 23.9.1966 for the judgment-debtor to measure and demarcate 13 grounds and 491 sq.ft. in the property described therein and decree-holder to deposit the price in court before that date - Money deposited but demarcation done only in 1973 - Decreeholder filing petition for execution of decree in 1986 - Petition, if barred by limitation - Starting point for limitation.

The plaintiff deposited the balance of sale price before 23.9.1966. In the present case, the demarcation and measurement was not done on or before 23.9.1966 within the time fixed for measurement and demarcation and when the measurement and demarcation was not done within the time stipulated in the decree, the decree-holder ought to have applied to the court for execution of the decree and for suitable direction to the defendant to make demarcation. The decree-holder cannot wait till the judgment-debtor measures and demarcates the land in the year 1973.

Therefore, the period of limitation for filing the execution petition would start from 23.9.1966 and not from the year 1973 when the demarcation was done.

[Para. 7]

(C) *Civil Procedure Code (V of 1908), Secs. 151 and 152 - Decree-holder contending that decree was not drafted in accordance with judgment - Revisional court, if can correct mistake.*

A decree can be corrected only by a court which passed that decree. This revisional court cannot correct the decree passed in the suit. [Para. 9]

Cases referred to:

Umayal Achi and another v. Ramanathan Chettiar, (1980) 1 M.L.J. 24. [Para. 9]

Yeshwant Deo Rao v. Lalchand Ramchand, A.I.R. 1951 S.C. 16. [Para. 9]

Vidyanath Aiyar v. Subramania Pattar, I.L.R. 36 Mad. 104. [Para. 9]

Krishnayya v. Parvatarani Bhosayya, (1954) 1 M.L.J. 462. [Para. 9]

Rameshmar Singh v. Homesmar Singh, A.I.R. 1921 P.C. 31. [Para. 9]

Sitaramamurthy v. Thamma Lakshminarayananamurthi, (1942) 2 M.L.J. 568. [Para. 9]

Petition under Sec. 115 of Act V of 1908 praying the High Court to revise the order of the II Additional District Court, Tiruchirappalli, dated 6.8.1985 and made in C.M.A.No.26 of 1982 (E.P.No.346 of 1981 in O.S.No.35 of 1965, dated 16.2.1982, I Additional District Munsif, Tiruchirappalli).

K.Sampath, for Petitioner.

P.K.Sivasubramaniam, for Respondent No.1.

The Court made the following

ORDER: This revision is directed against the order passed in C.M.A.No.26 of 1982, which in turn arose out of the order passed in E.P.No.346 of 1981 in O.S.No.35 of 1965. The petitioner herein is the legal representative of the plaintiff, who filed the suit O.S.No.35 of 1965 for specific performance of the contract of sale. The suit was decreed in favour of the plaintiff. The plaintiff filed E.P.No.346 of 1986 to execute the decree. In the decree, it is stated that the defendant do measure and demarcate the boundaries for 13 grounds and 491 sq.ft. in the property described hereunder on or before 23.9.1966, that the plaintiff do deposit into court on or before 23.9.1966 the balance of the sale price for 13 grounds and 491 sq.ft. on measurement and demarcation, and that on such measurement and demarcation and fixation of the price and on deposit, the defendant do execute

the sale deed in respect of the suit site in favour of the plaintiff at her cost as alleged and in default the court do execute the sale deed on application of the plaintiff and the cost of such execution of the sale deed be recovered from the defendant. The plaintiff filed the present execution petition to execute the decree under O.21, Rule 34, C.P.C. According to the defendant/judgment debtor the execution petition was filed after 12 years beyond the time stipulated in the decree and therefore the execution petition is liable to be dismissed. But according to the plaintiff/decreed holder the land in question was not measured and demarcated the boundaries on or before 23.9.1966. It was actually demarcated in the year 1973. Therefore, if the time is calculated from the date of compliance, of the decree in the year 1973 then the execution petition is in time. This contention of the decree-holder was accepted by the execution court. Accordingly, order was passed in the execution petition. Aggrieved, the judgment-debtor preferred an appeal. The appellate court came to the conclusion that the execution petition was filed beyond 12 years from 23.9.1966. Hence, the execution petition is barred by limitation. In that view of the matter, the appellate court reversed the order passed by the execution court and dismissed the execution petition. It is against this order, the present revision petition has been preferred by the decree-holder.

2. Learned counsel for the decree-holder/ petitioner herein submitted as under:

The judgment-debtors were given time to measure and demarcate the land on or before 23.9.1966. This was not done by the judgment-debtors. According to the decree-holder, the judgment-debtor went to a foreign country and his brother was asked to demarcate and measure the land and accordingly the brother of the judgment-debtor measured and demarcated the land in the year 1973. After the lands were measured and demarcated in the year 1973 the present execution petition was filed on 19.4.1980. Therefore, the execution petition is not barred by limitation. Since the judgment-debtor failed to measure and demarcate the land as stipulated in the decree on or before 23.9.1966 the time for filing the execution petition should not be calculated from that time. The decree-holder has already deposited the balance of sale consideration before 23.9.1966, as against the order passed under O.21, Rule 34 only

a revision will lie and the first appeal filed by the judgment-debtor is not competent. The order passed under O.21, Rule 34 accepting or refusing to accept the draft sale deed is amenable to an appeal as per the provisions of O.43, Rule 1(i), of C.P.C. But in the present case, the order passed by the execution court does not relate to accepting or refusing to accept the draft sale deed. Therefore, the provisions contained in O.43, Rule 1(i), C.P.C., will not be applicable to the facts of this case so as to enable the judgment-debtor to file an appeal before the first appellate court. Hence, according to the decree-holder the first appeal to court was not correct in reversing the order passed by the execution court.

3. On the other hand, learned counsel appearing for the respondent/ judgment-debtor submitted as under:

In the decree it is clearly stated that the judgment-debtor should measure and demarcate the land on or before 23.9.1966 and the plaintiff should deposit into court on or before 23.9.1966 the balance of sale price on such measurement and demarcation. The demarcation and measurement was not done on or before 23.9.1966, as stipulated in the decree, the decree-holder ought to have filed an execution petition within 12 years from that date. Even if the demarcation was done in the year 1973 that would not help the decree-holder to calculate the period of 12 years from 1973 onwards. The petition was filed by the decree-holder under O.21, Rule 34, C.P.C. along with the draft sale deed and that execution petition was allowed and ordered. Therefore, against the order passed on the petition filed under O.21, Rule 34, only an appeal will lie before the first appellate authority as contemplated under O.43, Rule 1(i), C.P.C. Hence, no revision will lie. It is not correct on the part of the decree-holder to state that the impugned order was not passed under O.21, Rule 34, C.P.C. It was therefore, submitted that the execution petition was filed beyond 12 years from the stipulated date of 23.9.1966. Hence, the execution petition is liable to be dismissed. For all these reasons it was pleaded that since the order passed by the first appellate court is in order, no interference is called for.

4. I have heard the rival submissions.

5. The fact remains that the petitioner herein is the decree-holder and he filed an execution petition to execute the decree obtained in a suit for specific

performance of a contract for sale. According to the decree passed in the suit, O.S.No.35 of 1965, the defendant should measure and demarcate the boundaries for 13 grounds and 491 sq.ft. in the property described in the schedule on or before 23.9.1966 and the plaintiff should deposit into court on or before 23.9.1966 the balance of sale consideration for 13 grounds and 491 sq.ft. on such measurement and demarcation. According to the decree-holder he deposited the balance of sale consideration before 23.9.1966, but the judgment-debtor failed to measure and demarcate the lands on or before 23.9.1966. According to the decree-holder the judgment-debtor measured and demarcated the lands in the year 1973 and thereafter within 12 years from the year 1973, i.e. on 19.4.1985 the decree-holder filed the execution petition.

6. The learned counsel appearing for the decree-holder submitted that E.P.No.346 of 1981 was filed for executing a decree for specific performance of the contract. The relevant provision in O.21, Rule 34, of C.P.C., Clause 1 provided that the decree-holder should file a draft sale deed along with the execution petition. If the judgment-debtor has any objection to the terms of the draft sale deed and if the order is passed on the objections, then the order is appealable under O.43, Rule 1(i) of C.P.C. O.43, Rule 1(i) specifically provides an appeal against an order passed with regard to the terms of the draft sale deed. But in the present case, according to the learned counsel for the decree-holder there is no reference to the draft sale deed in the counter affidavit filed by the respondent and the counter affidavit raises objection only to the main execution petition. Therefore, according to the decree-holder the order passed by the execution court is not appealable. The decree-holder submitted that the appellate court has no jurisdiction to entertain this appeal, and the order passed by the appellate court is liable to be set aside under Sec.115 of C.P.C. Therefore, according to the decree-holder the order passed by the appellate court is a nullity.

7. It remains to be seen that the execution petition was filed under O.21, Rule 34, C.P.C., praying to direct the defendant-judgment-debtor to execute a sale deed as per the draft sale deed produced in the court and in default to cause the execution of the sale deed by the court itself since the entire sale consideration had already been deposited in

court. O.21, Rule 34, says that where the execution petition is for the execution of a decree or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the court. According to the provisions contained in O.43, Rule 1(i), on an order passed on the objection to the draft of a document or of an endorsement an appeal will lie. In the present case, the execution petition was filed with a draft sale deed under O.21, Rule 34(i), Civil Procedure Code. The judgment-debtor raised an objection with regard to the draft sale deed filed by the decree-holder. On such objection, an order was passed by the execution court. Therefore, only an appeal will lie against the order passed by the execution court. Further, the point of jurisdiction must be raised in the initial stage. That was not done in this case. Hence, the contention put forward by the petitioner herein viz., that the appellate court has no jurisdiction to entertain the appeal cannot be accepted. According to the decree-holder the execution petition is within time. But according to the judgment-debtor the execution petition is barred by limitation. The judgment-debtor submitted that the period of limitation should run from 23.9.1966 and not from the year 1973. The decree passed in O.S.No.35 of 1965 dated 23.7.1966 is as under:

"(1) The defendant do measure and demarcate the boundaries for 13 grounds and 491 sq.ft in the property described hereunder on or before 23.9.1966.

(2) That the plaintiff do deposit into court on or before 23.9.1966 the balance of the sale price for 13 grounds and 491 sq.ft on measurement and demarcation.

(3) That on such measurement and demarcation and fixation of the price and on deposit the defendant do execute the sale deed in respect of the suit house-sites in favour of the plaintiff at her costs as agreed and in default the court do execute the sale deed on application of the plaintiff and the cost of the execution of such sale deed be recovered from the defendant.

(4) That the defendant do pay to the plaintiff the sum of Rs.1,423 being costs of this suit and do bear his own costs of Rs.507.50."

The plaintiff deposited the balance of sale price before 23.9.1966. In the present case, the demar-

cation and measurement was not done on or before 23.9.1966 within the time fixed for measurement and demarcation and when the measurement and demarcation was not done within the time stipulated in the decree, the decree-holder ought to have applied to the court for execution of the decree and for suitable direction to the defendant to make demarcation. The decree-holder cannot wait till the judgment-debtor measures and demarcates the land in the year 1973. Therefore, the period of limitation for filing the execution petition would start from 23.9.1966 and not from the year 1973 when the demarcation was done.

8. Learned counsel appearing for the decree-holder submitted that the decree is not drafted in accordance with the judgment. The counsel for the decree-holder submitted that in the judgment it is stated that the time limit upto 23.9.1966 is given only for depositing the amount and not for demarcating the land. Further only after measurement and demarcation of the land and after fixation of price and on deposit the defendant was directed to execute the sale deed. Therefore, there is no time limit for measurement and demarcation. But in the decree it is stated that measurement and demarcation should be done within two months period i.e. on or before 23.9.1966. Therefore, it was submitted that decree was not drafted in accordance with the judgment. A plain reading of paragraph 11 of the judgment in O.S.No.35 of 1965 would go to show that the measurement and demarcation should be done within two months period and the balance of sale consideration should also be paid or deposited within the same two months period. Therefore, it is not correct on the part of the judgment-debtor to state that there is no time-limit prescribed for measurement and demarcation and two months time was given only for depositing the balance of sale price after such measurement and demarcation was done.

9. According to the learned counsel for the decree-holder the decree was not drafted in accordance with the judgment and therefore this mistake should be corrected under Sec.151 or Sec.152 of C.P.C., by this Court. A decree can be corrected only by a court which passed that decree. This revisional court cannot correct the decree passed in the suit C.S.No.35 of 1965. Further, the execution court cannot go behind the decree. Learned counsel appearing for the judgment-debtor relied upon the following decisions in order to support his

contention, that execution of the decree in the present case is not subject to any condition precedent. *Unayal Achi and another v. Ramanathan Chettiar*, (1980) 1 M.L.J. 24 and *Yeshwant Deo Rao v. Lalchand Ramchand*, A.I.R. 1951 S.C. 16. On the other hand, learned counsel for the decree-holder in order to support his contention that decree is executable after measurement and demarcation was done by the judgment-debtors, relied on the following decisions, viz. *Vidyanath Aiyar v. Subramania Pattar*, I.L.R. 36 Mad. 104, *Krishnayya v. Parvatarani Bhosayya*, (1954) 1 M.L.J. 462, *Rameshmar Singh v. Homesmar Singh*, A.I.R. 1921 P.C. 31 and *Sitaramamurthy v. Thamma Lakshminarayana-murthi*, (1942) 2 M.L.J. 568. I have gone through all these decisions carefully. All these decisions laid down a principle that if the execution of the decree is depending upon an event to be happened then the decree became executable only if such event took place, otherwise the decree is executable from the date of passing the decree. In the instant case, the trial court directed the judgment-debtor to measure and demarcate the land on or before 23.9.1966. If the decree-holder failed to measure and demarcate the land on or before 23.9.1966, the decree-holder need not wait till the judgment-debtor measures and demarcates the land. When the judgment-debtor failed to perform the condition imposed upon him within the particular date, the decree-holder ought to have filed an execution petition to compel the judgment-debtor to perform his part of the obligation imposed by the court. In the present case, where the judgment-debtor failed to perform his part of the obligation on or before 23.9.1966 the limitation to file execution petition would start from that date. There is no condition in the decree that the judgment-debtor can measure and demarcate the land as and when she pleases and the decree-holder can approach the execution court after such measurement and demarcation are done. Therefore, the execution petition filed on 19.4.1980 is beyond 12 years period from 28.9.1966 and hence, it is liable to be dismissed as time barred. In that view of the matter, I hold that there is no infirmity in the order passed by the appellate court in reversing the order passed by the execution court in E.P.No.346 of 1981. Accordingly, this revision is dismissed. There will be no order as to costs.

B.S.

Revision dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan and Thangamani, JJ.*

R.C.Nos.1 of 1979, 3, 4, 5, 6, 7, 8 and 9 of 1980 and 1 and 2 of 1981
24th February, 1993.

P.S.Balakrishnamaraja and others ...Petitioners
v.

S.K.Alagar Raja and others ...Respondents.

(A) *Constitution of India (1950) - Constitutional validity of Act - Decision on - Basis for.*

It is now settled law that the constitutional validity of an Act has to be decided on the basis of the Constitution as it was on the date when the Act was passed subject to any retrospective amendment of the Constitution. [Para. 3]

(B) *Tamil Nadu City Tenants' Protection Act (III of 1922), Sec.9(i)(a)(ii) introduced by Tamil Nadu Act (XXIV of 1973) - Whether violative of Arts.14, 19(1)(f) and 31 of Constitution of India - Section whether has no nexus with object of the Act - Whether travels beyond scope of object of the Act.*

The clause introduced by the Amendment Act XXIV of 1973 has now given a right to the tenant even in the absence of any suit or proceeding for eviction. Even a tenant whose contract of tenancy subsists is enabled by the said provision to apply to the court for a direction to the landlord to sell the land to him. When the object of the main Act is to give protection against eviction and the object of the amendment act is to make that protection available to persons who have suffered decrees or orders by reason of the proviso to Sec.12 of the Act, there is no doubt that the provisions found in Sec.9(1)(a)(ii) introduced by the amendment has no relation to the said objects and it travels far beyond the same. There is no nexus between the said objects and the provision introduced by the amendment. The question of protection against eviction would arise only on the termination of the contractual relationship and institution of a proceeding for eviction. When the tenant does not face any such threat and the landlord is willing to continue the relationship of landlord and tenant and has no intention to evict the tenant so long as the latter pays the fair rent, the provision enabling the tenant to compel the landlord to sell the land to him is arbitrary and unreasonable. The

provision is equally violative of Arts.19(1)(f) and 31 of the Constitution of India. Art.19(1)(f) declares the fundamental right to the landlord to hold property..... That fundamental right to hold properties is sought to be interfered with by a statutory right to purchase property conferred on the tenant. Such a right cannot be allowed to take precedence over the fundamental right of the landlord to hold property. It must be noted that the right conferred by the new provision introduced by the amendment is not one arising after the termination of the contractual relationship or on the filing of a proceeding for ejectment. Hence, it cannot be justified as a reasonable restriction on the exercise of the landlord's fundamental rights within the meaning of Art.19(9) of the Constitution of India. It will be a case of deprivation of the landlord of his right to hold property without any justification therefor. The amendment is not a law which will fall under Art.31(2) of the Constitution. In the result, the court holds that Sec.9(1)(a)(ii) of the Tamil Nadu City Tenants' Protection Act introduced by the Tamil Nadu Act XXIV of 1973 is unconstitutional insofar as it relates to tenants against whom a suit for ejectment has not been instituted or a proceeding under Sec.41 of the Presidency Small Cause Courts Act, 1882 (Central Act XV of 1882) has not been taken by the landlord. [Paras. 15, 16 & 23]

Cases referred to:

Waman Rao v. Union of India, A.I.R. 1981 S.C. 271: (1981) 2 S.C.C. 362: (1981) 2 S.C.R. 1. [Para. 3]
Manoel Francisco v. Collector of Daman, A.I.R. 1984 Bom. 461. [Para. 3]
Mylapore Hindu Permanent Fund Limited v. K.S.Subramania Iyer, A.I.R. 1970 S.C. 1683. [Para. 6]
Haridas Girdharidas v. Varadaraja Pillai, A.I.R. 1971 S.C. 2366. [Paras. 6, 9]
M.Varadaraja Pillai v. Haridas Girdharidas, 86 L.W. 157. [Para. 9]
Sundareswarar Devasthanam v. Marimuthu, A.I.R. 1963 Mad. 369. [Para. 13]
N.Vajrapani Naidu v. New Theatres Carnatic Talkies Ltd., A.I.R. 1964 S.C. 1440: (1965) 1 S.C.J. 368: (1965) 1 M.L.J. (S.C.) 47: (1965) 1 An.W.R. (S.C.) 47: (1964) 6 S.C.R. 1015. [Paras. 13, 14]
Ameerunnissa v. Mahboob Begum, A.I.R. 1953 S.C. 91: 1953 S.C.A. 864: 1953 S.C.J. 61: 1953 S.C.R. 404. [Para. 15]
S.M.Transports (P) Limited v. V.Sankaraswamigal

Mutt, A.I.R. 1963 S.C. 864: (1963) 1 S.C.R. (Supp.) 232. [Para. 16]

P.AnanthaKrishnan v. G.Ramakrishnan, A.I.R. 1987 S.C. 1272. [Para. 16]

His Holiness Sri La Sri Ambalavana Pandara Sannadhi Avargal v. The State of Tamil Nadu, (1985) Writ L R (Supp.) 1. [Para. 19]

Sayed Shamish Thaikkal v. Ibrahim Sahib, (1957) 2 M.L.J. 265. [Para. 22]

Petitions presented under Sec.9(1)(a)(ii) of the Madras City Tenants Protection Act as amended by Madras Act 4 of 1972 and Act 24 of 1973 praying that in the circumstances stated therein the High Court will be pleased to fix the price for the undermentioned property (vacant site) and direct the respondent to sell the said property to the petitioner for the price so fixed by this Court on or before a particular date on the petitioner depositing the price so fixed into court and also directing the Respondent to pay the petitioner the costs of this petition (in R.C.Nos.1 of 1979, 5, 6, 7, 8 and 9 of 1980 and 1 and 2 of 1981), etc.

R.Sundaravaradhan, Senior Counsel for *Mrs.R.Kalavathy*, for Petitioners in R.C.Nos.1 of 1979, 7, 8 and 9, 1 and 2 of 1981.

N.Maninarayanan, for *S.V.Jayaraman*, for Petitioner in R.C.Nos.3 and 4 of 1980.

M.Agni, for Petitioners in R.C.Nos.5 and 6 of 1980.

R.Natanasabapathy, for Respondents R.C.Nos.3 to 6 of 1980.

Mohan Parasaran, for Respondent in R.C.No. 1 of 1979 and for Respondent Nos.1 and 2.

R.Swaminathan, Additional Government Pleader, Corporation of Madras.

The Order of the Court was made by *Srinivasan, J.* In these matters, original petitions were filed in the Court of the District Munsif, Srivilliputhur under Sec.9(1)(a)(ii) of the Madras City Tenants' Protection Act (Act III of 1922) as amended by Madras Act IV of 1972 and XXIV of 1973 for direction to the respective respondents to sell the properties to the petitioners for the price fixed by the court. The petitioners were numbered and taken on file as O.P.No.20 of 1973, 3 of 1974, 4 of 1974, 22 to 24 of 1973, 29 and 30 of 1973 and 17 and 18 of 1973 respectively. The respondents, who are the owners of lands, questioned the constitutional validity of the said section and raised other grounds contesting the sustainability of the petitions. When the matters were pending in the

Court of the District Munsif, petitioners were filed in this Court under Art.22 of the Constitution of India for transferring the original petitions to this Court as they involved the constitutional validity of a provision in an enactment. These petitions were ordered and the original petitions were directed to be transferred to this Court. Though they ought to have been numbered in this Court as Original Petitions, they have been numbered as Referred Cases erroneously. The mistake committed by the registry in giving the proper nomenclature to the petitions need not detain us from disposing of the same.

2. The question to be decided in these cases is whether Sec.9 of the Tamil Nadu City Tenants' Protection Act (Act III of 1922) as amended by Tamilnadu Act XXIV of 1973 is constitutionally valid. The attack is not against the entire Sec.9. It is only against clause 10(a) (ii) of the section which was introduced by Tamilnadu Act XXIV of 1973. It is contended that the clause violates Art.14 of the Constitution of India inasmuch as it is arbitrary and it has no nexus with the object of the Act. It is also stated that it travels beyond the scope of the object of the Act. The second contention is that when the clause was introduced, Art.19(1)(f) and Art.31 of the Constitution of India were in force and the clause violated the said provisions and is consequently invalid and unconstitutional.

3. Art.19(1)(f) of the Constitution declared the fundamental right of all citizens to acquire, hold and dispose of property. Art.19(5) of the Constitution provided that the said right shall not affect the operation of any existing law in so far as it imposed, or prevent the State Government from making any law existing reasonable restrictions on the exercise of such right in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Art.31 of the Constitution provided that no person shall be deprived of his property save by authority of laws. By the Constitution (Forty-fourth Amendment) Act, 1978, Art.19(1)(f) and Art.31 of the Constitution were deleted with effect from 20.6.1979. It is now settled law that the constitutional validity of an act has to be decided on the basis of the Constitution as it was on the date when the Act was passed subject to any retrospective amendment of the Constitution. Constitution (Forty-fourth Amendment) Act, 1978, has been held not to be retrospective. *Vide Waman Rao v. Union of India, A.I.R. 1981 S.C. 271: (1981)2*

S.C.C. 362: (1981)2 S.C.R. 1 and Manoel Francisco v. Collector of Daman, A.I.R. 1984 Bom. 461. Hence, the question whether Sec.9 of the Tamil Nadu City Tenants' Protection Act as amended by Act XXIV of 1973 offends the provisions of Art.19(1)(f) and Art.31 of the Constitution of India has to be considered.

4. Tamil Nadu City Tenants' Protection Act (III of 1922) had originally the name, the Madras City Tenants' Protection Act. At the commencement, the object of the Act was to give protection to tenants of land belonging to others for a long period, who had put up building on the land in the hope that they would not be evicted from the land and the said Act was made applicable only to the tenancies created before the commencement of the Act viz., 1922. The preamble clearly indicated that the intention behind the legislation was to give protection only to tenants who had constructed building on others' land in the hope that they would not be evicted so long as they pay a fair rent for the land. On account of the inflationary pressure in the wake of the First World War, there was a steep rise in land values and rents and many tenants who had constructed buildings on lands obtained leases were sought to be evicted by the landlords. In order to prevent loss to the tenants consequent upon the enforcement of the strict provisions of the Transfer of Property Act, the Legislature enacted the Madras City Tenants' Protection Act III of 1922. Under the Act, every tenant is on ejection entitled to be paid as compensation the value of the building which may have been erected by him or his predecessors-in-interest and for which compensation had not already been paid to him. By Sec.9 of that Act, it is provided that any tenant entitled to compensation and against whom a suit in ejection has been instituted may within the time prescribed apply to the court for an order that the landlord shall sell the whole or part of the land for a price to be fixed by the court. By Sec.12 of that Act, it is provided that nothing in any contract made by a tenant shall take away or limit his rights under the Act. There was a proviso to the section which saved any stipulations made by the tenant in writing registered as to the erection of buildings, in so far as they relate to buildings erected after the date of the contract.

5. The act as originally enacted applied to the lands in the City of Madras. By Madras Act 19 of

1955, power was conferred upon the State Government to extend the Act by notification to tenancies of land created before the date on which the Act was extended, to any other municipal towns and any specified village within five miles of the City of Madras or such Municipal town with effect from such date as may be specified in the notification. The State Government exercised its power and extended the provisions of the Act to several Municipal Towns.

6. The proviso to Sec.12 of the Act was interpreted by the Supreme Court in *Mylapore Hindu Permanent Fund Limited v. K.S. Subramania Iyer*, A.I.R. 1970 S.C. 1683 and *Haridas Girdharidas v. Varadaraja Pillai and another*, A.I.R. 1971 S.C. 2366 and it was held that the protection against eviction was not available to the tenants who had stipulated in writing that the landlord could have the option of buying the building erected by the tenant at the time of the termination of the tenancy. In the latter case, the court made the following observation:

"11. It must be remembered that the Madras City Tenants' Protection Act, 1921 was passed in 1922 to give protection to certain classes of tenants who had constructed buildings on others' lands in the hope that they would not be evicted so long as they paid a fair rent for the land. It was not the object of the Act to cover a hope if the 'hope' was entertained contrary to express stipulations as to erection of buildings. Accordingly, proviso to Sec.12 exempted any stipulations made by the tenant in writing registered as to the erection of buildings, in so far as they related to buildings, erected after the date of the contract."

7. The Legislature introduced Tamil Nadu Act IV of 1972 amending not only the preamble, but also Sec.12 of the Act. The Statement of Objects and Reasons for the said Act read thus:

"It has been represented to the Government that tenants who have invested large amounts in superstructures in lands taken on lease are denied the protection conferred by the Madras City Tenants' Protection Act, 1921 involving great hardship by reason of the proviso to Sec.12 of that Act as interpreted by the Supreme court in recent cases on the ground that they had entered into contract with the landlord to surrender both the buildings and the land on the expiry of the tenancy agreement.

The Government have examined the representation and after careful consideration they have decided that the protection given by the Act should be enjoyed by all tenants, irrespective of the fact whether they have entered into an agreement with the landlords containing stipulations as to the erection of buildings constructed after the date of the contract and limiting the rights under the act. In all recent tenancy legislations provision is made that any stipulation in a contract taking away or limiting the rights conferred by the legislation should be ineffective. To be in conformity with the trend of the recent tenancy legislation and also to avoid the hardship caused to such tenants it is proposed to omit the proviso to Sec.12 of the Madras City Tenants' Protection Act, 1921 with retrospective effect. The landlord may pay compensation to the tenant under Sec.3 of the Act for the building or receive the value from the tenant for the land under Sec.9 of the Act.

2. Suitable validating provision has also been made in clause 4.

3. However, cases where the landlord has already taken possession of the land and buildings from the tenant are not to be affected by the proposed amendment—see clause 5.

4. The bill seeks to give effect to the above objects."

8. In the preamble the words "in the hope that they would not be evicted" were deleted. The proviso to Sec.12 of the Act was also deleted. Consequently, the preamble after the amendment read, "whereas it is necessary to give protection against eviction to tenants, who in Municipal towns, townships and adjoining areas in the State of Tamil Nadu have constructed buildings on others' lands, so long as they pay a fair rent for the land." Sec.12 of the Act after the amendment is in the following terms:

"Nothing in any contract made by a tenant shall take away or limit his rights under this Act."

Act IV of 1972 was made expressly retrospective by a validation section, though cases in which the landlord had before the date of commencement of the act taken possession of the land and building from the tenant, were excluded from the applicability of the said Act.

9. Even after the passing of Madras Act IV of 1972,

the courts expressed the view that the validation section of the said act did not enable the reopening of any judgment or decree or order of any court or authority. In fact, the said view was expressed in an application filed in the case which was decided by the Supreme Court in *Haridas Girdharidas v. Varadaraja Pillai*, A.I.R. 1971 S.C. 2366. An application was filed for an application to sell the land to him in this Court. That application was dismissed. The judgment is reported in *M. Varadaraja Pillai v. Haridas Girdharidas*, 86 L.W. 157. The tenant filed an application for review of the judgment of the Supreme Court. But it was dismissed as withdrawn. Thereafter, the Legislature passed Tamil Nadu Act 24 of 1973 and amended the definition of "tenant" found in Sec.2 of the Act and introduced the impugned provisions in Sec.29 of the Act. The Statement of Objects and Reasons read as follows:

"The object underlying Tamil Nadu Act 4 of 1972 was to confer benefits on all the tenants who were in actual physical possession of the lands and buildings, notwithstanding any judgment, decree or order or any court holding that the tenant was not entitled to the benefits of the Act by reason of the proviso to Sec.12 of the Principal Act. The position has been examined and it has been decided to amend the principal Act so as to confer the benefits of the Act on persons who were tenants under tenancy agreements to which the principal act was applicable notwithstanding the fact that courts have passed decrees for possession or for similar relief on the ground that the proviso to Sec.12 of the principal act as it stood before the publication of Tamil Nadu Act 4 of 1972 disentitled them to the benefits under the Act. The bill seeks to achieve the above object.

The Bill also seeks to give a right to such persons to make an application to the court within a period of two months of the publication of the proposed Act for claiming the benefits under the Act. Provision has also been made empowering the courts to reopen and review the proceedings relating to such decree or order, as if the proposed act were in force at the time at which the decree or order was passed."

10. A reading of the statement shows that the amendment is for the purpose of giving relief to the tenants, who suffered decrees or orders of eviction by reason of the proviso to Sec.12 of the

Act. The second paragraph of the statement also refers only to the persons mentioned in the first paragraph. As per the Statement of Objects and Reasons, it is only those persons against whom judgments, decrees or orders were passed are enabled to make an application to the court within a period of two months on the publication of the Act for claiming the benefits under the act. The avowed object of the Amendment Act is only to protect such persons who were found by courts to be disentitled to the benefits of Sec.9 of the Act by reason of the proviso to Sec.12 of the Act. It was not the object of the Legislature to extend the benefit to other persons.

11. However, the actual amendment introduced in Sec.9 of the Act as found in sub-clause (ii) of clause (1)(a) thereof is in the following terms:

"Notwithstanding anything contained in clause (a)(i) of this sub-section, any such tenant as is referred to in Sub-clause (ii)(b) of clause (4) of Sec.2 or his heirs, may within a period of two months from the date of the publication of the Madras City Tenants' Protection (Amendment) Act, 1973 apply to the court (whether or not a suit for ejectment has been instituted or proceeding under Sec.41 of the Presidency Small Cause Courts Act, 1882 (Central Act XV of 1882) has been taken by the landlord or whether or not such suit or proceeding is pending) having jurisdiction to entertain a suit for ejectment or in the City of Madras either to such court or to the Presidency Small Causes Court, for an order that the landlord under the tenancy agreement shall be directed to sell for a price to be fixed by the court the whole or part of the extent of land specified in the application."

The clause can be invoked by any tenant covered by Sec.2(4)(ii)(b) of his heirs, whether or not a suit or proceeding has been instituted against him or them for eviction. It is this clause which is attacked as violative of Art.14, Art.19(1)(f) and Art.31 of the Constitution of India.

12. We have seen that the object of the Amendment Act as set out in the Objects and Reasons is confined to a particular class of tenants against whom orders or decrees have been passed on the footing that they are not entitled to the benefits of Sec.9 of the Act, in view of the proviso to Sec.12 of the Act. The object of the main Act has throughout been to give protection against eviction of

tenants, who have constructed buildings on others' lands so long as they pay a fair rent for the land. No doubt, the preamble as it stood originally, referred to the tenants who had constructed buildings in the hope that they would not be evicted so long as they paid fair rent. After the amendment of the preamble, all tenants who have constructed buildings on others' lands whether with a hope that they would not be evicted or without such hope, will be benefited by the provisions of the Act. It is only in consonance with the same, Sec. 12 of the Act was amended and the proviso was deleted. But, still the object of the Act is only to give protection against eviction so long as the tenants pay a fair rent for the land. The right to purchase land under Sec. 9 of the Act arises only on ejectment, which is undoubtedly after the determination of the tenancy. Sec. 9(1) (a) of the Act expressly refers to a tenant who is entitled to compensation under Sec. 3 of the Act and against whom a suit in ejectment has been instituted or proceeding under Sec. 41 of the Presidency Small Cause Courts Act, 1882 has been taken. Sec. 3 of the Act provides for compensation to the tenant for the building only on ejectment. Thus, the provisions of the Act apply to a situation where the contractual relationship of landlord and tenant has been terminated and the landlord seeks to enforce his right to recover possession. The landlord is the owner of the land who is attempting to take back possession of the land while the tenant is the owner of the superstructure erected by him. Under the provisions of the Transfer of Property Act, the tenant will not be entitled to claim any compensation for the building. He must either remove the building or lease it to be enjoyed by the lessor. In many a case, the hardship to be suffered by the tenant would outweigh the advantage gained by the landlord by getting back possession of his land. In order to alleviate such hardship, the legislation was enacted with a provision enabling the tenant to buy the land.

13. It has been held in *Sundareswarar Devasthanam v. Marimuthu*, A.I.R. 1963 Mad. 369, by a Division Bench of this Court that Sec. 9 of the Act is in its nature expropriatory and could be confined only to suits or applications in terms asking for possession and will not apply to a suit for declaration of the tenants' title and for an injunction. Sec. 9 of the Act, as pointed out by the Supreme Court in *N. Vajrapani Naidu v. New The-*

atres Carnatic Talkies Ltd., A.I.R. 1964 S.C. 1440: (1965) 1 S.C.J. 368: (1965) 1 M.L.J. (S.C.) 47: (1965) 1 An.W.R. (S.C.) 47: (1964) 6 S.C.R. 1015 is not so much to deprive the landlord of his property or to acquire his rights to it as to give effect to the real agreement between him and his tenant, who induced the tenant to construct his building on the plot let out to him. In the situation which arises after the termination of the tenancy, the Legislature thought fit to confer a statutory right on the tenant to purchase the land resulting in a coalescence of the ownership of the building and land.

14. The constitutional validity of the section as it stood prior to the Amendment Act 24 of 1973 was upheld by this Court as well as the Supreme Court. Suffice it to refer to the judgment of the Supreme Court in *N. Vajrapani Naidu's case*, A.I.R. 1964 S.C. 1440: (1965) 1 S.C.J. 368: (1965) 1 M.L.J. (S.C.) 47: (1965) 1 An.W.R. (S.C.) 47: (1964) 6 S.C.R. 1015.

15. The clause introduced by the Amendment Act 24 of 1973 has now given a right to the tenant even in the absence of any suit or proceeding for eviction. Even a tenant whose contract of tenancy subsists is enabled by the said provision to apply to the court for a direction to the landlord to sell the land to him. When the object of the main Act is to give protection against eviction and the object of the Amendment Act is to make that protection available to persons who have suffered decrees of orders by reason of the proviso to Sec. 12 of the Act, there is no doubt that the provisions found in Sec. 9(1)(a)(ii) introduced by the amendment has no relation to the said objects and it travels far beyond the same. There is no nexus between the said objects and the provision introduced by the amendment. The question of protection against eviction would arise only on the termination of the contractual relationship and institution of a proceeding for eviction. When the tenant does not face any such threat and the landlord is willing to continue the relationship of landlord and tenant and he has no intention to evict the tenant so long as the latter pays the fair rent, the provision enabling the tenant to compel the landlord to sell the land to him is arbitrary and unreasonable. It is relevant in this connection to remember the test laid down by the Supreme Court in *Ameerunnissa v. Mahboob Begum*, A.I.R. 1953 S.C. 91: 1953 S.C.A. 864: 1953 S.C.J. 61: 1953 S.C.R. 404, in the following words:

"(11) The nature and scope of the guarantee

that is implied in the equal protection clause of the Constitution have been explained and discussed in more than one decision of this Court and do not require repetition. It is well settled that a legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not 'per se' amount to discrimination with the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislature has in view.

.....

We are not unmindful of the fact that the presumption is in favour of the constitutionality of an enactment but when on the face of it a piece of legislation is palpably unreasonable and discriminatory and the selection or classification made by it cannot be justified on any conceivable or rational ground, the court has got to invalidate the enactment on the ground of its violating the equal protection clause."

In the present case, it goes without saying that the provision contained in Sec.9(1)(a)(ii) of the Act conferring benefits on the tenants against whom no proceeding for eviction has been instituted has no rational basis and totally unconnected with object of the Act. Hence, we hold that the provision introduced by the Amendment Act is violative of Art.14 of the Constitution of India.

16. The provision is equally violative of Arts.19(1)(f) and 31 of the Constitution of India. Art.19(1)(f) declares the fundamental right of the landlord to hold property. It is not necessary for the present purpose to refer to the right to acquire and dispose of. That fundamental right to hold properties is sought to be interfered with by a statutory right to purchase property conferred on the tenant. It has been held in *S.M.Transports (P) Limited v. V.Sankaraswamigal Mutt*, A.I.R. 1963 S.C. 864: (1963)1 S.C.R. (Supp.) 232, that the right conferred on the tenant under Sec. 9 of the Act is not an interest or right in the property. It is reiterated

in *P.Ananthakrishnan v. G.Ramakrishnan*, A.I.R. 1987 S.C. 1272, in the following passage:

"10. Sec.9 confers a privilege on a tenant against whom a suit for eviction has been filed by the landlord but that privilege is not absolute. Sec.9 itself imposes restriction on the tenant's right to secure conveyance of only such portion of the holding as would be necessary for his convenient enjoyment. It creates a statutory right to purchase land though the medium of court on the fulfilment of conditions specified in Sec.9 of the Act. It is not an absolute right, as the court has discretion to grant or refuse the relief for the purchase of the land. In *S.M.Transports (P) Limited v. V.Sankaraswamigal Mutt*, A.I.R. 1963 S.C. 864: (1963)1 S.C.R. (Supp.) 282, this Court considered the question whether the right of a tenant to apply to a court for an order directing the landlord to sell the land to him for a price to be fixed by it under Sec.9 of the Act is a property right. The court held, that the law of India does not recognise equitable estates, a statutory right to purchase land does not confer any right or interest in the property. The right conferred by Sec.9 is a statutory right to purchase land and it does not create any interest or right to the property. The tenant's "right to secure only such portion of the holding as may be necessary for his convenient enjoyment is equitable in nature. Under the common law a tenant is liable to eviction and he has no right to purchase the land demised to him at any price as well as under the Transfer of Property Act. The only right of a tenant who may have put up structure on the demised land is to remove the structure at the time of delivery of possession on the determination of the lease. Sec.9 confers an additional statutory right on a tenant against whom suit for ejectment is filed to exercise an option to purchase the demised land to that extent only which he may require for convenient enjoyment of the property. The tenant has no vested right in the property instead; it is a privilege granted to him by the statute which is equitable in nature."

Such a right cannot be allowed to take precedence over the fundamental right of the landlord to hold property. It must be noted that the right conferred by the new provision, introduced by the amendment is not one arising after the termination of the

contractual relationship or on the filing of a proceeding for ejectment. Hence, it cannot be justified as a reasonable restriction on the exercise of the landlord's fundamental rights within the meaning of Art. 19(5) of the Constitution of India. It will be a case of deprivation of the landlord of his right to hold property without any justification therefor. The amendment is not a law which will fall under Art. 31(2) of the Constitution.

17. Mr. Sundaravaradan, learned senior counsel appearing for the tenants submits that the object of the Act, viz., protection against eviction is achieved by the right conferred on the tenant to purchase the land and thus, the provision is not arbitrary and unreasonable. According to learned counsel, the amendment falls well within the scope of the object. We do not agree. We have already pointed out that the object is only to protect the tenant against eviction and when there is no threat of eviction, there is no question of conferring a right on the tenant to purchase the land. Even the Statement of Objects and Reasons for the Amendment Act referred only to tenants who suffered decrees or orders. Hence, there is no nexus between the object of the Amendment Act and the provision introduced.

18. Learned counsel compares the provisions of the Act with the Tamil Nadu Occupants of Kudiyruppu Conferment of Ownership) Act (XL of 1971). That is a substantive enactment to provide for the conferment of ownership rights on occupants of Kudiyruppu in the State of Tamil Nadu. The scope and object of the said enactment is entirely different and no comparison can be made between that Act and the present Act.

19. Learned counsel submits that when the preamble of the Act is amended and the words "in the hope that they would not be evicted" are deleted, the object of the Act has been widened and the Legislature has only conferred an additional benefit to the tenant by expanding his rights. We do not find any substance in the contention. We have already given our reasons earlier and it is not necessary to repeat them here. Learned counsel places reliance on certain passage in the Judgment of a Division Bench of this Court in *His Holiness Sri La Sri Ambalavana Pandara Sannadhi Avargal v. The State of Tamil Nadu*, (1985) Writ L.R. (Supp.) 1. The Bench had to consider the Constitutional validity of the Tamil Nadu Cultivating Tenants (Payment of Fair Rent) Amendment Act (17 of

1980) and the Tamil Nadu Public Trusts (Regulation of Administration of Agricultural Lands) Amendment Act (18 of 1980). It was observed that the question as to whether there was necessity for legislation or not and what was the motive of Legislature in enacting a particular enactment were not matters into which the court could go. But it was pointed out that the scope of the enquiry by the court will be to see whether there was nexus between the two enactments and the objects. In the present case we are not going into the necessity of the amendment or the motive therefor. We have found that there is no nexus between the avowed object of even the Amendment Act and the provision introduced by the amendment. Learned counsel invites our attention to the following passage in that judgment:

"65. We have already reproduced Entry 18 which is the only relevant entry so far as the impugned enactment is concerned. That entry enables a State Legislature to enact Laws in respect of land, land tenures including the relationship of landlord and tenant and the collection of rent. It is now well-established that the doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the Legislature, and the whole doctrine of colourable legislation resolves into the determination of the question of competency of a particular legislature, to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to enact are wholly irrelevant. If the Legislature lacks competency, then the question of motive does not arise at all. The question whether a statute is constitutional or not will thus depend upon whether there was power in the legislature to enact the impugned legislation. In a federal Constitution, where legislative powers are distributed between the Centre and the States, their respective spheres are marked by the entries in the appropriate Lists. The question which arises is whether the Legislature has or has not, in respect of the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such a transgression may be patent on the face of the statute, it may also be disguised and indirect. And it is statutes like this kind that fall within the expression of colourable legislation, which means that,

although apparently the Legislature in passing a statute purported to act within the limits of its powers, in substance and in reality it transgressed its powers, the transgressions being veiled from what appears on proper examination to be a mere pretence or disguise."

It is submitted by him that the competency of the Legislature cannot be questioned in this case. Though a faint attempt was made by one of the counsel appearing for the landlords to challenge the competence of the Legislature, it was not pressed and ultimately the arguments were confined to Arts.14, 19(1)(f) and 31 of the Constitution of India.

20. Learned counsel submits that the amendment is only regulating the relationship of landlord and tenant and not an unreasonable restriction on the fundamental right of the landlord. We do not accept this contention. When the landlord is deprived of his property, it cannot be said that it is only a regulation of the relationship of the landlord and tenant.

21. Learned counsel submitted that the provision introduced by the amendment would fall under Art.39(b) and (c) of the Constitution of India. There is no merit in this contention. We do not accept the same.

22. Learned counsel referred to the judgment of Panchapakesa Ayyar, J., in *Sayed Shamish Thaikkal v. Ibrahim Sahib*, (1957)2 M.L.J. 265 and contended that even long before the present amendment, this Court had recognised the right of the tenant to file an original petition for a direction to the landlord to sell the land. In that case, before the Act was extended to the area in which the property was situated, the landlord and the tenant had settled their rights by a consent decree in a suit for eviction whereby the tenant was to be a lessee for twelve years at a particular rate of rent and he was to vacate the premises at the end of the period. The decree provided that the landlord could get possession through court and the tenant was entitled to remove the superstructure. It was during the period of tenancy provided in the decree, the Act was extended. The tenant filed an original petition for a direction under Sec.9 of the Act to the landlord to sell the land to him. Repelling the contention that an original petition was not maintainable, the court held that it was more appropriate, to file an original petition in cases, of that type. The learned Judge observed thus:

"In these days of ex-proprietary and revolutionary laws, several rights never dreamt of when the suit was disposed of are given to tenants, agricultural and others, under statutes which stand by themselves and have to be carefully gone into and interpreted before the relief vouchsafed by them is available to the person claiming them. The fact that that person happened to be a party to a suit and decree, touching the matter either directly or tangentially, is irrelevant. So the proper way of deciding the questions arising under such independent statutes will be in original petitions though the effect of allowing the original petition may be to modify a decree, where the party granted the relief is a party to the decree. But that cannot make any difference. Nor can it cause the least injury to the person affected. It is all a question of half a dozen and six, the nomenclature along differing."

The observations cannot be taken out of the context of the case and utilised by the tenants in the present case.

23. In the result, we hold that Sec.9(1)(a)(ii) of the Tamil Nadu City Tenants' Protection Act introduced by the Tamil Nadu Act 24 of 1973 is unconstitutional in so far as it relates to tenants against whom a suit for ejectment has not been instituted or a proceeding under Sec.41 of the Presidency Small Cause Courts Act, 1882 (Central Act XV of 1882) has not been taken by the landlord. In all these cases, no suit for ejectment has been filed by the landlord. Hence, the original petitions filed by the tenants in the Court of District Munsif, Srivilliputhur are unsustainable and are liable to be dismissed.

24. In the view we have taken, nothing survives in the original petitions filed by the tenants and there is no need for sending them back to the District Munsif, Srivilliputhur.

25. We must also place on record the information given by counsel regarding some of them. It is stated that in O.P.No.4 of 1974 (R.C.No.4 of 1980) both the petitioners are dead and their legal representatives have not come on record. In O.P.Nos.22, 23, 24, 29 and 30 of 1973 (R.C.Nos.5 to 9 of 1980), it is represented that the parties have settled their dispute outside court and the tenants have purchased the lands. But, counsels are not able to give definite information for want of definite instructions. Hence, we are not able to pass orders on that

basis. As all the original petitions are being dismissed by us, we find it not necessary to call for further details in that regard.

26. In fine, the original petitions are dismissed. No costs, Government Pleader's fees Rs.1,000.

B.S. ---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *K.A.Swami, C.J. and Somasundaram, J.*

L.P.A.No.197 of 1993 *10th December, 1993.*

Mrs.Saroj Goenka and others *...Appellants*
v..

Nariman Point Building Services and Trading Private Ltd., Madras and others *...Respondents.*

(A) Companies Act (I of 1956), Secs.10-F, 397 and 398 - Appellants filing company petition under Secs.397 and 398 - Maintainability of petition questioned by respondent - Company Law Board directing that maintainability question would be heard along with other issues arising in petition - Appeal against that order, if maintainable.

An appeal under Sec.10-F of the Companies Act can be entertained only if the appeal involved a question of law. From the respective case of the parties, it is clear that the issue relating to maintainability cannot be held to be a pure question of law. That being so, the Company Law Board cannot be held to have committed any error of law in holding that the issue relating to maintainability of the petition shall also be decided along with the other issues. That being so, it shall have to be held that there was no question of law involved for entertaining the appeal under Sec.10-F of the Act.

(B) Civil Procedure Code (V of 1908), O.14, Rule 2 - Companies Act (I of 1956), Secs.397 and 398 - Petition under - Maintainability of - Questioned - Question, if shall have to be tried as a preliminary issue.

The question as to maintainability of petition or lack of jurisdiction of the court, if it involves pure question of law, as per the provisions contained in O.14, Rule 2 of the Code of Civil Procedure shall have to be tried as a preliminary issue. But, if it involves mixed questions of law and fact it would again depend upon the facts and circumstances of each case, whether such an issue could be tried as preliminary issue. However, it cannot be laid down as a proposition of law that no such issue can be tried as a preliminary issue, because there may be cases in which large number of issues may arise such as the case on hand, wherein the petition itself runs into several hundreds of pages and involves several issues. If in such a case, maintainability question has to be decided along with the other several issues arising in the case and ultimately, it is held that the petition is not maintainable, the parties would have been unnecessarily compelled to go through the mill of the trial. Therefore, as it has already been pointed out, even in cases where the issue as to maintainability or lack of jurisdiction involves mixed questions of law and fact can also be decided as a preliminary issue depending upon the facts and circumstances of each case. The alleged non-maintainability of the petition under Sec.399 of the Act on account of personal disability of the concerned petitioners for moving the petition could not be equated to bar the proceedings under any express provision of law. But, even assuming that such has did exist, the objection could not be decided without going into the factual controversy as to whether, on the date of the petition, the petitioners commanded shares worth to per cent of the issued capital. None of the other preliminary objections raised by the applicants could also be tried as preliminary issue. The question as to whether the company petition was maintainable in law and the fact had to be decided ultimately on the merits while considering the main petition. In cases, where, as already pointed out, the pleadings run into several hundreds of pages and several issues arise, it would not be just and proper to subject the parties to the trial of the entire case for the purpose of deciding the issue of maintainability. If, in such cases, the

maintainability issue is decided as a preliminary issue, it would be convenient for both the parties because, in the event it is held that the petition is not maintainable, several other issues involved in the case need not be tried and the evidence need not be adduced..... Pursuant to the order under appeal, the Company Law Board has proceeded to decide the maintainability issue as a preliminary issue. The case has now been posted on the 11th and 12th January, 1994 for hearing the issue. The court is informed that the pleadings necessary for deciding the issue of maintainability are also complete inasmuch as an affidavit is filed by the respondents who have raised the issue of maintainability. Counter-affidavit is also filed by the petitioners in Company Petition No.40 of 1993 the Company Law Board also has fixed the case for hearing on the question of maintainability. If, at this stage, the order of the learned single Judge is interfered with and the respondents are directed to file their Written statement and to raise the issues and thereafter to try the issue as to maintainability as a preliminary issue, it would only result in further delay of the proceedings. In the facts and circumstances of the case, it is just and appropriate to try the issue relating to maintainability of the petition as a preliminary issue.

[Paras. 4, 4.1 & 4.2]

(C) Companies Act (I of 1956), Secs.397 and 398 - Petition under - Maintainability of petition questioned - Company Law Board passing interim orders and holding that issue of maintainability would be decided along with other issues raised in petition-Board, if has jurisdiction to pass interim order.

It is not a case in which it can be held that the Company Law Board has no jurisdiction to entertain the petition under Secs.397 and 398 of the Act. No doubt, the persons who have invoked the jurisdiction whether they are entitled to the relief under Secs.397 and 398 of the Act or are entitled to maintain such a petition, are the questions which are required to be decided by the Company Law Board, but this does not take away the jurisdiction, nor does it affect the jurisdiction of the Company Law Board to pass such interim orders as to entertain interim applications as are necessary in the interests of the subject-matter of the proceedings and also of the parties..... It is not the jurisdiction of the Company Law Board to entertain a petition under Secs.397 and 398 of the Act that is under doubt, it is only the capacity or

the competency of the petitioners to maintain the petition under Secs.397 and 398 of the Act that is in question. As long as the decision or the determination of such a question lies within the jurisdiction of the Company Law Board, it cannot be held that pending determination of such issue, the Company Law Board cannot or is not competent to entertain interim applications or pass interim orders which are necessary for ensuring the final reliefs which the petitioners may be entitled to get failing which it may be possible in a given case that the ultimate success in the case may become futile when the very subject matter of the proceedings may not be available or it may become impossible to realise the fruits of the proceedings. Hence, the court is of the view that the Company Law Board cannot be restrained from entertaining an interim application or passing an interim order if it is found necessary in the interests of the subject-matter of the proceedings and of the parties.

[Para. 5]

Cases referred to:

D.P.Maheswari v. Delhi Administration, A.I.R. 1993 S.C. 153: (1983)4 S.C.C. 293. [Para. 4]
Sourashtra Cement and Chemicals Industries Limited v. Esma Industries Private Limited, 69 C.C. 372. [Paras. 4, 4.1]
Kihoto Hollohan v. Zachillhu, (1992)2 S.C.C. (Supp.) 651. [Para. 5]
In re. Bengal Luxmi Cotton Mills Limited, (1965)35 C.C.187. [Para. 5]
Ved Prakash v. Iron Traders, A.I.R. 1960 Punj. 427. [Para. 6]
Raza Textiles Limited v. Income-tax Officer, Ram-mout, A.I.R. 1973 S.C. 1362: 1973 Tax.L.R. 684: 87 I.T.R. 539: (1973)1 S.C.C. 633. [Para. 6]
Cotton Corporation of India Limited v. United Industrial Bank, A.I.R. 1983 S.C. 1272: (1983)3 Comp.L.J. 171. [Para. 6]
World Wide Agencies Private Limited v. Margaratt T.Desor, (1990)1 S.C.C. 536. [Para. 6]
 Appeal under Clause 15 of the Letters Patent against the order of Abdul Hadi, J. dated 15.10.1993 and made in the exercise of the appellate jurisdiction of the High Court in A.A.O.No.1017 of 1993 (C.P.No.40 of 1993 dated 14.7.1993 the Company Law Board, Principal Bench, New Delhi).
T.S.Krishnamurthy Iyer, Senior Advocate, for M/s.Yasoda Varadhan and K.Kannan, for Appellants.
S.R.Mukerjee, Senior Advocate, for T.Poornam, for Respondent No.1.

P.Chidambaram, Senior Advocate for *P.S.Raman*, *P.R.Raman* and *K.S.Viswanathan*, for Respondent Nos.2 to 5.

The Judgment of the Court was delivered by *K.A.Swami, C.J.*: This Letter Patent Appeal is preferred against the order dated 15.10.1993, passed by the learned single Judge in C.M.A.Nos.1017 of 1993, which was preferred against the order dated 15.7.1993, passed by the Company Law Board, Principal Bench, New Delhi in C.P.No.40 of 1993. The Company Law Board, by the aforesaid order, restrained all the respondents in the Company Petition No.40 of 1993 from giving effect to any transfer or any transmission of shares in the said companies and also from increasing the issued and paid up share capital in any manner whatsoever. They were also further restrained from disposing of or encumbering their fixed assets or investment except in the normal course of business. The company, in which petitioner No.1 was a director, was also restrained from holding any board meetings till the date of the next hearing without giving at least three days notice to the first petitioner either by registered A.D. post or through courier service under receipt along with a copy of the agenda for the board meeting. The petitioners and respondents aware also permitted to approach the Bench at any time with proper application and copies served on the other parties in the event of any need for intervention. In addition to that, it was also further directed in paragraph 2 of the order as follows:

"All the applicants will serve copies of their applications on others before 23.7.1993 and those parties will file their replies before 7.9.1993 and counter replies, if any, will be filed by 7.10.1993. As far as the main petition is concerned, the petitioner has already been served on all the parties, as per the affidavit of service filed by the petitioners. The respondents will file their replies on the main petition by 7.9.1993 and the petitioners will file their rejoinders, if any, by 7.10.1993. The case will come up for hearing on 29.10.1993 at 11.00 a.m., for continuing the arguments on maintainability and the main petition along with all other applications will be taken up for hearing on 2nd November, 1993 at 11.00 a.m., and the hearing will continue till 5th November."

2. Learned single Judge has held that as the maintainability of the petition was raised, the Company

Law Board should have heard that question first before proceeding to decide the other questions involved in the petition. Learned single Judge has also further held that it was also unnecessary to have called upon the respondents to file their replies to the main petition by 7.9.1993 and the petitioners to file their rejoinders by 7.10.1993, without deciding the question of maintainability. In addition to this, the learned single Judge has further directed that the maintainability of the company petition be decided expeditiously, preferably within a fortnight from the date of the order.

2.1. Aggrieved by the aforesaid order, the Letters Patent Appeal is preferred.

2.2. In the light of the contentions urged on both the sides, the following points arise for consideration:

(1) Whether the learned single Judge should have entertained the appeal under Sec.10-F of the Companies Act (hereinafter referred to as the Act)?

(2) Whether this is a case in which the question of maintainability should have been decided as a preliminary issue? and

(3) Whether the order under appeal requires to be interfered with?

3. The appellants have filed Company Petition No.40 of 1993, under Secs.397 and 398 of the Act for the various reliefs, set out in paragraph 8 of the petition. As the reliefs sought for run into several pages, we do not consider it necessary to incorporate the same. The respondents have not yet filed their objections. When the interim order was passed, some of the respondents raised an objection as to maintainability of the petition itself and requested that the same should be decided as a preliminary issues. As already pointed out, the Company Law Board has negatived the contention and directed that the question of maintainability shall also be decided along with the other issues arising in the petition.

3.1. It is contended by Sri Krishnamoorthy Iyer, learned senior counsel appearing for the appellants, that an appeal against the order of the Company Law Board under Sec.10-F of the Act would lie only on a question of law. The question as to whether the maintainability of the petition should be tried and decided as a preliminary issue or not is not a pure question of law, as the determination of the said question involves and calls for

determination of several facts also. Therefore, the issue not being a pure issue of law, appeal could not have been entertained under Sec.10-F of the Act. Sec.10-F of the Act reads as follows:

"10-F appeals against the orders of the Company Law Board: Any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order.

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period of not exceeding sixty days."

3.2. Thus, an appeal under Sec.10-F of the Act can be entertained only if the appeal involves a question of law. The maintainability of the petition by the appellants has been raised on the ground that the appellants/petitioners are not the members of the company and they do not hold the requisite number of shares. For the purpose of maintaining a petition under Secs.397 and 398 of the Act, there is no doubt that the petitioners must satisfy the conditions laid down in Sec.399 of the Act, which provides that the members of a company shall have the right to apply under Secs.397 and 398 of the Act, in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members. Whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all call and other sums due on its members and in the case of a company not having a share capital, not less than one-fifth and the total number of its members. The section further provides that where any share of shares are held by two or more persons jointly, they shall be counted only as one member. Sub-sec.(3) thereof further provides that the members of a company are entitled to make an application by virtue of Sub-sec.(1) any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them. Sec.41 of the Act further defines the expression 'member' as follows:

"(1) The subscribers of the memorandum of a

company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company."

3.3. The contention of the respondents is that the petitioners are not share-holders and their names are not entered in the register of members and they are not the subscribers of the memorandum of the company. As such, they cannot be either held to hold the requisite number of shares, nor can be held to be the members of the company. According to the case of the petitioners, the late Shri Ramanath Goenka was a registered shareholder of 9200 equity shares and 4000 cumulative redeemable preference shares and one-third of the same has devolved upon the petitioners, who are no other than the widow and daughter of the pre-deceased son of Ramanath Goenka. As such their one-third share would come to 3093.33 shares and 1666.07 of the preference shares with voting rights under Sec.87 of the Companies Act. As such, they have the right to file the petition under Secs.397 and 398 of the Act. At this stage, it may be mentioned that there is also a suit, namely, C.S.No.1246 of 1992, filed on the Original Side of this Court for a declaration that the shares held by late Shri Ramanath Goenka were, in fact, the shares of plaintiff. There is also another suit filed by the first appellant being C.S.No.1123 of 1992. On the Original Side of this Court for the various reliefs pertaining to the shares held by the late Shri Ramanath Goenka. Therefore, it is contended by the learned counsel that the issue relating to maintainability cannot be held to be a pure question of law, as it depends upon the determination of the aforesaid several facts. As such, it could not have been decided as a preliminary issue. Hence, the Company Law Board was justified in deciding that the said issue will also be decided along with the other issues. From the respective case of the parties, referred to above, it is clear that the issue relating to maintainability cannot be held to be a pure question of law. That being so, the Company Law Board cannot be held to have committed any error of law in holding that the issue relating to maintainability of the petition shall also be decided along with the other issues. That being so, it

shall have to be held there was no question of law involved for entertaining the appeal under Sec.10-F of the Act. However, in the light of the facts and circumstances of the case, we do not consider it necessary to answer point No.1 at this stage itself. We would now take up point No.2.

4. *Point No.2:* The question as to maintainability of petition or the lack of jurisdiction of the court, if it involves pure question in law, as per the provisions contained in O.14, Rule 2 of the Code of Civil Procedure shall have to be tried as a preliminary issue, but, if it involves mixed questions of law and fact, it would again depend upon the facts and circumstances of each case, whether such an issue could be tried as a preliminary issue. However, it cannot be laid down as a proposition of law that no such issue can be tried as a preliminary issue, because there may be cases in which large number of issues may arise, such as the case on hand, wherein the petition itself runs into several hundreds of pages and involves several issues. If in such a case, maintainability question has to be decided along with the other several issues arising in the case, and ultimately if it is held that the petition is not maintainable, the parties, would have been unnecessarily compelled to go through the mill of the trial. Therefore, as we have already pointed out even in cases where the issue as to maintainability or lack of jurisdiction involves mixed question of law and fact, can also be decided as a preliminary issue depending upon the facts and circumstances of each case. No doubt, learned counsel for the appellants has placed reliance on a decision of the Supreme Court in *D.P. Maheswari v. Delhi Administration*, A.I.R. 1993 S.C. 153: (1983) 4 S.C.C. 293 and *Sourashtra Cement and Chemicals Industries Limited v. Esma Industries Private Limited*, 69 C.C. 372. *Maheswari's case*, A.I.R. 1993 S.C. 153: (1983) 4 S.C.C. 293 related to a dispute arising under the Industrial Disputes Act. It was held that either the jurisdiction of the High Court under Art.226 of the Constitution or the jurisdiction of the Supreme Court under Art.136 be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from court to court for adjudication of peripheral issues, avoiding decision on issues more vital to them. The tribunals and courts, which are requested to decide preliminary questions must therefore ask themselves whether such threshold

part-adjudication is really necessary and whether it will not lead to other woeful consequents. After all Tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be satisfied by all manner of preliminary objections and journeyings up and down. It is also further observed that the nature of the jurisdiction under Art.226 is supervisory and not appellate while that under Art.136 is preliminary supervisory but the court may exercise all necessary appellate powers to do substantial justice. Thus, in the aforesaid decision also, it has been pointed out that the court which has to decide preliminary questions must ask itself such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. Therefore, the said decision also does not exclude the possibility of deciding the issue relating to maintainability as a preliminary issue. In *Sourashtra Cement and Chemicals Industries Limited v. Esma Industries Private Limited*, 69 C.C. 372, a learned single Judge of the Gujarat High Court has held that the preliminary objections raised by the applicants to the maintainability of the petition required at least affidavit evidence to be led and involved mixed questions of law and fact. Moreover, it did not touch upon the jurisdiction of the court nor raised any question regarding the main proceedings being barred by any express provisions of law. The alleged non-maintainability of the petition under Sec.399 of the Act on account of the personal disability of the concerned petitioners for moving the petition could not be equated to bar the proceedings under any express provision of law. But, even assuming that such bar did exist, the objection could not be decided without going into the factual controversy as to whether, on the date of the petition, the petitioners commanded shares worth 10 per cent of the issued capital. None of the other preliminary objections raised by the applicants could also be tried as preliminary issues. The question as to whether the company petition was maintainable in law and in fact had to be decided ultimately on the merits while considering the main petition.

4.1. As pointed out by us earlier, it cannot be laid down as a trite proposition of law that even in cases where the point as to maintainability involved mixed question of law and fact, it cannot be tried as a preliminary issue. The Supreme Court in

the aforesaid decision also has pointed out that the court has to consider in each case whether such an issue should be tried as a preliminary issue, we may also point out that in the normal circumstances, where the case does not involve pleadings running into hundreds of pages and several issues, the issue relating to maintainability can be tried along with the other issues, because trial of such a case would not occupy longer time and would not subject the parties to long trial. But, in cases, where, as already pointed out, the pleadings run into several hundreds of pages of several issues arise, it would not be just and proper to subject the parties to the trial of the entire case for the purpose of deciding the issue of maintainability. If in such cases, the maintainability issue is decided as a preliminary issue, it would be convenient for both the parties, because in the event it is held that the petition is not maintainable, several other issues involved in the case need not be tried and the evidence need not be adduced. In a case like this, there will be a large volume of evidence, will have to be adduced as several are to be raised. Therefore, we are of the view that the proposition laid down in *Sourashtra Cement and Chemicals Industries Limited v. Esma Industries Private Limited*, 69 C.C. 372, cannot at all be applied. As far as the decision of the Supreme Court is concerned, we have pointed out that the said decision does not state in categorical terms that it is not permissible to try an issue relating to maintainability as a preliminary issue. Hence, we are of the view that the direction issued by the learned single Judge that the issue as to maintainability should be tried as a preliminary issue does not call for interference.

4.2. There is also one more reason, why we are not persuaded to interfere with the direction given by the learned single Judge as to trying the issue regarding maintainability as a preliminary issue. That reason is that pursuant to the order under appeal, the Company Law Board has proceeded to decide the maintainability issue as a preliminary issue. The case has now been posted on the 11th and 12th of January, 1994 for hearing the issue relating to the maintainability of the petition. We are also informed that the pleadings, necessary for deciding the issue of maintainability, are also complete inasmuch as an affidavit is filed by the respondents, who have raised the issue of maintainability. Counter-affidavit is also filed by the

petitioners in Company Petition No.40 of 1993. The Company Law Board also has fixed the case for hearing on the question of maintainability. If at this stage, the order of the learned single Judge is interfered with and the respondents are directed to file their written-statement and to raise the issues and thereafter to try the issue as to maintainability as a preliminary issue, it would only result in further delay of the proceedings. Therefore, even though on point No.1 we have taken the view that the question of law does not arise out of the order passed by the tribunal. We have held, in the facts and circumstances of the case, that it is just and appropriate to try the issue relating to maintainability of the petition as preliminary issue. Therefore, we do not consider it necessary, in the interest of avoiding delay in the proceedings and in the interests of the parties, to interfere with the direction of the learned single Judge to try the issue of maintainability as a preliminary issue.

5. *Point No.3:* Both the sides made concerted efforts on this point. It is contended on behalf of the appellants that the learned single Judge is not at all justified in directing that until the question of maintainability is decided, no other interim application should be taken up for consideration. On the contrary, it is contended on behalf of the respondents that when the question as to the maintainability of the very petition is involved, the petitioners in the company petition are not entitled to seek any interim direction, nor the Company Law Board can consider the interim applications, filed by them. We find it very difficult to agree with the contention of learned counsel for the respondents. It is not a case in which it can be held that the Company Law Board has no jurisdiction to entertain the petition under Secs.397 and 398 of the Act. No doubt the persons who have invoked the jurisdiction, whether they are entitled to the relief under Sec.397 or 398 of the Act or are entitled to maintain such a petition, are the questions which are required to be decided by the Company Law Board, but this does not take away the jurisdiction, nor does it affect the jurisdiction of the Company Law Board to pass such interim orders or to entertain such interim applications as are necessary in the interests of the subject-matter of the proceedings and also of the parties. We may point out at this stage itself the object with which the interim orders are passed. In *Kihoto Hollohan*

v. *Zachillhu*, (1992)2 S.C.C. (Supp.) 651, it has been held thus:

"The purpose of interlocutory orders is to preserve in *status quo* the rights of the parties, so that, the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency. One of the contentions urged was as to the invalidity of the amendment for non-compliance with the Proviso to Art.368(2) of the Constitution. It has now been unanimously held that paragraph 7 attracted the proviso to Art.368(2). The interlocutory orders in this case were necessarily justified to that no landslide changes were allowed to occur rendering the proceedings ineffective and infructuous."

No doubt, learned counsel for the respondents has placed reliance on a decision of the High Court of Calcutta, *In re. Bengal Luxmi Cotton Mills Limited*, (1965)35 C.C.187. There is no doubt that in that case, it has been held that without deciding the maintainability issue, no interim application need be entertained, nor an interim order need be passed. We find it difficult to agree with the view expressed by the learned single Judge of the Calcutta High Court. As pointed out by us, it is not the jurisdiction of the Company Law Board to entertain a petition under Secs.397 and 398 of the Act that is under doubt, it is only the capacity or the competency of the petitioners to maintain the petition under Secs.397 and 398 of the Act that is in question. As long as the decision or the determination of such a question lies within the jurisdiction of the Company Law Board, it cannot be held that pending determination of such issue, the Company Law Board cannot or is not competent to entertain interim applications or pass interim orders, which are necessary for ensuring the final reliefs, which the petitioners may be entitled to get, failing which it may be possible in a given case that the ultimate success in the case may become futile when the very subject-matter of the proceedings may not be available or it may become impossible to realise the fruits of the proceedings. Therefore, as pointed out by the Supreme Court in *Kihoto Hollohan v. Zachillhu*, (1992)2 S.C.C. (Supp.) 651, the interim orders are passed only to ensure that in the ultimate analysis to the parties succeeding, relief should be available. Hence, we are of the view that the Company Law Board cannot be restrained from entertaining an interim

application or passing an interim order if it is found necessary in the interests of the subject-matter of the proceedings and of the parties. Therefore, we are of the view that the order of the learned single Judge in so far as it restrains the Company Law Board from entertaining and considering the interim applications requires to be interfered with. We also make it clear that we should not be understood as having laid down that the Company Law Board should entertain an interim application and pass an interim order. It is open to it to consider any such application that is filed whether the relief sought for requires to be granted in the facts and circumstances of the case as it is a matter for decision by the Board. We should not be taken to have interfered with the discretion which the Company Law Board enjoys in the matter of passing the interim orders.

6. Several decisions were cited at the Bar, namely, *Ved Prakash v. Iron Traders*, A.I.R. 1960 Punj. 427, *Raza Textiles Limited v. Income-tax Officer, Ramnagar*, A.I.R. 1973 S.C. 1362; 1973 Tax.L.R. 684; 87 I.T.R. 539; (1973)1 S.C.C. 633, *Cotton Corporation of India Limited v. United Industrial Bank*, A.I.R. 1983 S.C. 1272; (1983)3 Comp.L.J. 171 and *World Wide Agencies Private Limited v. Margaratt T.Desor*, (1990)1 S.C.C. 536. We have not referred to those decisions as they relate to the merits of the case, with which we are not concerned at this stage.

7. Accordingly, the points raised for determination are answered as follows:

Point No.1: Answered in the affirmative in the light of the finding recorded on point No.2.

Point No.2: Answered in the affirmative,, in the light of the facts and circumstances of the case, as pointed out while discussing point No.2.

Point No.3: The order under appeal in so far as it restrains the Company Law Board from entertaining and considering the interim applications is liable to be interfered with.

8. For the reasons stated above, the appeal is allowed in part; the order dated 15.10.1993, passed by the learned single Judge in C.M.A.No.1017 of 1993, insofar as it directs the Company Law Board not to entertain the interim applications and consider the same, pending decision on the question of maintainability is set aside. Consequently, the Company Law Board is at liberty to entertain the interim applications and consider them in accordance with law. In other respects, the order

of the learned single Judge is maintained. However, it is directed that the Company Law Board shall decide the question of maintainability on or before the end of March, 1994. In the facts and circumstances of the case, there will be no order as to costs.

B.S.

---- Appeal allowed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Thangamani, JJ.

A.S.No.634 of 1983

5th October, 1993.

Union of India owning the Southern Railway having its Office at Park Town, Madras-3 represented by its General Manager ...Appellant v.

United Tractors and another ...Respondents.

(A) Railways Act (IX of 1890), Sec.57 - Consignor entrusting twelve consignments by rail - Consignments delivered to consignee in damaged condition - Consignee sustaining damages and suing Railways for recovery of loss sustained - Consignee not being party to contract with the Railways, if can maintain suit.

If a suit is based on the contract, then it has to be filed by the person who entered into the contract. But a suit can be based on the tort also. In the case of damage to or loss of goods, there can be two kinds of suits, one based on contract and the other on tort. In the present case, there is no doubt that the plaint is based on tort. The 1st plaintiff (consignee) having obtained the ownership of the goods is entitled to sue on tort for the damages caused to it as against the defendant. Consequently the suit

filed by the plaintiffs herein is maintainable.

[Para. 6]

(B) Railways Act (IX of 1890), Secs.74, 73 and 76-F - Tractors consigned to the consignee delivered by Railways in damaged condition - Open delivery certificates issued by the railways - Onus of proof of negligence, if on consignee - Inference of negligence, if can be drawn.

Placing reliance on Sec.74(3) of the Railways Act, it is contended that the onus is on the plaintiffs to prove negligence on the part of the railway administration. Sec.74(3) must be taken along with Sec.73 and Sec.76-F of the Act for the purpose of construction. Sec.73 is a general section which speaks about the general responsibility of the railway administration as a carrier of animals and goods. According to the provisions of Sec.73 the railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery in transit arising from any cause except the causes set out therein. Nine causes have been set out in that section and they are the only exceptions. If the loss, destruction, damage, deterioration or non-delivery is occasioned on account of any other cause other than those mentioned in Sec.73 the railway administration will be liable. There is, however, a proviso to Sec.73, according to which even where such loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, i.e., causes set out in Sec.73 the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the animals on goods. Thus, the onus is thrown on the railway administration to prove that it has exercised reasonable foresight and care in carrying the goods. Sec.74(3) is a sort of exception to Sec.73. In the present case, goods were carried at owners' risk rate and therefore the burden is on the plaintiffs to prove that there has been negligence or misconduct on the part of the railway administration. But Sec.76-F brings in a further exception to Sec.74. Under Clause (b) of Sec.76-F, if in respect of any consignment of goods or of any package which had been covered or protected in such a way that the covering or protection is not readily removable by hand, the railway administration shall be bound to disclose to the consignor how the

consignment or the package was dealt with throughout the time it was in its possession or control in the event of pilferage in transit. In the present case, the evidence shows that the tractors were packed properly with wooden plants and they cannot be removed easily by hand. At the place of destination, the consignment was found in a pilfered and damaged condition. Exs.A-2, A-4, A-6 etc., which are open delivery certificates clearly show that the tractors when they reached the place of destination was found in pilfered and parts missing condition. Thus Clause (b) of Sec.76(F) would automatically come into play in the present case. Hence it is necessary for the railway to disclose to the consignor how the consignment or the package was dealt with throughout the time it was in its possession or control. Learned counsel for the appellant contends that the present suit has been only the consignees and not by the consignor and, therefore Sec.76-F would not apply. There is no substance in the contention. Sec.76-F does not contemplate the filing of the suit. The question will arise as soon as the packages are found in a pilfered condition. In all such cases, the railway administration shall be bound to disclose to the consignor how the consignment or the package was dealt with. In the present case, the appellant has not chosen to make a disclosure either before the filing of the suit or in the written statement. Nor has it adduced any evidence whatever at the time of trial to disclose how it dealt with the goods. Hence the initial burden which is on the appellant under Sec.76-F of the Act has not been discharged by the appellant. If the appellant had disclosed how it dealt with the goods, then the question would be whether negligence or misconduct could be inferred fairly from such disclosure. When the appellant failed to make such disclosure, it goes without saying that inference of negligence or misconduct can be drawn as against the appellant.

[Paras. 11, 12, 13 & 15]

(C) *Contract Act (IX of 1872), Sec.151 - Goods entrusted to railways for carriage - Loss or damage to goods - Liability of railways for.*

The responsibility of the railways is that of a bailee and it has to discharge its duties as a bailee. If it fails to do so, it has to be made liable for the loss or damage to goods.

[Para. 16]

Cases referred to:

Kapurchand Bhagaji Firm v. Laxman Trimbak, A.I.R. 1952 Nag. 57. [Para. 4]

M/s.Shankar Housing Corporation v. Smt.Mohan Devi and others, A.I.R. 1978 Del. 255. [Para. 4]

The Union of India v. West Punjab Factories Limited, A.I.R. 1966 S.C. 395; (1966)1 S.C.W.R. 246; (1966)1 S.C.J. 350; 1966 S.C.D. 988; (1966)2 A.L.T. 269; (1966)1 S.C.R. 580. [Para. 5]

Kalasami Nadar v. Ponruswami Mudaliar and others, A.I.R. 1962 Mad. 44; 74 L.W. 495; I.L.R. 1961 Mad. 1091. [Para. 6]

Jalim Singh Katary v. The Secretary of State of India in Council, I.L.R. 31 Cal. 951; 8 C.W.N. 725. [Para. 9]

Ramachandra Natha v. The Great Indian Peninsular Railway, I.L.R. 39 Bom. 485; 17 B.L.R. 496. [Para. 9]

The Union of India v. Mahadeolal Prabhu Dayal, A.I.R. 1965 S.C. 1755. [Para. 14]

Firm Kesrimal Taranlal Sarda and Co. v. Union of India, A.I.R. 1968 M.P. 199. [Para. 14]

Ramakrishna Ramnath Shop v. Union of India, A.I.R. 1960 Bom. 344. [Para. 16]

Dwarkanath v. Rivers Steam Navigation Company, 20 Bom.L.R. 735; A.I.R. 1917 P.C. 173. [Para. 16]

Union of India v. Parikh Shankarlal Jethalal, A.I.R. 1956 Nag. 255. [Para. 16]

Asaram Gangaram v. Union of India, New Delhi, A.I.R. 1957 Nag. 59. [Para. 17]

Union of India v. Radhakisan Ramnath, A.I.R. 1969 Bom. 7. [Para. 18]

Union of India v. Brijlal Purshotamdas, A.I.R. 1969 S.C. 817; (1969)1 S.C.R. 910. [Para. 19]

Union of India representing South-Eastern Railway v. Laduram Fakirchand, A.I.R. 1974 Cal. 207. [Para. 20]

A.Venugopal, for Appellant.

S.Sampathkumar, for Respondents.

The Judgment of the Court was delivered by Srinivasan, J.: The defendant, who has suffered a decree for a sum of Rs.92,628.76 in the trial court, has preferred this appeal. The defendant is Union of India, owning the Southern Railway, represented by its General Manager. The respondents filed the suit O.S.No.153 of 1980 making the following claim. Twelve consignments, each consisting of 3 Nos. M.F.1035 Tractor, were entrusted to the railway administration between April and December, 1977 at Madras by M/s. Tractors and Farm Equipments Limited, Madras (TAFE Ltd.), the consignor for safe carriage by rail to Gorakhpur. The 1st respondent/1st plaintiff is the consignee. The consignments were delivered to

the 1st plaintiff in a damaged condition resulting in damage and shortage to each consignment. The 1st plaintiff has suffered a loss of Rs.92,628.76 in all. The details are set out in the plaint. On demand, the railway effected open delivery noting the damage and shortage at the time of delivery. The loss occurred only due to the negligence and/or misconduct on the part of the employees of the railway administration and the defendant is, therefore, liable in law to make good the loss suffered by the 1st plaintiff. In spite of notice under Sec.80, C.P.C., the defendant has failed to comply with the demand. The 2nd plaintiff is insurer of the consignments and it has settled the claim with the 1st plaintiff. Thus, the 2nd plaintiff has subrogated to the rights of the 1st plaintiff. The suit is, however, filed by both the plaintiffs in order to avoid any technical defence which may be taken by the defendant. Thus the plaintiffs have claimed a decree for a sum of Rs.92,628.76 with interest at 6% per annum from the date of plaint.

2. In the written statement, the defendant raised the following pleas. The suit is not maintainable. It is denied that the 1st plaintiff is a firm registered under the provisions of law and the plaintiffs should strictly prove the same. Right and title of the 2nd plaintiff is denied. M/s.TAFE Ltd., consigned three tractors under different invoice numbers and the fittings were not packed separately as expressly declared by the consignor in the Forwarding Note executed by it. The following remark is made in the Forwarding Note:

"Detachable parts not packed separately."

The consignor, who is a party to contract, accepted the railway receipt with the above remark without demur. The tractors were taken with all care and caution in the same wagon to the destination without any delay or handing by the railway staff. At the destination they were unloaded by the consignee. There was no negligence or misconduct on the part of the railway administration. The consignor, who is a party to the contract, can alone maintain the suit and it is not open to the plaintiffs to file the suit. Valid claims were not made under Sec.78(b) read with Sec.140 of the Indian Railways Act. Notice under Sec.80, C.P.C. is not valid. The suit claim is without any basis, highly exaggerated the inadmissible. Hence, the suit should be dismissed.

3. The plaintiffs filed as many as 72 documents and examined two witnesses. The first witness is the

employee of the Insurance Company, the 2nd plaintiff. The second witness is a supervisor in the consignor company, viz. TAFE Ltd. The defendant filed 24 documents comprising of forward notes and railway receipts. The defendant has not examined any witness. The trial court found all issues in favour of the plaintiffs and negated the contentions of the defendant. Consequently, a decree was granted to the plaintiffs by the trial court after deducting a sum of Rs.600 from the claim made in the plaint.

4. In this appeal, learned counsel for the appellant has raised seven contentions. We will deal with them in seriatim. The first contention is that the 1st plaintiff has not proved that it is a registered partnership firm and that the person who signed the plaint is a partner. Whose name has been entered in the register. Reliance is placed on the judgments of the Nagpur High Court in *Kapurchand Bhagaji Firm v. Laxman Trimbak and others*, A.I.R. 1952 Nag. 57 and Delhi High Court in *M/s.Shankar Housing Corporation v. Smt.Mohan Devi and others*, A.I.R. 1978 Del. 255, for the purpose of contending that the person who is filing the suit must be shown as a partner in the register of firms. There is no merit in this contention. Ex.A-72 is the photostat copy of the registration certificate of the 1st plaintiff firm. That proves that the 1st plaintiff firm has been registered and the person who has signed the plaint on behalf of the 1st plaintiff firm is a partner thereof. The plaint has been signed by Sri Amar Pal Singh. The said person is shown as a partner of the 1st plaintiff firm in Ex.A-72. Hence the contention of the appellant in this regard is rejected.

5. The second contention is that the suit can be maintained only by the consignor as the contract is only with the consignor and the consignee cannot maintain the suit. In paragraph 8 of the written statement it is stated that the consignor who was a party to the contract of carriage alone is entitled to file the suit against the defendant for recovery of damages, if any. It is contended that there is no evidence at all before the court to show that the consignor has become the owner of the goods and that it could maintain the suit on the basis of such ownership. Learned counsel submits that the claim bills (Exs.A-48 to A-59) do not make out a case of ownership being with the consignee, the 1st plaintiff. Our attention is drawn to the judgment of the Supreme Court in *The Union of India v. West*

Punjab Factories Limited, A.I.R. 1966 S.C. 395: (1966)1 S.C.W.R. 246: (1966)1 S.C.J. 350: 1966 S.C.D. 988: (1966)2 An.L.T. 269: (1966)1 S.C.R. 580. The Supreme Court said in that case, "the mere fact that the consignee is different from the consignor does not necessarily pass title to the goods from the consignor to the consignee, and the question whether title to goods has passed to the consignee will have to be decided on other evidence. It is quite possible for the consignor to retain title in the goods himself while the consignment is booked in the name of another person." In the present case, Ex.A-1, Ex.A-3, Ex.A-5, Ex.A-7, Ex.A-9, Ex.A-11, Ex.A-13, Ex.A-15, Ex.A-17, Ex.A-19, Ex.A-21 and Ex.A-23 are invoices issued by the consignor to the 1st plaintiff. They contain the endorsement that the goods are sold and on the top of the each invoice, the following expression is found.

"Sold to Union Tractors, Gorakhpur."

That is more than sufficient to show that the goods have been sold and the title has passed to the consignee, the 1st plaintiff. Learned counsel for the respondents invites our attention to Sec.57 of the Indian Railways Act, 1890. Under that section, where any goods or sale proceeds in the possession of a railway administration are claimed by two or more persons, or the ticket or receipt given for the goods is not forthcoming, the railway administration may withhold delivery of the goods or sale proceeds until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway administration against the claims of any other person with respect to the goods or sale-proceeds. Learned counsel submits that all the railway receipts have been produced in the present case by the 1st plaintiff. Hence, the railway administration is bound to deliver goods to the 1st plaintiff. As a matter of fact, the goods were delivered to the 1st plaintiff under open delivery certificates. Hence, there is no merit in the contention that the title in the goods has not passed to the consignee, the 1st plaintiff.

6. There is also no substance in the contention that it is only the contracting party who can maintain the suit. If a suit is based on the contract, then it has to be filed by the person who entered into the contract. But a suit can be based on the tort also. In the case of damage to or loss of goods, there can be two kinds of suits, one based on contract and the other on tort. In *Kalasami Nadar v. Ponnuswami*

Mudaliar and others, A.I.R. 1962 Mad. 44: 74 L.W. 495: I.L.R. 1961 Mad. 1091, a Division Bench of this Court said, "the claim is made by the consignor himself, who entered into a contract with the appellant for the carriage of the goods from Koilpatti to Coimbatore which having regard to the nature of the business of the appellant implied a safe carriage of the goods. A breach of that obligation would be a breach of contract. It may be, that by virtue of the public employment of the appellant and the nature of his obligations, he would be liable in tort. That would only mean that so far as the consignor is concerned, he can at his option sue on contract or on tort. But where the claim is made by the consignee, the position might be different as he not being a party to the contract of carriage made by the consignor, will not be able to enforce a contractual obligation but can only sue on tort." In the present case, we have no doubt that the plaint is based on tort. The 1st plaintiff having obtained the ownership of the goods is entitled to sue on tort for the damage caused to it as against the defendant. Consequently, the suit filed by the plaintiffs herein is maintainable.

7. The third contention is that the forward notices contain an endorsement that detachable parts are not packed separately. It is seen from Ex.B-1, Ex.B-3, Ex.B-9 etc. that such endorsement is made on each forward note. The contention is that the goods have been booked at owner's risk rate. The consignor has not booked the goods at the railway risk rate, but has availed of the concessional rate, i.e. owner's risk rate. It is therefore contended that as per the Railway Goods Tariff, if such parts are missing, the railway administration is not responsible in cases of goods which are being carried at owner's risk rate. The goods Tariff No.33, which was in force from 1.2.1971, contains relevant rule at page Nos.319 and 320. The article referred to therein is Motor tractors. As per column 1, it includes motor tractors in knocked down condition. The note at the bottom reads thus:

"Railways accept no liability for detachable fittings such as rubber mats, spare tyres, lamps, inflators, tools, bells, etc. unless they are securely packed in cases and entered on the railway receipt. Detachable fittings in cases will be carried in the same truck as the motor tractors, no charge being levied provided they form part of the motor tractor or tractors with which they are loaded, and the total weight of

detachable fittings and the motor tractor or tractors does not exceed the prescribed minimum weight for charge laid down above."

In the Goods Tariff No.35, which was in force from 1st September, 1976, a similar entry is found at page Nos.119 and 200 and there is no difference whatever in the language and hence it is not necessary to repeat the same. However, in the Goods Tariff No.36, which came into force from 1st November, 1980, a change is introduced in the note at page No.203. The note includes batteries, dynamos, cut-outs in addition to rubber mats, spare tyres, lamps, inflators, tools, bells, etc. which were already mentioned in the previous tariffs. In the Goods Tariff No.37, which came into force from 1st July, 1982 the entry is similar to the one found in Goods Tariff No.36. Relying on the goods Tariff Nos.36 and 37 of 1980 and 1982, learned counsel for the appellant contends that dynamos, cut-outs and batteries are also detachable fittings and they were detachable throughout and it is not as if they became detachable only in 1980 for the first time. According to him, the parts which were mentioned in Goods Tariffs of the years 1971 and 1976 should be deemed to include dynamos, cut-outs and batteries even though they are not expressly mentioned. It is argued that the items mentioned therein are only illustrative and not exhaustive. Learned counsel contends that the railway administration cannot be made liable for the missing parts, viz. dynamos, cut-outs and batteries. It is contended by him that the express endorsement made on the forward notes that detachable parts are not packed separately would clearly show that the railway cannot be made liable for loss of such parts. If the consignor wanted the railway administration to be accountable for the loss of such parts, he ought to have packed them separately and got them entered in the railway receipt. In the absence of such entry in the railway receipt, it is not open to the consignor or the consignee to make a claim for the loss of such part. Thus according to him the liability for the loss or damage to such parts is excluded expressly by the contract itself. We are unable to accept this contention. As pointed out already, the goods tariffs, which came into force in 1971 and 1976 did not include batteries, dynamos and cut-outs. For the first time they were included only in 1980 and continued in 1982. We are considering in the present case consignments of 1977 when the tariff

of 1976 was in force. When the railway administration has chosen to omit those items in the earlier tariffs, they cannot now contend that they have no liability with regard to those items even for the prior consignments. The liability was excluded if at all only from the year 1980 and later on and not for the earlier periods.

8. It is also rightly pointed out by learned counsel for the respondents that the expression used in the tariff is 'fittings' and not 'parts'. It is argued that in the present case the parts which are missing are essential parts of the tractors, without which a tractor cannot be called a tractor at all. The tractors cannot be used unless those parts are fitted in the tractors. Our attention is also drawn to the definition of the word 'fittings' in Webster's New Twentieth Century Dictionary, 2nd Edition at page No.694, wherein it is defined as "the fixtures, furnishings or decorations of a house, office, automobile, etc." In Black's Law Dictionary, 6th Edn. at page 1117 the word 'part' is defined as "an integral portion, something essentially belonging to a larger whole; that which together with another or others make up a whole." The tariff has deliberately used the expression 'fittings' and not the expression 'parts'. Hence the contention that dynamos, cut-outs and batteries could be treated as fittings and not as parts for the purpose of the tariff cannot be accepted. That is why the railway administration has chosen to include them specifically in Goods Tariff 1980 as they would not by themselves be treated as fittings.

9. Learned counsel for the respondents relies on the judgments in *Jalim Singh Katary v. The Secretary of State of India in Council*, I.L.R. 31 Cal. 951: 8 C.W.N. 725 and *Ramachandra Natha v. The Great Indian Peninsular Railway*, I.L.R. 39 Bom. 485 and contends that the tariff cannot override the statutory provisions of the Railways Act and if there is a provision in the tariff exempting the Railways from liability for loss of such goods, the said provision will be invalid in law. It is not necessary for us to consider that aspect of the matter. On the facts of this case we hold that the parts which are lost in transit cannot be considered to be detachable fittings within the expression used in the tariff.

10. There is no substance in the contention that these parts ought to have been packed separately and kept in the tractors. It is in evidence that the tractors were driven to the railway yard before

they were loaded into the wagon. Hence, the tractors were in running condition and the consignor did not want to remove the essential parts thereof. Obviously, the consignor wanted the tractors to be delivered at the place of destination in running condition and hence the tractors were left intact inside the wagon and that will not absolve the railway from their liability to pay for the loss or damage caused.

11. The next contention urged by learned counsel is that onus is on the plaintiffs to prove negligence on the part of the railway administration. According to him, in the present case, there is absolutely no evidence to prove such negligence. It is contended that the open delivery certificates issued by the railways and produced by the plaintiffs will not prove any negligence on the part of the railway. Reliance is placed on Sec. 74 of the Railway Act. Sub-sec. (3) of Sec. 74 is the relevant provision for this case. It reads thus:

"When any goods are deemed to have been tendered to be carried, or are carried, at the owner's risk rate, then, notwithstanding anything contained in Sec. 73, the railway administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit, of such goods from whatever cause arising, except upon proof that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on the part of the railway administration or of any of its servants."

It is contended that in the present case the burden has not been discharged by the plaintiffs and the railway administration cannot be made liable.

12. Sec. 74(3) must be taken along with Sec. 73 and Sec. 76(f) of the Act for the purpose of construction. Sec. 73 is a general section, which speaks about the general responsibility of the railway administration as a carrier of animal and goods. According to the provisions of Sec. 73, the railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery, in transit, arising from any cause except the causes set out therein. Nine causes have been set out in that section and they are the only exceptions. If the loss, destruction, damage, deterioration or non-delivery is occasioned on account of any other cause other than those mentioned in Sec. 73, the railway administration will be liable. There is, however, a proviso to Sec. 73, according

to which, even where such loss, destruction, damage, determination or non-delivery is proved to have arisen from any one or more of the aforesaid causes, *i.e.* causes set out in Sec. 73, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods. Thus, the burden is thrown on the railway administration to prove that it has exercised reasonable foresight and care in carrying the goods. Sec. 74(3) is a sort of exception to Sec. 73. In the present case, the goods were carried at owners' risk rate and therefore, the burden is on the plaintiffs to prove that there has been negligence or misconduct on the part of the railway administration. But Sec. 76(f) brings in a further exception to Sec. 74. That section reads as follows:

"76-F Burden of proving misconduct in case of non-delivery or pilferage in transit of goods carried at owner's risk rate.- Notwithstanding anything contained in Sec. 74-

(a) Where the whole of a consignment of goods, or the whole of any package forming part of a consignment, carried at owner's risk rate is not delivered to the consignee and such non-delivery is not proved by the railway administration to have been due to fire or to any accident to the train, or

(b) Where, in respect of any consignment of goods or of any package which had been covered or protected that the covering or protection was not readily removable by hand, it is pointed out to the railway administration on or before delivery that any part of such consignment or package had been pilfered in transit,

the railway administration shall be bound to disclose to the consignor how the consignment or the package was dealt with throughout the time it was in its possession or control, but if negligence or misconduct on the part of the railway administration or of any of its servants cannot be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor."

13. Under clause (b) of Sec. 76-F, if in respect of any consignment of goods or of any package which had been covered or protected in such a way that the covering or protection is not readily

removable by hand, the railway administration shall be bound to disclose to the consignor how the consignment or the package was dealt with throughout the time it was in its possession or control in the event of pilferage in transit. In the present case, the evidence shows that the tractors were packed properly with wooden planks and they cannot be removed easily by hand. At the place of destination, the consignment was found in a pilfered and damaged condition. Ex.A-2, Ex.A-4, Ex.A-6, etc. which are open delivery certificates clearly show that the tractors, when they reached the place of destination, were found in pilfered and parts missing condition. Thus, Clause (b) of Sec.76-F would automatically come into play in the present case. Hence, it is necessary for the railways to disclose to the consignor how the consignment or the package was dealt with throughout the time it was in its possession or control. Learned counsel for the appellant contends that the present suit has been filed only by the consignee and not by the consignor and, therefore, Sec.76-F would not apply. There is no substance in this contention. Sec.76-F does not contemplate the filing of the suit. The question will arise as soon as the packages are found in a pilfered condition. In all such cases the railway administration shall be bound to disclose to the consignor how the consignment or the package was dealt with.

14. Learned counsel refers to the judgment of the Supreme Court in *The Union of India v. Mahadeopal Prabhu Dayal*, A.I.R. 1965 S.C. 1755. It is held in that case that the disclosure before the filing of the suit has to be made only when there is a demand by the consignor. But once the suit is filed, the disclosure has to be made in the written statement or in the evidence. If it is not made then it is for the court to consider whether inference should be drawn from the evidence on record. The judgment of the Supreme Court in *Mahadeopal Prabhu Dayal*, A.I.R. 1965 S.C. 1755 has been followed in *Firm Kesrimal Taranlal Sarda and Co. v. Union of India*, A.I.R. 1968 M.P. 199, in which also it is stated that a demand should be made before the disclosure is called for. But both the cases cited supra refer to the disclosure prior to the filing of the suit. In *Mahadeopal case*, A.I.R. 1965 S.C. 1955, the Supreme Court has pointed out that once the suit is filed either by the consignor or by the consignee, it is for the railway administration in

the first instance to substantiate the disclosure which might have been made before the litigation or which might have been made in the written statement in reply to the plaint. In that case, it is said, "when the railway administration has given its evidence in proof of the disclosure and the plaintiff is not satisfied with the disclosure made in the evidence, the plaintiff is entitled to ask the court to call upon the railway to fulfil its obligation under the contract and the railway should then have the opportunity of meeting the demands of the plaintiff before its case is closed. Thus, in addition to the evidence that the railway may adduce on its own (and in doing so the railway has necessarily to keep in mind the provisions of Sec.114 of the Indian Evidence Act) the plaintiff can and should draw the attention of the court if he feels that full disclosure has not been made. In that case he can ask the court to require the railway to make further disclosure and should tell the court what further disclosure he wants. It is then for the court to decide whether the further disclosure desired by the plaintiff should be made by the railway, and if the court decides that such further disclosure should be made the railway has to make such further disclosure as the court orders it to make on the request of the plaintiff. If the railway fails to take the opportunity so given to satisfy the demands of the plaintiff, endorsed by the court, the railway would be in breach of its contractual obligation of disclosure. It is at this stage, therefore, that the railway can be truly said to be in breach of its contractual obligation of disclosure and that breach arises because the railway failed to disclose matters which the court on the request of the plaintiff asks it to disclose."

15. In the present case, the appellant has not chosen to make a disclosure either before the filing of the suit or in the written statement. Nor has it adduced any evidence whatever at the time of trial to disclose how it dealt with the goods. Hence the initial burden, which is on the appellant under Sec.76-F of the Act, has not been discharged by the appellant. If the appellant had disclosed how it dealt with the goods then the question would be whether negligence or misconduct could be inferred fairly from such disclosure. When the appellant failed to make such disclosure, it goes without saying that inference of negligence or misconduct can be drawn as against the appellant.

16. The responsibility of the railways is that of a bailee and it has to discharge its duties as a bailee. If it fails to do so, it has to be made liable for the loss of or damage to goods. This question was considered under the provisions of the old Railways Act in *Ramakrishna Ramnath Shop v. Union of India*, A.I.R. 1960 Bom. 344 and the court said, "in cases to which Sec.74-C of the Railways Act is applicable the burden of proving misconduct or negligence is of course on the plaintiff, but as observed by the Privy Council in *Dwarkanath v. Rivers Steam Navigation Company*, 20 Bom.L.R. 735: A.I.R. 1917 P.C. 173 under Sec.106 of the Indian Evidence Act the bailee should call all the material witnesses to prove the facts which were within the special knowledge of the bailee. As observed in *Union of India v. Parikh Shankarlal Jethalal*, A.I.R. 1956 Nag. 255, the law does not cast any burden upon the Administration to establish positively how the loss or damage occurred, and to prove an absence of negligence on their part. But a duty is cast on the administration to lay all the materials concerning the occurrence before the court; but even so it remains for the consignee to satisfy the court that the true inference from the materials is that the carrier's servants have not shown due care, skill and nerve.

17. As observed in *Asaram Gangayam v. Union of India*, New Delhi, A.I.R. 1957 Nag. 59:

"It is no doubt true that it is always for the plaintiff to prove that the loss was caused by the neglect or negligence of the railway administration. But when the court has the evidence that the goods had deteriorated while in the custody of the Railway Administration there is a *prima facie* case of negligence for the railway administration to answer. Under Sec.106 of the Evidence Act, the special facts and circumstances under which the consignment was handled are only known to the railway administration, and therefore, it is for them to place that material before the court for forming its opinion on the question whether it had taken as much care of the goods as is required of them. The railway administration should place material before the court from which it could be inferred how the consignment was dealt with, in order to ascertain whether the railway administration took as much care as is required of them, being bailees of the goods under Secs.151, 152 and 161 of the Contract Act."

18. In *Union of India v. Radhakisan Ramnath*, A.I.R. 1969 Bom. 7. Secs.74(A) and 74(C) were considered and the Court observed as follows:

"The learned counsel then contended that the plaintiff had not discharged the burden of proof laid upon him by Secs.74-A and 74-C. According to him the forwarding note had an endorsement with regard to the nature of the packing and that endorsement showed that it was a gunny bag packing and that the goods were to be transported at the risk of the consignor. There is no evidence in this case even to indicate that the damage in respect of which the plaintiff has sued the railway administration has resulted from a defective packing. As I have already stated before, if the railway administration wants to take protection under Sec.74-A of the act, it must be shown that the goods were liable to deterioration, leakage, wastage or damage in transit as a result of the defective packing. In other words, it is only when the damage complained of has resulted from a defective packing and in addition to this such defective packing is recorded by a sender in the forwarding note then only it is the duty of the plaintiff to show that the railway administration is guilty of negligence or misconduct. But if in a given case the damage is not in any way related to or is not a consequence of the defective packing, obviously the condition necessary for the operation of Sec.74-A is not fulfilled. In the instant case, therefore, even assuming that the alleged endorsement in the forwarding note amounts to an admission of the consignor that the packing was a defective packing, it is not the defendant's case, or it is at least not proved, that but for such a defective packing the goods would not have been damaged. On the other hand the plea of the defendant railway administration is that the water which damaged the consignment must have gone through the door flaps. In this case, the damage is caused by an external agency. It is not the case of the defendants that any defective packing was the cause of the damage caused to the consignment. It is not established in this case that the damage to the consignment was a result of any defective packing and in my view the instant case is not at all governed by the provisions of Sec.74-A of the Act."

19. Sec.74-D of the old Act came up for

consideration before the Supreme Court in *Union of India v. Brijlal Purshotamdas*, A.I.R. 1969 S.C. 817: (1969) 1 S.C.R. 910. The court observed that "Sec.74-D envisages a disclosure in the form of a precise statement of how the consignment was dealt with by the administration followed by evidence at the trial in proof of the statement. The section clearly contemplates that on this matter the administration should submit its evidence first at the trial, and it is only when negligence or misconduct cannot fairly be inferred from such evidence that the burden of proving the negligence or misconduct shifts to the consignor." Sec.74-D of the old Act corresponds to Sec.76-F of the present Act. It is also said that "if the written statement filed by the administration discloses facts which show that in the common course of events the loss would not have happened if proper care had been taken, a presumption of negligence is raised and it is for the administration to rebut it by contrary evidence. In the absence of such evidence the court may draw the inference that the loss was caused by the negligence of the administration."

20. In *Firm of T.Muddu Veerappa Sons and K.H.Veeranna Setty v. Union of India and another*, the court considered Sec.73 and Sec.77-C of the Act. The relevant part of the judgment reads thus; "To begin with, let us look at Sec.77-C of the Act. It refers to two circumstances, one of which is a defective condition of the goods and another as defective or improper packing as a consequence of which they are liable to damage, deterioration, leakage or wastage. The fact of such defective packing must be recorded by the sender or his agent in the forwarding note. Then, in a such a case, notwithstanding anything contained in the provisions of Chapter VII, the railway administration shall not be responsible for any damage, deterioration, leakage or wastage, except upon proof of negligence or misconduct on the part of the railway administration or any of the servants. But the plaintiff claims compensation for the loss due to pilferage. Can such a loss be brought within the meaning of the expression damage, deterioration, leakage or wastage? Can a loss due to pilferage be directly attributable to any defective or improper packing? Can a defective packing of the goods, protect the railways against its liability for loss due to pilferage? I

think not. It seems to me that the said section was obviously intended to cover the cases of damage, deterioration, leakage or wasting either due to the defective condition of the goods or due to its defective or improper this defective or improper packing. It cannot cover loss due to pilferage. Pilferage meant stealing in small quantities. The loss or shortage resulting by such stealing in my judgment, cannot be said to be a damage or deterioration, leakage or wastage of the goods."

In *Union of India representing South-Eastern Railway v. Laduram Fakirchand*, A.I.R. 1974 Cal. 207, a similar ruling was given under Sec.77-C of the Act.

21. As already stated in the present case, the appellant has not chosen to disclose the facts in the written statement. For has it adduced any evidence whatever at the time of trial. Thus it has not discharged the burden cast on it by Sec.76-F. Therefore, the only inference that can be drawn by the court is that the appellant is guilty of negligence and misconduct due to which loss and damage have occurred.

22. The next contention of learned counsel for the appellant is that there is no proof whatever of the entrustment of the parts which are missing. According to learned counsel if the parts had been separately packed and entered in the railway receipts that would have been evidence of such entrustment. It is contended that in the present case there is no evidence of such entrustment. There is no merit in this condition. The railway receipts show that the tractors as a whole were entrusted to the railways for carriage. If any parts had been kept loosely they should have been described. But in the present case, admittedly no part was kept loosely and the tractors were in running condition at the time of entrustment. P.W.2 has given evidence that the tractors were in running condition and they were driven to the railway yard for the purpose of loading into the wagon. Hence all the parts were intact in the tractors at the time they were booked for carriage. Hence, it cannot be contended that there is no separate proof of entrustment of the parts. Reliance is placed by learned counsel for the appellant on the judgment of Justice Shanmukham in *North Bengal Tractors and Farm Machinery and another v. Union of India owning Southern Railway represented by its General Manager*, C.S.No.264 of 1980 dated 28.3.1980, a

perusal of the said judgment shows that it was decided on the facts of that case. It cannot be utilised for the present case to support the contention of the appellant that there is no proof of entrustment. Once the tractors were entrusted to the railway administration in running condition, it is presumed in the normal course that the tractors were intact. If the tractors were in knocked-down condition at the time of entrustment for carriage that should have been noted in the railway receipts. In the absence of such entry in the railway receipts, it has to be inferred that tractors were entrusted to the railway administration in running condition with all its parts in tact and there is no necessity for proof of separate entrustment of the parts.

23. Next contention is there is no evidence of the value of the missing goods. Learned counsel submits that the relevant bills have not been produced and no acceptable evidence is adduced before the court to show parts which are missing were of such value. Exs.A-48 to A-59 are the claim bills sent by the plaintiffs to which copies of Exs.A-60 to A-71 have been attached. Exs.A-60 to A-71 are the price-lists to prove the value of the parts. The claim bills are connected with the railway receipts. The trial court has considered this aspect of the matter in great detail in paragraphs 15 to 27. With regard to each item, the trial court has referred to various documents produced on the side of the plaintiffs and the evidence in connection therewith. In view of the fact that the trial court discussed the same in detail, we do not think it necessary to repeat it here. However, we will advert to one item by way of illustration. Learned counsel for the appellant drew our attention to Ex.A-60 and submitted that Ex.A-60 is said to be a price-list. But it does not contain the date or the railway receipt number. According to him it is not connected with the parts which are said to be missing as shown in the open delivery certificate. There is no merit in this contention. Ex.A-60 is connected with Ex.A-57. Ex.A-57 is the claim bill made by the plaintiffs on 21.12.1977. That has been forwarded to the defendant under Ex.A-36. A copy of Ex.A-60 is attached to Ex.A-57. That shows clearly the number of the missing parts, the description of the parts and the various marks of identification. It also gives the rate and the net value of the parts. For example, dynamo assembly bears the No.22741. The total quantity is 3. The

value is Rs.1,220.64. The bill refers to railway receipt number as No.5/999836 dated 16.11.1977. Thus Ex.A-60 if taken along with Ex.A-57 would make out clearly that the parts which are missing are of the specific value mentioned therein. The parts are identifiable from the two documents and their prices are clearly given. There is no substance in the contention of the appellant that the manufacturers have not gone into the box to give evidence as to when exactly those parts were manufactured or whether the parts were imported or indigenous. As said already the learned trial Judge has taken pains to refer to the documents relating to each of the items and we do not find any necessity to repeat them. A perusal of paragraphs 15 to 27 of the trial court judgment convince us that the trial Judge has taken the correct view in regard to the value of the goods. Hence we hold that the plaintiffs have adduced sufficient evidence and conclusively proved the value of the parts which are lost or missing.

24. The last contention of learned counsel for the appellant is that no claim was made as required by Sec.78-B of the Railways Act within six months from the date of delivery of the goods for carriage by railway. This contention is applicable only with regard to items 7, 8 and 11. The contention is that with regard to all the items, the plaintiffs have produced Exs.A-30 to A-38. The replies issued to them by the railways are marked as Exs.A-39 to A-47. There is no reply to Ex.A-33, Ex.A-34 and Ex.A-37. It is therefore argued that if such claim had been made, the railways would have sent replies. In the absence of any proof produced by the plaintiffs that claims were sent to the railways and they reached them, it should be held that no such claim was made by the plaintiffs. We are unable to accept this contention. We find from the documents, Exs.A-27 to A-38, that with regard to each consignment claims have been made immediately by the 1st plaintiff and in reply thereto the railways have been sending their replies. Just because replies with regard to three of the claims are not available to be produced before court, it does not mean that no such claim was made. Apart from this P.W.1 has given evidence that Exs.A-27 to A-38 were forwarded to the defendants. There is no suggestion in the cross-examination that the claims under Ex.A-33, Ex.A-34 and Ex.A-37 were not sent to the defendant. There is no question in the cross-examination with regard to the same. As

pointed out already the defendant has not chosen to let in any evidence on its side. Hence, in the absence of any evidence on the side of the defendant, the court is entitled to accept the evidence of P.W.1 and hold that claims have been made under Sec.78-B of the Act within the prescribed time. As contended by the plaintiffs the trial court has rightly accepted the case of the plaintiffs and held that Sec.78-B of the Act has been complied with in the present case. We have no hesitation to affirm the said finding and to hold that the requirements of Sec.78-B of the Act have been fulfilled in the present case.

25. For the above reasons, all the contentions urged by learned counsel for the appellant are negatived. The appeal fails and it is dismissed with costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *S.M.Ali Mohamed, J.*

C.R.P.No.4376 of 1985 *12th November, 1993.*

M.L.Irudayam Pillai (deceased) and others
...Petitioners

v.

S.PL.Chockalingam Chettiar and another
...Respondents.

Civil Procedure Code (V of 1908), Sec.65 - Property sold in court auction on 29.3.1976 - Sale confirmed on 20.12.1976 - In between third person entering into a mortgage with respect to that property - Tenant depositing rent in court - Auction purchaser if entitled to the amount deposited.

It is clear from the ruling of the Supreme Court in *Janakaraj v. Gurdial Singh*, A.I.R. 1967 S.C. 608, that as per Sec.65 of Civil Procedure Code, where immovable property is sold in execution of the decree and once such sale is confirmed by the court, the title of the purchaser relates back to the date of sale and as such during the material time, the first respondent (court auction purchaser) has title to the property and he is the owner of the property and is entitled to the amount of rent deposited by the second respondent/tenant. In view of the above there is no substance in the contention of the learned counsel for the petitioner (mortgagee) that he is entitled to the amount deposited by the second respondent. [Para. 5]

Case referred to:

Janakaraj v. Gurdial Singh, A.I.R. 1967 S.C. 608. [Para. 4]

J.G.Kanagaraj, for Petitioner.

A.S.Balaji for *T.V.Balakrishnan*, for Respondent No.1.

A.R.Nagarajan, Additional Central Government Standing Counsel, for Respondent No.2.

The Court made the following

ORDER: This revision petition is against the order passed by the Principal Sub Judge, Madurai, in R.C.A.No.119 of 1982, dated 4.10.1983.

2. During the material time, the original owner of the building in premises No.282, South Market Street, Madurai, was one Abdul Khader and the second respondent Union of India, Madurai City Division, represented by the Senior Superintendent of Post Offices, was the tenant in a portion of the building by paying a rent of Rs.350 per month. The property was brought for sale as per the judgment and decree in O.S.No.530 of 1970. The first respondent S.PL.Chockalingam Chettiar purchased the property in court auction sale on 29.3.1976 and the sale was confirmed by the court on 20.12.1976. Between the period of sale of the property, viz. 29.3.1976 and 20.12.1976 the petitioner entered into a mortgage on 14.6.1976. The second respondent Union of India filed a petition in R.C.O.P.No.129 of 1978 for deposit of rent. The first respondent filed I.A.No.394 of 1982 for withdrawal of the amount. The petitioner who was a party to the application filed a counter contending that he was entitled to the amount of rent that was deposited. The Rent Controller rejected the contention of the petitioner and allowed I.A.No.394 of 1982 in favour of the first respondent. The

petitioner filed in appeal in R.C.A.No.119 of 1982 and the same was also dismissed. In the meantime, the first respondent had already withdrawn the amount of Rs.15,200 that was deposited by the second respondent. Aggrieved by the said order, the petitioner has filed this revision petition.

3. It is contended by the learned counsel for the petitioner that he entered into a mortgage with the original owner, Abdul Khader on 14.6.1976 and the encumbrance certificate did not disclose that there was any sale in favour of the first respondent. Therefore, he is entitled to the amount deposited in the court by the second respondent and both the courts erred in law by dismissing the application.

4. On the other hand, the learned counsel for the first respondent submitted that he is an auction purchaser of the property and purchased the same on 29.6.1976 and the sale was confirmed by court on 20.12.1976 and therefore, he is the owner of the property and he is entitled to the amount of rent deposited by the second respondent, with the Rent Controller and there is no infirmity in the orders of the Rent Controller and the Appellate Authority. In support of the above contention, he has cited the ruling of the Supreme Court in *Janakaraj v. Gurdial Singh, A.I.R. 1967 S.C. 608 at 610*, wherein it is observed as follows:

"Sec.65 of the Code of Civil Procedure lays down that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when it is said and not from the time when the sale becomes absolute. The result is that the purchaser's title relates back to the date of sale and not the confirmation of sale".

5. It is clear from the above ruling of the Supreme Court that as per Sec.65 of Civil Procedure Code, where immovable property is sold in execution of a decree and once such sale is confirmed by the court, the title of the purchaser relates back to the date of sale and as such during the material time, the first respondent has title to the property and he is the owner of the property and is entitled to the amount of rent deposited by the second respondent/tenant. In view of the above there is no substance in the contention of the learned counsel for the petitioner that he is entitled to the amount deposited by the second respondent. The learned counsel for the petitioner submitted that the peti-

tioner has already filed a suit in O.S.No.768 of 1988 on the file of III Additional Sub Court, Madurai, challenging the sale of the property in favour of the first respondent, is the petitioner has filed the suit questioning the title of the first respondent with regard to the property, it is open to him in the suit to claim for mesne profits, if ultimately the court gives a judgment in his favour. Accordingly, this revision petition is dismissed. Upon the peculiar facts and circumstances of the case, there will be no order as to costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Mishra and S.M.Ali Mohamed, JJ.

O.S.A.No.43 of 1993 and W.P.No.8418 of 1993
15th September, 1993.

S.Ganapathy Chettiar, Proprietor, Karkalaiyar Plastic Works
...Appellant

R.V.Dharmalingam Mudaliar and others
...Respondents.

(A) *Criminal Procedure Code (II of 1974), Secs.107, 145, 146, 149 and 151 - Role of the police in civil disputes - Person having no right interfering with possession of another lawfully entitled to it or landlord trying forcibly to evict tenant - Police, if justified in saying that employment related to a property right - Duty of police in such cases.*

There can be little doubt that the police shall have no role to play in the adjudication of a dispute of possession where there is a claim on the one side of the relationship of landlord and tenant and on

the other side of possession as a partner which possession had already been vacated by the plaintiff. The police has no role to play in a civil dispute. A civil dispute has to be decided in accordance with law only in a proper civil proceeding. Not all civil disputes, however, are untouchables for either the police or the criminal courts. There can be many occasions of a person having no semblance of a right interfering with the possession of a person who is lawfully entitled to it or a certain landlord trying forcibly to evict the tenant by adopting illegitimate and unlawful means. The version of the one or the other as to the nature of the right claimed and disputed may not be enough for the police to say that because it is a civil dispute, we have no role to play. There can be serious apprehensions of the breach of the peace created on account of the attitude of the parties and the police on receipt of a complaint that any person was likely to commit a breach of the peace or disturb the public tranquillity or to do any unlawful act that would probably occasion a breach of the peace or disturb the public tranquillity cannot be justified in saying that because the complaint related to a property right there is no occasion for a report to a Magistrate for action under Sec.107 of the Code of Criminal Procedure and to seek a direction from competent Magistrate for executing bonds with or without sureties for maintaining the peace and the tranquillity. There may further be occasions requiring the police to play an effective role and seek orders of a competent Magistrate to prevent obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray and invoke Sec.144 of the Code of Criminal Procedure leaving for the Magistrate empowered to act in the case of a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof to act under Sec.145 of the Code of Criminal Procedure and order attachment of the subject of the dispute or to appoint a receiver under Sec.146 of the Code of Criminal Procedure. Such preventive laws also empower a police officer to interpose for the purpose of preventing cognizable offences under Sec.149 of the Code of Criminal Procedure as well as to arrest to prevent the commission of cognizable offences under Sec.151 of the Code of Criminal Procedure.

[Para. 9]

(B) *Civil Procedure Code (V of 1908), O.39, Rules 1 and 2 - Injunctions - Grant of - Rule of preservation of status quo - Exceptions to - Relief that will be granted.*

Courts ordinarily do not favour grant of a mandatory injunction and prefer preservation of *status quo* than making one party to vacate and another to occupy any property. The rule as to preservation of *status quo*, however, has several exceptions, one such exception being that one which has unlawfully thrown out another from his lawful possession must be directed to restore the *status quo* ante when he resorted to the unlawful act. This will be least that a court will order as recurring damages which a person in lawful possession will suffer if he is kept out of possession may not be compensated only in terms of money. In such a case, the balance of convenience is always in favour of a party who has acted within the confines of law.

[Para. 12]

Appeal under Clause 15 of the Letters Patent against the order under O.36, Rule 11 of Original Side Rules of A.R. Lakshmanan, J., dated 4.3.1993 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.A.No.3 of 1993 in C.S.No.2 of 1993, etc.

T.V. Ramanujam for *K. Selladurai*, for Appellant. *A.L. Somayaji*, for Respondent Nos.1 to 4.

A.S. Venkatachalamoorthy, Government Pleader, for Respondent Nos.1 and 2 in W.P.No.8418 of 1993.

K. Sengottian, for Respondent Nos.3 and 4 in W.P.No.8418 of 1993.

The Judgment of the Court was delivered by *Mishra, J.*: The plaintiff in C.S.No.2 of 1993 and the applicant in O.A.No.3 of 1993 has preferred this appeal against an order by a learned single Judge of this Court under which, he has disposed of the application or injunction to restrain the respondents Dharmalingam Mudaliar, D. Ravindranathan, Pathy and Kannan from interfering with his possession and enjoyment of the suit property pending disposal of the suit by an order to the effect that both the parties would not make any construction till the disposal of the suit, and that the hearing of the suit would be expedited. The plaintiff, appellant in the appeal, has filed the writ petition (W.P.No.8418 of 1993) for a *mandamus*/direction for restoration of the possession of the subject property to him, from which it is alleged he has been dispossessed by

the 3rd respondent therein and the respondents in the appeal (respondents 5 to 8 in the writ petition) have been put in possession by him (the 3rd respondent in the writ petition). Since facts covered by the plaint in the suit, the application O.A.No.3 of 1993 and the writ petition are mostly common and complement or supplement each other and the issue before us is whether to grant to the appellant herein a modified prayer of injunction of restoration of possession *pendente lite*, we propose to narrate such relevant facts which are stated in the plaint, in the application for injunction, in the writ petition and other affidavits of the parties including the counters of the respondents leaving however, adjudication of the issues of fact and the law as and when determined by the trial court. The plaintiff's case is as follows.

2. He is a statutory tenant under the 1st defendant and is in lawful possession of the subject property, wherein he is carrying on business under the name and style of Karkalaiyar Plastic Works. He has got the licence from the Corporation of Madras, for the running of a 20 H.P. motor for the said business and the supply of electricity from the Tamil Nadu Electricity Board in his name for the business at the premises in his occupation, that is to say, the subject property. The business is registered as a small scale industry with the Department of Industries and Commerce, Government of Tamil Nadu. He has been in occupation and running the business at the said premises right from 1973 onwards and paid rent every month to the 1st defendant for the possession of premises for industrial purposes. The plaintiff has stated, "the rents for the months of April, May, June and July, 1992 have been paid on 13.8.1992, for which the 1st defendant issued stamp receipt to the plaintiff. The plaintiff has sent Rs.1,000 by telegraphic money order on 15.10.1992 from Bombay to the 1st defendant towards the rent for the months of August and September, 1992. Then after coming to Madras paid Rs.100 to the 1st defendant. The plaintiff has paid the rents for the months of October and November, 1992 to the 1st defendant in cash on 17.12.1992. The 1st defendant has been promising to send stamped receipt later. The plaintiff has no reason to suspect the *bona fide* of the 1st defendant. From 17.12.1992 onwards the 1st defendant's son, the 2nd defendant herein has been coming to the suit property often and when the plaintiff asked for rental re-

ceipts for the rent already paid for the months of August, September, October and November, 1992 he asked the plaintiff to go and see the 1st defendant. When the plaintiff went and saw the 1st defendant, he was saying that he will be sending the rental receipts. Few days later the son of the 1st defendant D.Ravindranathan called upon the plaintiff to vacate the suit property without giving any reason. The plaintiff replied by stating that he lawfully carrying on business in the suit property as a statutory tenant having invest huge amounts and he cannot be called upon to vacate according to the whims and fancies of the 2nd defendant (son of the 1st defendant). While so, on 25.12.1992 the 2nd defendant along with defendants 3 and 4 came to the suit property along with some able bodied persons and started behaving in an unruly manner and created scene. They caused damage to the machineries of the plaintiff. They created a law and order situation. The plaintiff lodged a police complaint with G-2 Police Station against the defendants 2 to 4. The police came and sent away those persons. The 3rd defendant is another son of the 1st defendant. The 4th defendant is the brother-in-law of the 1st defendant". Alleging that the defendants were threatening to throw him away forcibly and dispossessing him from the tenanted premises by taking law into their own hands, the plaintiff has filed the suit for a permanent injunction along with a relief by way of damages, which relief is based on the allegation that the defendants have caused damage to the machineries used by the plaintiff in his business son 23.12.1992 and caused mental suffering and agony and further", "... during recent rains a tree has fallen on the shed in the suit property and the shed was damaged. The plaintiff has carried out work to set right things to safeguard his machineries with the full knowledge of the 1st defendant. The Corporation of Madras has also issued permission in this regard". The plaint was presented in court on 28.12.1992. An application for injunction, however, was moved on the same day in which, the plaintiff stated that there was some litigation between the 1st defendant and a third party regarding the suit property, "at that time, the son of the 1st defendant one Ravindranathan came to me and asked me to sign in some stamp paper and papers stating that they are necessary for their case and he also gave me a letter in stamp paper stating that after the case is over, in case he sells the property, he will sell the

same to me". In an additional affidavit, filed on 12.1.1993, the plaintiff appellant, however, stated that he filed the suit in a hurry before the vacation court for the reasons of the urgency, but did not state about the role of the Inspector of Police, Periamet Police Station G-2, Madras-3, 3rd respondent in the writ petition, who played a vital role in the sense that on 25.12.1992 when the plaintiff lodged a police complaint about the activities of the defendants and their musclemen, he prevented them from committing trespass, but locked the suit premises and kept the key with him. The plaintiff filed the suit on 28.12.1992, but it could not be numbered and brought for orders on the following day, that is to say, on 29.12.1992, on which day, the plaintiff contacted the Inspector of Police, G-2 Police Station, Periamet, Madras, who stated that he would hand over the key to the plaintiff. The court reopened after Christmas vacation only on 4.1.1993, when the plaint was numbered and the application for injunction was posted before the court only on 6.1.1993. Some of the defendants had entered caveat through their counsel and when the application for injunction was moved, the defendants represented by their counsel admitted that plaintiff's machineries were there in suit property and his telephone connection in the suit premises also existed, but pleaded that the plaintiff had already surrendered possession of the tenanted premises to the 1st defendant voluntarily in June/July, 1992 "then my counsel produced the rental receipts to show that I have paid rents even thereafter, which has been received by the 1st defendant". Even during the course of arguments on 6.1.1993, the plaintiff's counsel represented before the court that the defendants were attempting to take the key from the police and accordingly sought appointment of an Advocate-Commissioner to note down the physical features of the suit premises, so that the real state of affairs were brought on the records. A Commissioner was appointed with the consent of both the parties on 6.1.1993. In his additional affidavit, the plaintiff has stated as follows:

".....after the Advocate-Commissioner was appointed by this Hon'ble Court on 6.1.1993, I contacted the Inspector of Police, G-2 Police Station, Mr.Somasundaram and the Sub-Inspector and asked them to hand over the key to me. They were evasive. Then I came to know that the Inspector of Police of G-2 Police

Station, Mr.Somasundaram and the Sub Inspector of Police, Mr.Srinivasan have colluded with the 1st defendant. I came to know that they have handed over the key to the 1st defendant. When I went to the suit property on 6.1.1993, there were two constables in the suit property which is in my lawful possession. The defendants were also not allowed to enter suit property. Then, I went to the office of the Commissioner of Police, Egmore, Madras on 7.1.1993 and wanted to give a complaint against the Inspector of Police, G-2 Police Station, and the Sub Inspector of Police. I took the written complaint along with me. I was not allowed to see the Commissioner of Police. Hence, I sent the complaint by Registered Post on 7.1.1993 to the Commissioner of Police, Egmore, Madras-8. I also gave a complaint on 7.1.1993 to the Honourable Chief Minister of Tamil Nadu, Home Secretary, Government of Tamil Nadu and the Assistant Commissioner of Police, Law and Order, Flower Bazaar Range, Madras-1. I have sent everything by registered post with acknowledgement due. Earlier I have also sent a telegram to the Commissioner of Police, Egmore, Madras-8 stating that I was prevented from meeting him and that is why I am sending the complaint by registered post with acknowledgement due. After I sent the complaint in the morning on 7.1.1993, the Advocate-Commissioner visited the suit property in the evening of 7.1.1993. When the Advocate-Commissioner came to the suit property, it was locked and there were two constables. The said constables prevented even the Advocate-Commissioner from entering the suit property and asked the Advocate-Commissioner to go and meet the Inspector of Police, G-2 Police station. No one was allowed to enter the suit property. The constable said that the property is under lock and key of Inspector of Police, G-2 Police Station and the Advocate-Commissioner should go and meet him. The Advocate-Commissioner was made to wait for half an hour. Then my counsel requested the Advocate-Commissioner to note this and report the same to this Honourable Court and seek for direction. After that only, the two constables allowed the Advocate-Commissioner inside. One lady came and opened the lock. Thus, the whole thing has

been stage managed to create false evidence after I filed the suit before this Honourable court. After entering the suit property, it was found that my things and machineries are there. My machineries have been damaged. The Advocate-Commissioner has been nothing things. I requested the Advocate-Commissioner to note down the damages to my machineries which is also one of the physical features. But the counsel for the respondents/defendants wanted the Advocate-Commissioner to give a finding as to who is in possession. The Advocate-Commissioner rightly stopped the proceedings stating that he will seek for further directions from this Honourable Court”.

There is an additional fact mentioned in this affidavit that the 1st defendant was having a litigation with one Appa Rao and during the course of the said proceedings, the 1st defendant had taken his (plaintiff's) signatures on some stamp papers under threat and alleged, “Now I understand that he has filled up some of those stamp papers and trying to use the same against me”.

3. The 1st defendant's counter to the injunction application has disclosed the defendants' case as follows:

The plaintiff is not in any kind of possession of the suit property. As matter of fact, he has shifted machinery to Srinivasapuram, Eruvadi, Tirunelveli District, Pin Code 627103 and his office to No.14, Vanigar Street, Eruvadi, Tirunelveli District, Pin Code 627103. He shifted the machinery to his factory at Srinivasapuram in July, 1992 and has been running his business thereunder the name and style of Rajkumar plastics. It was a partnership firm, of which the 1st defendant and the plaintiff were partners which occupied the premises (the subject property), but the said firm has not been carrying on the manufacturing activities. The plaintiff wanted to remove the machineries brought in by him and which were used for the partnership business and accordingly removed the same. After the removal of the machinery by the plaintiff, the 1st defendant, his wife and the 3rd defendant returned to possession and enjoyment of the suit property. His case is that he was running a factory under the name and style of the United Traders Metal Industries since 1950. When, however, he became old and was not in a position to personally look after the business, he entered into a partnership with the plaintiff in the year 1977,

the firm being called either United Traders Metal Industries or Karkalaiyar Plastic Works. The partnership was a share profiting of 25% to the 1st defendant and 75% to the plaintiff. The plaintiff's allegation that the 1st defendant received rent for the occupation of the premises by him has been replied to by a assertion that since the plaintiff insisted that he needed receipts of the payment of the share profits in the form of rental receipts, the 1st defendant issued such receipts and, “thereafter in 1978-79 there was a raid by the Sales Tax Authorities. After such a raid the applicant represented that he had been unfortunately inflicted with arrears of sales tax and penalty and if he (the 1st defendant) agreed to continue to issue receipts as aforesaid it would facilitate him to reduce his liability in respect of other taxes. Only in such circumstances, he was constrained to issue receipts. After denying the allegations of Ravindranathan (son of the 1st defendant) obtaining signature of the plaintiff on a paper, the plaintiff's assertion that he was a tenant under him and the allegation that on 25.12.1992 his son Ravindranathan, along with other defendants and some other persons, caused any threat or scene at the premises (subject property), the 1st defendant has alleged that the plaintiff has been adopting all the questionable methods to dispossess the suit property and threatening the defendants 1st defendant with dire consequences if they did not oblige him. The allegation of a need to repair the damages when has been answered by the 1st defendant as follows:

“On account of the betrothal of my last son Sri D.Gunasekaran, we had locked the premises and had gone to my another son Sri D.Ravindranathan's place for about a week from 2.12.1992. During that period the sons of the applicant had unlawfully entered into the suit premises after breaking open the lock and had cut the big ‘Arasamaram’ and started some unlawful construction after demolishing the existing structures. Coming to know of it, we informed the Madras Corporation. On 8.12.1992 an official by name Sri Veeraraghavan who is the Administrative Officer, Division No.46 of the Corporation of Madras visited the premises and ordered the said persons to stop the unauthorised construction. The said persons stopped the unauthorised construction and immediately left the place. Thereafter, for about

15 days, we were living in the premises peacefully. On 24.12.1992 we went to Sri Angala Paramaswari Ammal Temple in Choolai at about 7.00 a.m. after locking the gate of the premises. When we returned from the temple at about 8.30 a.m. applicant along with his henchmen was standing in front of the gate and started threatening us and did not allow us to open the gate and enter the premises. We immediately went to the Periamet Police Station and wanted to lodge a complaint. On account of the death anniversary of the former Chief Minister Thiru M.G. Ramachandran and opening of the memorial at Marina Beach the concerned Inspector of Police and the other police officials had gone for bandobust duty. Therefore, we could lodge our complaint only at about 5.00 p.m. At about 7.00 p.m. a Head Constable and two constables accompanied us to the suit premises. On seeing the police personal the applicant and his henchmen ran away. Thereafter we were able to open the lock and enter the premises. On 25.12.1992 the Sub Inspector of the said Periamet Police Station visits the premises, called the applicant who is residing in a rented portion of the opposite house and advised him not to disturb us and not to create any disturbance in the locality. The above facts and the photograph produced would clearly show that the structures for which the applicant claims to be a tenant are not in existence at all on account of their demolition by the applicant's sons. Facts being as stated above the allegations made in para 8 are patently false.

As a matter of fact on 1.1.1993 at about 3.00 a.m. about 25 persons came in auto rickshaws and threw big stones inside our premises and made an attempt to gate crash into the premises. Providence saved us; Thereafter at about 4.30 p.m. I receive an anonymous telephone call. The caller threatened me saying that there was going to be a murder inside the premises and that I would be killed. Again I went to the Periamet police station and lodged a complaint and requested for police protection. The police provided protection by posting two constables at the premises with five arms. They were there till 11.00 a.m. on 8.1.1993. It is pertinent to note that the applicant has caused disconnection of the telephone.

At this juncture I submit that on 6.1.1993 when the application was taken up this Hon'ble Court was pleased to observe that a Commissioner had to be appointed in order to see who is in possession of the suit property premises. But when the learned Advocate-Commissioner visited the place on 7.1.1993 we were told that he was going to note down only the articles and machinery. Therefore we served a memo dated 7.1.1993 on the learned Advocate-Commissioner requesting him to note the actual inmates who are in the suit property. The learned Advocate Commissioner started noting down the same and when he recorded that one Annammal, wife of Dharmalinga Mudaliar the 1st defendant (myself) was therein the suit premises, the learned counsel for the applicant started objections. I was also inside the premises when the learned advocate commissioner came. The learned counsel for the applicant wanted the alleged damage to articles to be noted down to which we objected. Therefore, the learned Advocate Commissioner could not complete his job. There was no pandemonium as such as stated by the learned Advocate-Commissioner in his interim report dated 11.1.1993. He has omitted to mention the name of the old lady who was in the suit premises at that time. We reserve our right to file our objections after the final report is submitted by the learned Advocate-Commissioner.

4. It may be in controversy as to what role actually the police played. But it is admitted that it did play a role in the dispute between the parties and the 1st defendant has narrated the events giving his version of the controversy as follows:

"As stated in my counter affidavit on 24.12.1992 itself the applicant along with his henchmen created trouble which prompted me to prefer a complaint to the police. On seeing the police he and his henchmen ran away. Thereafter, on 25.12.1992 the Sub-Inspector of Periamet Police Station visited the premises, called the applicant who is residing in a rented portion of the opposite house and advised him not to disturb me and not to create any disturbance in the locality. It is pertinent to note here that all along I and my family members as stated in my counter affidavit have been in possession and enjoyment of the suit property. I submit that I am not aware of any complaint that is said to have

been lodged by the applicant with the police.”
 “...The allegation that the defendants are attempting to take the key from the police is specifically denied in view of the fact that the police never locked the premises and kept the key with them.”

Some other defendants in the suit have also filed their return and the plaintiff has filed a reply affidavit, particularly, rebutting the claim of the 1st defendant that he was living in the suit premises with his wife and has said, “after the appointment of an Advocate-Commissioner by orders of this Hon’ble Court dated 6.1.1993 with the help of police the respondent is trying to create false evidence. I am in possession as a statutory tenant. I have not given wrong address. I have given the address known to me. In fact the first respondent is living with his son, the 2nd respondent and has written letters to me from there, in October, 1992. It is only the first respondent who is giving wrong address in his caveat petition as well as this counter-affidavit.’ He has also denied the defendants’ case of any partnership of this voluntarily vacating the premises in favour of the 1st defendant and about his shifting the business and/or closing the business at Madras.

5. After hearing the parties and taking into consideration the relevant facts, the learned Single Judge has noted, “...in regard to the question of possession on the date of suit there is no clear material evidence available. One thing is clear, viz. that there was a scuffle for possession by both the parties and scuffle between them. Likewise, as to who amongst the parties was responsible for the construction going on there is also not clear. Both the parties claim that they have been doing the construction. No documentary evidence is placed before me clinching the issue. In view of mutually contradictory contentions raised by both the parties, I appointed a Commissioner to inspect the property. His report disclosed that when he went to the suit property for inspection, he found two police constables on guard and that the doorway to enter the property, was locked inside. The Commissioner reports that initially he was resisted by the police to enter into the property but that on production of the warrant issued by this Court, he was permitted to inspect. The Commissioner says that the door way was opened by an old lady and neither of the parties deny that the old lady is the wife of the 1st defendant. How she

happens to be in the house when the Advocate-Commissioner went there is, according to the plaintiff, a state of affairs brought about by the 1st defendant after the application for appointment of Commissioner was ordered. Again no materials are there to show at whose instance the police constables were put on guard of the property. In my view, their presence clearly indicate to my mind a law and order problem having arisen in regard to the possession of the suit property. The above are only some of the materials relevant for consideration of the question at this stage. It is also significant to notice that the report of the Advocate-Commissioner enumerates some articles and machineries in the premises. While the plaintiff claims some of them as his, the 1st defendant claims others as his. Individually, neither of them make a claim to any of the articles which is claimed by the other. In other words, it is evident that articles of both the parties are there. The Commissioner’s report does not make a mention of materials required for the industry is alleged to have been carried on. Therefore, while the plaintiff says that he is using the 1st defendant says that he is residing with his family. The factum of an old lady being present at the time of Commissioner’s inspection point to residential use, although it may not be conclusive. It is to be noted that the plaintiff does not claim title to the suit property. He claims that he is only a tenant. Hence, the right to possession is there with the 1st defendant. To oust him from the suit property when admittedly, according to the Commissioner, an old lady was inside the house, is not just. Likewise, if really the plaintiff was carrying on business in the suit property on the date of suit, it would be equally unjust to be dispossessed. But, the report of the Advocate Commissioner does not give materials for coming to a conclusion that such a business was being run. I make it clear that I am not expressing any opinion on the question of possession by making observation that further evidence is absolutely necessary to decide the question one way or the other,” and thus concluded the balance of convenience lies in asking both the parties to maintain status *status quo* as it obtained on the date of inspection by the Advocate-Commissioner as mentioned in his report.

6. The facts in the writ petition and the counters therein do not in any manner introduce any new fact, event or case between the plaintiff and the

defendants in the suit, but have brought returns of the Commissioner of Police, Madras City, the Inspector of Police, G-2 Police Station, Periamet, Madras, who, according to the plaintiff, had locked the premises and kept the key with him and the Sub Inspector of Police, attached to the said police station. The Commissioner of Police has, in fact, filed two affidavits. In one he has said that a complaint petition of the plaintiff was received in his office on 8.1.1993 and the same was placed before the Deputy Commissioner of Police, Law and Order, North District, who in turn directed the Assistant Commissioner of Police, Law and Order, Flower Bazaar range, Madras for enquiry and necessary action. The Assistant Commissioner of Police conducted an enquiry and submitted a report to the Deputy Commissioner of Police to the effect that it was a civil dispute and as such the petition was lodged. In the second or the additional affidavit, he has touched the allegation of the plaintiff that he was not allowed to meet the Commissioner of Police on 7.1.1993 by stating as follows:

"I respectfully submit that the general public can have an interview with me on all days except Government Holidays between 10.00 a.m. and 13.00 hrs. A board is displayed at my office intimating the general public about this interview timings.

I most respectfully submit that no prior appointment is needed by the general public to have an interview during the abovesaid hours. However, the interview is formerly regulated by Thiru V.Kanniappan, the Assistant Commissioner of Police, Public Relation Officer, Madras City attached to my office who is also seated in the waiting hall attached to the Commissioner's room during such visiting hours. On 7.1.1993 I had attended office as usual and being a Thursday, I had held a press meet besides seeing the visitors at my office.

The receipt dated 7.1.1993 produced by the petitioner herein *prima facie* shows a telegram having been sent by the petitioner herein and addressed to me. Unfortunately the tapal register concerning the receipt of the telegram and Government tapal register maintained at the 'F' section of my office does not reflect the receipt of the above said telegram. In view of this I made enquiries with Thiru V.Kanniappan, Assistant Commissioner of Police, Public

Relation Officer, Madras City who was the Assistant Commissioner of Police, Public Relation Officer on 7.1.1993 with reference to the allegations made by the petitioner regarding the alleged refusal by the police constable attached to my office. Thiru V.Kanniappan has reported to me that to the best of his recollection and knowledge no such incident as alleged by the petitioner had taken place. However, I have severely warned all the officials that they must discharge their duties in the best interest of the public. I respectfully state that I will strictly abide by all directions that may be issued by this Hon'ble Court in relation to this issue."

The 3rd and 4th respondents have made almost the same statements in their counter affidavits. The 3rd respondent has denied that he locked the premises on 25.12.1992 and kept the key with him as well as the allegation that he represented to the plaintiff that he would hand over the key to him and stated that it is totally false to allege that he or the Sub Inspector of Police (4th respondent in the writ petition) colluded with respondents 5 to 8 i.e. defendants in the suit and handed over the key to the 5th respondent in the writ petition, i.e. to say the 1st defendant in the suit. He has also denied to have put any constables at the suit property and explained that being a troubled area, two best constables would be moving in and around the street to maintain the law and order and the plaintiff/petitioner probably mistook them to be the constables put to guard the suit property. He has said, it is false to state that anybody was prevented from entering into the suit property by the police as he or the 4th respondent Sub Inspector never interfered in the civil dispute between the plaintiff and the defendants in the suit. The 4th respondent has stated also in the same vein and made no improvement in respect of the facts.

7. A serious contention as to the possession of the suit property has thus arisen. According to the plaintiff/appellant, he has been in possession of the suit property as a statutory tenant under the 1st defendant and paying rent to him. According to the 1st defendant, the plaintiff entered into a partnership with him in the year 1977 and a partnership business was located in the suit premises, the profit sharing of the partnership being 25% for the 1st defendant and 75% for the plaintiff, which virtually came to a close in July, 1992 when

the plaintiff removed his machineries, etc. and vacated the premises voluntarily for good as he decided to have his business elsewhere. The plaintiff has supported his case of the relationship of landlord and tenant between the 1st defendant and himself by showing the issuance of the rental receipts by the 1st defendant. But the receipt for payment of rent, the 1st defendant has explained, however, that such receipts were issued by him to the plaintiff on his (letter's) insistence, but the receipts were really in token of the share profit of the defendant. Both parties, however, have admitted to have lodged complaints to the police, the 1st defendant on 24.12.1992 and the plaintiff on 25.12.1992, that one or the other was committing the act of trespass, in case of the 1st defendant the plaintiff after demolishing a structure called shed was attempting to reconstruct the same without the consent of the 1st defendant and without the prior permission of the Corporation of Madras and in case of the plaintiff, Ravindranathan, one of the sons of the 1st defendant, and some other persons had come and threatened the plaintiff, leading to the plaintiff's lodging complaint with the police, in which process the defendants' men also caused damage to machineries, etc. of the plaintiff. Both sides thus admit that police visited the premises and played a role. The plaintiff has alleged the 3rd respondent locked the premises on 25.12.1992 and kept the key with him and kept on telling the plaintiff that he would hand over the key to him. On 7.1.1993 when the Advocate-Commissioner visited the suit premises, the two constables posted at the suit premises, at the first instance, prevented the Advocate-Commissioner from entering into the suit premises, but later on allowed him to enter. The 1st defendant, however, has denied any such locking of the premises by the police and harped on his case that the plaintiff had vacated the suit premises in July, 1992. The case of the 1st defendant in this behalf has many loop-holes, the first and most vital being a complaint filed by the 1st defendant with the police on 24.12.1992 and another by one of the sons of the 1st defendant, who is not a party to the instant proceeding, with the police on 7.1.1993. In both these complaints the presence of the plaintiff in the suit premises is almost admitted. What is alleged is that the plaintiff had been trying to put up some new construction without the consent of the 1st defendant and without obtaining necessary

permission from the Corporation of Madras. There is a document on the record (English translation of which has been produced before us), which shows existence of some sort of partnership between the plaintiff and the 1st defendant, a document which has been described by the plaintiff at one place as obtained on the basis of a misrepresentation, and at another place under threat, but either in the capacity of the sole proprietor of the business concerned or as a managing partner thereof, it is shown, the plaintiff has been in possession, and it is conceded by the 1st defendant that the plaintiff has been running the business at the suit premises. The story of the partnership has no support except the document which is challenged by the plaintiff. But the story of the exclusive business of the plaintiff is supported by the great of tenancy receipts by the 1st defendant in favour of the plaintiff, which incidentally creates sufficient *prima facie* basis for building that the plaintiff's case that he is a tenant of the 1st defendant is probable.

8. The case of the 1st defendant that the plaintiff voluntarily vacated the suit premises and delivered possession to the 1st defendant, as we have already observed, has many loop-holes and those loop-holes also lend support to the case of the plaintiff that the police did not take the impartial stand of preventing the aggressive or aggressor party from interfering with the peaceful possession of either the plaintiff or the 1st defendant. The facts, as we have seen eloquently speak in favour of the existence of the plaintiff's business in the suit premises in December, 1992 and the incidents of 24th and 25th December, 1992 which are reported to the police by the 1st defendant and the plaintiff go to show that there has been a clash between the parties, if not physical, atleast with respect to the exercise of possession, but the 1st defendant had on 24.12.1992 not yet seen the plaintiff out of possession. The incident, as alleged by the plaintiff, took place on 25th or not, but it is admitted by the 1st defendant that the police came and intervened first on the 24th of December and again on the 25th of December. What has surprised us most, however, is the attitude adopted by the 3rd and 4th respondents, *viz.* Inspector and Sub Inspector of Police attached to G-2 Police Station, Periamet. who have chosen not even to admit that they responded to the complaints of the 1st defendant and the plaintiff

and that while so responding they found one or the other party committing aggression. Had they chosen to say what they had found either on the 24th of December or on the 25th of December, because of it is not in doubt that the police had visited, both according to the plaintiff and the defendants, the suit premises on both occasions, and given their version of the occurrence and the possession of the one or the other party, the same would have provided a good basis to test the veracity, that is to say the truth or otherwise of the version of the plaintiff as to the possession and interference in the plaintiff's possession by the defendants or the claim of the physical possession of the 1st defendant and has living with his wife in the suit premises after the plaintiff vacated the same.

9. There can be little doubt that the police shall have no role to play in the adjudication of a dispute of possession, where there is a claim on the one side of the relationship of landlord and tenant and on the other side of possession as a partner, which possession had already been vacated by the plaintiff. The police has no role to play in a civil dispute. A civil dispute has to be decided in accordance with law only in a proper civil proceeding. Not all civil disputes, however, are untouchables for either the police or the criminal courts. There can be many occasions of person having no semblance of a right interfering with the possession of a person who is lawfully entitled to it, or a certain landlord trying forcibly to evict the tenant by adopting illegitimate to and unlawful means. The version of one or the other as to the nature of the right claimed and disputed may not be enough for the police to say that because it is a civil dispute, we have no role to play. There can be serious apprehensions of the breach of the peace created on account of the attitude of the parties and the police on receipt of a complaint that any person likely to commit a breach of the peace or disturb the public tranquillity or to do any unlawful act that would probably occasion a breach of the peace or disturb the public tranquillity cannot be justified in saying that because the complaint related to a property right there is no occasion for a report to a Magistrate for action under Sec.107 of the Code of Criminal Procedure and to seek a direction from a competent Magistrate for executing bonds with or without sureties for maintaining the peace and the tranquillity. There may further be occasions requiring the police to play an effective

role and issue orders of a competent Magistrate to present obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot or an affray and invoke Sec.144 of the Code of Criminal Procedure leaving for the Magistrate empowered to act in the case a dispute likely to cause breach of the peace concerning any land or water or boundaries thereof to act under Sec.145 of the Code of Criminal Procedure and order attachment of the subject of the dispute or to appoint receiver under Sec.146 of the Code of Criminal Procedure. Such preventive laws also empower police officer to interpose for the purpose of preventing cognizable offences under Sec.149 of the Code of Criminal Procedure as well as to arrest to prevent the commission of cognizable offences under Sec.151 of the Code of Criminal Procedure. We have not digressed when we have referred to these provisions of the Code of Criminal Procedure from the main controversy before us because, on the facts, as presented before us, we have no manner of doubt that the police has played a role, but it has not chosen to disclose the whole truth. The truth, undoubtedly, is somewhere between the version of the plaintiff or the 1st defendant either the 3rd respondent took the key in his possession and later got the 1st defendant induced in possession of the suit property or he did not do any such thing, and some how either for the reason that the plaintiff vacated and allowed the 1st defendant to enter possession or otherwise the 1st defendant entered upon the property. There were moments or serious tension between the parties giving one occasion on 24th of December to the 1st defendant to rush to the police and another on 25th December to the plaintiff to rush to the police. On 7th of January, 1993 the police was guarding the subject property, that is to say the suit property when the Advocate-Commissioner visited the suit premises, the two constables reported about specific instructions to them to prevent any entry upon the suit property and they named, according to the Advocate-Commissioner, the 3rd respondent as the officer issuing such instructions. Learned counsel appearing for the respondents 3 and 4 has tried to persuade us to hold that since records at the police station do not support either of the versions, that is to say, the plaintiff's version or the defendants' version and they do not also justify his statements

that are attributed to the constables by the Advocate-Commissioner in his report and all that is said about the role of the 3rd respondent in the writ petition, that is to say the Inspector of Police, G-2 Police Station of the 4th respondent, that is to say the Sub Inspector of Police are connected by the plaintiff to lend credence to his case that the 1st defendant succeeded in dispossessing him with the police help. We are, however, not satisfied that these respondents have stated the whole truth by saying that they have played no role at all. We have on the record the affidavit of the Commissioner of Police, Madras City, and he, it appears, at least has whom desire to improve the functioning of the police in the City of Madras. It is indeed necessary that the Police Commissioner is made aware that hands off, if sort of a civil dispute is reported, is no a totally correct approach, at the same time interference to support one party whose case is found by such policemen justifiable is also not correct approach. The correct approach in a situation where dispute of civil a true is likely to cause apprehensions of the breach of the peace or the public tranquillity or where there are obstructions to the rightful exercise of possession of one by another who was a right or no right of his own but is ready to act aggressively is to take recourse to the provisions under Sec.107 or Sec.144 of the Code of Criminal Procedure as the case may be and to leave rest to be done by the Magistrate concerned in accordance with law and to Act strictly in obedience to the law under the directions of the Magistrate in this behalf. Such Magisterial powers in the city are some times exercised by the police personnel as well and if they are vested with such magisterial powers there is no reason why they should not take resources to such specific provisions of law and make known their actions so that the aggrieved party may take recourse to law to avoid any action against itself.

10. We have no reason to feel satisfied that when on 7th of January, 1993 the plaintiff visited the office of the Police Commissioner he was not rebutted by the constable on duty, yet because that has caused as serious consequences and in any case when lawfully or unlawfully the 1st defendant had already been put in possession of the property, the Police Commissioner could do nothing tangible, we do not propose to go further into it. We have, however, reasons to think that the Assistant Commissioner, who held enquiry, gave no

serious consideration to the complaint of the plaintiff that the Inspector of Police and Sub Inspector of Police of G-2 Police Station, Periamet, Madras had played parties role and he made no enquiry into it although the plaintiff's complaint was allegedly enquired into by him. Had he held enquiry and verified facts, perhaps he would have seen through the defence of the 3rd and 4th respondent in the writ petition, that is to say, Inspector of Police and Sub Inspector of Police of G-2 Police Station, Periamet, Madras-3 and we should not have been left with no specific information as to their conduct in the matter.

11. Even if we leave, however, this aspect of the case aside, we have every reason to find in favour of the plaintiff that he had been to possession of the suit property and that he has been thrown out of possession by means sanctioned by law. His properties including the telephone and electrical connections existing in the premises, acceptance of rent and granting receipts to the plaintiff by the 1st defendant, stating in the complaint to the police on 24th December that the plaintiff/appellant had demolished a certain portion of the shed and was reconstructing the same without the consent of the Corporation of Madras are some such facts which lie the defence and make the case of the plaintiff more probable. It is not the stage, however, for us to finally accept the version of the plaintiff or the 1st defendant and decide any issue of fact finally. We say so for the reason that the above, in our view, is sufficient *prima facie* to hold that the plaintiff has been thrown out of a property in his possession without sanction or authority of law and the 1st defendant has not been fair in denying to him possession of the premises either in the capacity of a tenant under him or in the capacity atleast of the managing partner of a firm which has not yet been legally dissolved.

12. Courts ordinarily do not favour grant of a mandatory injunction and prefer preservation of *status quo* than making one party to vacate and another to occupy any property. The rule as to the preservation of *status quo*, however, has several exceptions, one such exception being that one who has unlawfully thrown out another from his lawful possession must be directed to restore the *status quo* note when he resorted to the unlawful act. This will be least that a court will order as recurring damages which a person on lawful

possession will suffer if he is kept out of possession may not be compensated only in terms of money. In such a case, the balance of convenience is always in favour of party who has acted within the confines of law. We have given our anxious consideration as to the nature of the order we should pass on the facts and in the circumstances of this case. We are inclined in the instant case to order that the defendants in the suit shall vacate possession and allow the plaintiff to assume possession of the suit premises forthwith and if there is any reluctance in vacating possession by the defendants, the respondents 1 to 4 in the writ petition shall ensure that they vacate possession and the plaintiff is put in possession of the suit property. The 1st defendant, we are informed, has reached a ripe age and even though he has, in our *prima facie* opinion, not acted in accordance with law and shown least regard to the law than his age and experience would have taught him to show, we are inclined to fix a time limit for him to vacate the suit premises and permit the plaintiff to assume possession. We accordingly indicated to the learned counsel for the defendants/respondents in the appeal to report after consulting the respondents concerned. He has, however, not indicated about any such time-limit that we should fix in this case. In view of the above we fix no time limit except that the plaintiff/appellant shall wait for a period of one week for the 1st defendant and others inducted by him to vacate the premises and in case they fail to vacate within the said period of one week to inform accordingly to the 2nd respondent in the Writ petition. The 2nd respondent in the writ petition shall issue necessary instructions to the police personnel concerned who shall ensure that *status quo* as ordered by us is restored. The plaintiff/appellant, however, when restored to possession shall not in any manner alter the physical features of the suit property except the repairs of the damages caused either by a natural calamity or by any of the defendants, their agents or men, for which purpose, however, he shall make a specific report to the trial court. The appeal is allowed and ordered accordingly. Since the order in appeal will take care of the ends of justice, no separate order is required in the writ petition. The writ petition is, accordingly, disposed of. On the facts of this case, there shall, however, be no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and Arumugham, JJ.*

L.P.A.No.140 of 1988

11th March, 1993.

K.R.Athappa Chettiar

...Appellant

v.

G.R.Ramasethu and another

...Respondents.

(A) *Civil Procedure Code (V of 1908), Sec.64 - Scope and object of.*

This provision in the Code states a rule that *lis pendens*, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtors of any debt; dividend or other monies contrary to such attachment shall be void as against all claims enforceable under the attachment. Thus all private transfers or delivery of the property attached or interest in the property etc., mentioned in this provision are not void at least not void in all cases and in all circumstances. They are void, 'as against all claims enforceable under attachment'. What claims are enforceable under the attachment, however, has to be understood with reference to the facts of each case. [Para. 3]

(B) *Civil Procedure Code (V of 1908), Sec.47 and O.21, Rule 90 - Money decree - Execution - House property of judgment-debtor - Sold in auction - Purchase by decree-holder himself - Property attached before judgment on 9.8.1971 - Appellant claiming to have negotiated for purchase of the house - Paid part of consideration on 28.8.1971 - Claiming to have got sale deed executed and put in possession in February, 1973 - If has locus standi to object to auction sale of the property - Claim if barred under Sec.64.*

It will be not correct without knowing the nature of the claim of the appellant by virtue of transfer by the judgment-debtor of the property which has been attached in the suit alone, to hold that the transfer is void for all purposes or that the transferee cannot plead some interest in the property for the *locus standi* to object to any auction sale of the property in attachment for realisation/satisfaction of a money decree. According the appellant, he had initiated for the purchase and paid a part of the consideration money by means of a cheque dated 28.8.1971 in pursuance of a sale

agreement followed by the sale deed dated 9.2.1973 and obtained delivery of possession in February, 1973 from which period he has been in possession of the property. Attachment is said to have been ordered in the money on 9.8. 1971 and effected on 15.8.1971. It is a case thus wherein, if the case of the appellant is proved that he had entered into an agreement for the sale of the property before the attachment was affected. Thus his case is one in which though a contract to sell does not create any interest in or charge on the property, it does give rise to an obligation which limits the right of its owner and any attachment of the right, title and interest of the owner is subject to the limitation by which he was bound. It will be erroneous, in the absence of adjudication of this aspect of the case to hold that the sale by the judgment-debtor in favour of the appellant of the property under attachment has been void. The auction-purchaser's plea of bar under Sec.64 has wrongly been sustained without taking notice of the fact whether there has been an agreement as alleged by the appellant or not of such an agreement existed, it has created an obligation subject to which alone the attachment operated or not. Rule 90 of O.21 of the Code gave to the appellant a right to apply to the court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it, if not as the purchaser, at least as the person whose interest was attached by the sale; the interest which operate as obligations upon his vendor under the agreement for sale and subject to which obligation alone the attachment operated. He could apply within 60 days of the sale for setting it aside. Sec.47 of the Code is a comprehensive provision which says that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit including the question whether any person is or is not a representative of another party. It is, thus, not against the Rules when the appellant moved the court for setting aside the sale by an application under Rule 90 of O.21 of the Code as the purchases or atleast whom interests were affected by the auctionable and invoked the court's jurisdiction under Sec.47 to decide his capacity as well as his objections to the sale of the property in question.

[Paras. 4 & 5]

(C) Limitation Act (XXXVI of 1963), Sec.17, Art.127 - Sale in execution of decree - Setting aside of - Limitation for - Standing point - Allegation in suit or proceeding that defendant committed a fraud - Extension of limitation until date of discovery - Question of fraud not adjudicated - Petition filed after expiry of 60 days of sale - If can be said to be barred by limitation.

The period of limitation of 60 days under Art.127 of the Limitation Act to set aside a sale in execution of a decree including any application by a judgment-debtor for the said purpose from the date of sale must mean from the date of confirmation of the sale because unless confirmed, there is no sale at all. An application to set aside a sale which is required to be filed within 60 days of the sale under Art.127 of the Limitation Act has to be extended when it is alleged in the suit or proceeding that the defendant or respondent or his agent committed a fraud until the date of discovery of the fraud and without adjudication in this behalf, to say that the suit or application has been filed after the expiry of 60 days of the sale and is, therefore, barred by limitation will be entirely wrong.

[Paras. 5 & 6]

(D) Evidence - Inferences - Permissibility.

It is well-settled that legal inferences are permissible but there is a clear line of division between an inference as a fact and a conjecture. [Para. 6]

Cases referred to:

M/s. Kayjay Industries (P) Limited v. M/s. Asnow Drums (P) Limited and others, A.I.R. 1974 S.C. 1331; 1974 S.C.D. 485; (1974) 2 S.C.C. 213; (1974) 2 S.C.J. 326. [Para. 2]

Radhey Shyam v. Shyam Behari Singh, A.I.R. 1971 S.C. 2337; (1971) 1 S.C.J. 650; 1970 S.C.D. 942; (1971) 1 S.C.A. 135; (1971) 1 S.C.R. 783. [Para. 2]

K. Balachandran v. A.M. Muthayyan Mudaliar, 87 L.W. 812. [Para. 3]

S.G. Films Exchange v. Brijnath Singhji, A.I.R. 1975 S.C. 1810; (1975) 2 S.C.C. 630. [Para. 3]

Nancy John Lyndon v. Prabhati Lal, A.I.R. 1987 S.C. 2061. [Para. 3]

Angu Pillai v. M.S.M.K. Chettiar, A.I.R. 1974 Mad. 16; (1973) 1 M.L.J. 334; 86 L.W. 94. [Para. 3]

Savitri Ammal v. Ramasami, (1898) 8 M.L.J. 266. [Para. 3]

Veerappa Thevar v. Venkatarama Iyer, 69 M.L.J. 678; A.I.R. 1935 Mad. 872; 1935 M.W.N. 942; 42 L.W. 544; 158 I.C. 940; I.L.R. 59 Mad. 1. [Para. 3]

Diraviyam Pillai v. Veeranan Ambalam, (1939) 2

M.L.J. 822: A.I.R. 1939 Mad. 702: 49 L.W. 460: 1939 M.W.N. 329: I.L.R. 1939 Mad. 853: 185 I.C. 562. [Para. 3]

Athinarayana Konar v. Subramania Iyer, (1941)2 M.L.J. 722: A.I.R. 1942 Mad. 67. [Paras. 3, 4]

P.K.Unni v. Nirmala Industries, A.I.R. 1990 S.C. 933. [Para. 8]

Joginder Kaur v. Financial Commissioner, Punjab, A.I.R. 1975 P. & H. 15. [Para. 10]

Parkash Kaur v. Sandhooran, A.I.R. 1979 P & H. 36. [Para. 10]

M/s.Surana and Surana, for Appellant.

T.R.Rajagopalan, for Respondents.

The Judgment of the Court was delivered by *Mishra, J.*: The plaintiff/respondent G.R.Ramasetu filed a suit in O.S.No.342 of 1971 in the Court of Subordinate Judge of Madurai and obtained a money decree. The said decree was put in execution in E.P.No.164 of 1973 and a house property belonging to the defendant-judgment-debtor V.S.Nammalvar was auction sold and purchased by the decree-holder himself. It appears however that this house property was sold by V.S.Nammalvar to the appellant on 9.2.1972. It also appears that the auction sale of the property concerned had preceded attachment before judgment in L.A.No.555 of 1971 in O.S.No.342 of 1971 order dated 9.8.1971 and the decree in the suit was on 30.11.1972 followed by E.P.No.164 of 1973 for sale of attached property in the year 1973. According to the appellant, he had in fact negotiated for the purchase and paid a part of the consideration money i.e., a sum of Rs.10,000 by means of a cheque to V.S.Nammalvar on 28.8.1971, in pursuance of a sale agreement reached between them, followed by the sale deeds execution and registration on 9.2.1972 for Rs.49,000 and delivery of possession after some delay in February, 1972 from which date onwards the appellant has been in possession.

2. The case of the appellant who has been described as the petitioner by the trial court has been summarised as follows:

"Ultimately, the petitioner got possession from him in February, 1973, from that time onwards the petitioner is in possession of the house. That house needed enormous repairs. The petitioner has done enormous repairs and improvements to the building. The value of house property in that locality is mounting up day by day. In September, 1979 the value of the house was Rs.1,75,000. As the second respon-

dent delayed giving vacant "possession of the house to the petitioner subsequent to the sale, the feelings between the petitioner and the second respondent became strained. This apart, the second respondent represented to the petitioner that he had mortgaged that house to one Veerappa Chettiar of Natarajapuram for Rs.10,000 and that, that was the only encumbrance over the property. Subsequently it came to light that there was an earlier mortgage for Rs.25,000 in favour of the said Veerappa Chettiar. The petitioner insisted on the second respondent discharging the entire mortgage. The second respondent was delaying the discharge of the mortgage debts. The petitioner was cheated by the second respondent. Ultimately, the second respondent discharged this mortgage by January, 1972. He did not vacate the tenant, who was in occupation of the downstairs portion. The tenant wanted some time to vacate was postponing. The second respondent has no property now. His whereabouts are not known on some occasion, he was seen in Madurai, but he avoided the petitioner. The price paid, the repairs and improvements effected by the petitioner have caused the petitioner heavy amounts. The petitioner is living in portion of the house, while the rest of the portions are under the occupation of the tenants."

In E.P.No.164 of 1973, the house however was brought for sale in court auction on 3.9.1979 and purchased by the decree-holder himself. The sale also was confirmed on 3.11.1979. The appellant however, according to his case, came to know of it only on 11.3.1980 when the court ameen came to the house and informed him that the order to deliver possession to the first respondent had been passed. He raised objections before the ameen and also moved the court by filing a petition under Sec.47 of the Code of Civil Procedure and/or O.21, Rule 90, C.P.C. praying for setting aside the sale held on 3.9.1979 in E.P.No.164 of 1973 in O.S.No.342 of 1971 on the file of the trial court. The judgment-debtor V.S.Nammalvar remained *ex parte*. The decree-holder filed his return saying that the appellant's allegations in the petition for setting aside the sale were not true and had been invented for the purpose of the case. Besides stating many things generally stated in such rejoinders, the decree-holder/respondent maintained that the

appellant should strictly prove the truth, validity and the binding nature of the sale transaction alleged by him and since he is a third party should also prove his alleged possession of the property. The appellant's case for setting aside the auction sale was that the sale was vitiated for the reasons of various irregularities afflicted by fraud and grossly under-valued etc., allegations, which were seriously contested by the plaintiff-decree-holder- auction purchaser. The trial court has after a detailed examination recorded on the basis of the evidence a categorical finding that the story that there has been a valid sale proclamation was not believable at all and it was a case where almost no sale proclamation was issued at all, and the irregularity in the publication of sale has caused substantial injury to the appellant. The trial court has also noticed that the sale proclamation was allegedly issued without any upset price and this is in the background that the property was brought on several occasions for sale, but was not sold for want of bidders. Upset price was originally fixed and was gradually reduced finally to Rs.5,000 subject to encumbrance of Rs.35,000 for the sale on 11.6.1979 on which date also it was not said for want of bidders. But, the trial court has found:

"The respondent/judgment-debtor was straight-away set *ex parte* when he was found absent and the upset price was reduced... to Rs.5,000. Under such circumstances it has to be held that there was no valid notice to the judgment-debtor *i.e.*, 2nd respondent before passing orders reducing the upset price."

Observing also that the price which a property fetches in court-auction sale and the market value of the property are distant neighbours and dealing with the evidence on the record as to the value of the property and the case law on the subject, particularly the judgment of the Supreme Court in *M/s. Kayjay Industries (P) Limited v. M/s. Asnow Drums (P) Limited and others*, A.I.R. 1974 S.C. 1331; 1974 S.C.D. 485; (1974) 2 S.C.C. 213; (1974) 2 S.C.J. 326 and *Radhey Shyam v. Shyam Behari Singh*, A.I.R. 1971 S.C. 2337; (1971) 1 S.C.J. 650; 1970 S.C.D. 942; (1971) 1 S.C.A. 135; (1971) 1 S.C.R. 783, the trial court has found:

"So, there are sufficient circumstances to hold that the first respondent had committed fraud in the matter of publication and the sale proclamation by actively taking part in creating a record as if there was proper publication of the

sale proclamation and publicity by beat of tom tom. As a result of lack of publication of sale, the property had been sold for a low price and the first respondent who is himself the decree holder had purchased the property with the leave of this Court."

The trial court judgment as left no question untouched including the ground as to bar of limitation to the application for setting aside the sale at the instance of the appellant.

3. On appeal, however, a learned single Judge of this Court has said that since the appellant was a purchaser of a property which has been under a court's attachment order, he had no enforceable claim as the sale in his favour was void and he had no interest in the property as to enable him to maintain the application as a representative of the judgment-debtor within the meaning of Sec.47 of O.21, Rule 90 of the Code of Civil Procedure. The learned single Judge has also said that the above apart, the application to set aside the sale has been filed beyond a period of 60 days of the date of sale and so barred under Art.127 of the Limitation Act, 1963.

After saying as above, the learned single Judge has also said:

"The first respondent though he attempted to say that he did not have any knowledge of the institution of the suit, the attachment before judgment and the other proceedings in his cross-examination as P.W.1 was forced to admit that Annamalai who had signed Ex.B-8, was his employee and he worked from 1975 and that he (P.W.1) used to go out often for business purposes. Ex.B-8 had been signed by the employee of the first respondent and it is not the case of the first respondent that Annamalai was not authorised to receive letters on his behalf. It therefore follows that the first respondent had knowledge of the proceedings in O.S.No.342 of 1971 even as far back as 8.1.1977 when Ex.D-5 had been received, and his case that he became aware of the proceedings only on 11.3.1980 at the time when the amin came to deliver possession of the property pursuant to the court auction sale, cannot therefore be accepted. Though the first respondent had also stated that by practice of fraud, he did not have the knowledge of the proceedings he had not given the particulars with reference to the so called acts of fraud and he had not also

substantiated the same by reliable or acceptable evidence. On the evidence, no fraud at all has been established and the case of the first respondent that owing to fraud he did not have the knowledge of the proceedings in O.S.No.342 of 1971 cannot, therefore, be accepted. It follows that the first respondent had knowledge of the attachment the passing of the decree as well as the invalidity of the "private sale in his favour after attachment even on 8.1.1977 and he should have, therefore, taken step atleast within three years thereafter, assuming that Sec.47, C.P.C. would be applicable. Therefore, even considering the application filed by the first respondent as maintainable and falling under Sec.47 and O.21, Rule 90, C.P.C it is seen that the application filed on 31.3.1980 was hopelessly out of time."

Sec.64 of the Code of Civil Procedure states as follows:

"64. Private alienation of property after attachment to be void: Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation: For the purpose of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

There has been many occasions that one or the other party invoked Sec.64 to deny any validity of sale, gift or otherwise transfer of interest in property and in cases under Sec.240 of the old Civil Procedure Code, VIII of 1859 corresponding to Sec.64 of the present Code, this provision was always read to convey that all alienations during the continuance of attachment were *null and void*. When, however, an issue in this behalf was specifically referred to a Division Bench of this Court in the case of *K.Balachandran v. A.M.Muthayyan Mudaliar*, 87 L.W. 812, the court after quoting Sec.240 of the Code noticed the obvious distinction between the old and the new provision in this behalf in these words:

"One of the differences between this section and Sec.64 of the present Code, is while in the present Code, the alienation subsequent to the attachment is held to be void only as against all

claims enforceable under the attachment, Sec.240 of the Act VIII of 1859 generally stated that the alienation during the continuance of the attachment shall be *null and void*. It may be noted at the outset that Sec.64 of the present Code is narrower in its effect regarding alienations during the continuance of attachment than Sec.240 of the earlier Code quoted above."

Finally after considering all relevant case law available till then said:

"It is abundantly clear that neither Sec.64 of the Code nor the corresponding provision in the earlier enactments made private alienation void for all purposes. Sec.64 specifically says that the transaction is void only as against all claims enforceable under the attachment. As pointed out in the first of the cases quoted above a private alienation when an attachment is in force is, not void, against the whole world. But the further question is whether the benefit of the attachment is available only to the attaching creditor. The plain words of Sec.64 show that it would be incorrect to say that the attachment was only for the benefit of the attaching creditor. In a case where a private alienation is effected while an attachment is in force, certainly, the auction purchaser of the attached property can invoke Sec.64 of the Code and successfully contend that the private alienation is void as against him.

But we are clearly of the opinion that even though Sec.64 of the Code can be invoked, "decrees and the benefit being for the decree-holders they can waive the benefit. As is that case the decree holders had entered into an actual contact with the purchasers....."

The Bench also added:

"All that we wish to say is that those decisions would have no application to a case coming under Sec.64 if the Code and even if the property is sold in court auction subject to the impugned alienation, if, the alienation is void under Sec.64 of the Code, the auction purchaser can certainly take advantage of the said provision in spite of the fact that he purchased the property in the court auction subject to such alienation."

This law has been reiterated on a number of occasions by the courts. This principle of law should not detain us further as the Supreme Court has also said in *S.G.Films Exchange v. Brijnath Singhji*,

A.I.R. 1975 S.C. 1810: (1975) 2 S.C.C. 630, on the applicability of Sec.64, C.P.C. as follows:

"As regards the applicability of Sec.64, Civil Procedure Code, we find that parties disagree on the question whether the attachment made by the Central Bank on 20.4.1955, in execution of the decree of which the plaintiff-respondent was the assignee existed on the date of the impugned lease of 30.3.1956. Learned counsel for the appellant relied upon the terms of an order recorded on the order sheet, in the Court of Additional District Judge, Jabalpur, in Civil Suit No.3-B of 1952 on 25.1.1956 showing that in view of the stay order received from the High Court, execution could not proceed. The order sheet, however, also contains the enigmatic statement that execution was dismissed as infructuous but the attachment was to continue for six months. The High Court had treated the last part of the statement in the order sheet as void and ineffective presumably on the ground that the Additional District Judge had no jurisdiction either to lift the attachment or to dismiss the execution proceedings after the High Court had given its order staying all further action in execution proceedings. The terms of the High Court's order are not evident from anything placed before us. On the other hand, learned counsel for the plaintiff-respondent relies upon a subsequent order of the same court, passed on 30.4.1960, in the same suit. The order shows that a compromise had been arrived at between the decree-holder and the judgment-debtor under which the decree-holder had agreed to lift attachment of property except with regard to Plaza Talkies which was to continue. We are, therefore, unable to hold that the concurrent findings of the trial court and the High Court that the Plaza Talkies was attached in execution of decree in Suit No.3-B of 1952 on 4.5.1955 and that this attachment was in existence when the impugned lease was executed on 30.3.1956 are erroneous. On these findings, the lease of 1956 was certainly struck by the provisions of Sec.64, Civil Procedure Code also, Sec.64, C.P.C. In fact, constitutes an application of the doctrine of *lis pendens* in the circumstances specified there."

The judgment of the Supreme Court in *Nancy John Lyndon v. Prabhati Lal*, *A.I.R. 1987 S.C. 2061*, is also to the effect that where the sale by a judg-

ment-debtor of the property attached in execution was effected during the subsistence of the attachment, it is void for the purpose of Sec.64 of the Code. This provision in the Code states a rule that *lis pendens* any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. Thus all private transfers or delivery of the property attached or interest in the property, etc. mentioned in this provision, are not void or at least not void in all cases and in all circumstances. They are void, "as against all claims enforceable under the attachment." What claims are enforceable under the attachment, however, has to be understood with reference to the facts of each case. A Bench of this Court had the occasion to discuss a matter not exactly as before us, but with substantial similarity in the facts in the case of *Angu Pillai v. M.S.M.K. Chettiar*, *A.I.R. 1974 Mad. 16: (1973) 1 M.L.J. 334: 86 L.W. 94*. That was a case of a money decree like the one before us and attachment of certain properties in execution of that decree was ordered. A claim under Sec.47 of the Code, however, was raised by one Kasi Viswanathan Chettiar contending that certain money had been deposited with the joint family by his mother who died and he as the sole heir was entitled to the said amount. Accordingly, his father had executed an agreement agreeing to mortgage the properties against which attachment was sought for. He accordingly maintained that decree-holder could bring the properties for sale only subject to the agreement. In another suit also he raised a similar plea. The defences in both the cases were that the alleged deposit was not true and that the alleged agreement was neither true nor valid. Objections in this behalf were dealt with in some detail with reference to the law as engrafted in Sec.54 of the Transfer of Property Act and Sec.64 of the Code of Civil Procedure. The Bench has said,

"8. The right of a promisee under a prior agreement of sale as against the subsequent attachment and the rights of a court auction purchaser under that attachment have been considered in several decisions of this Court beginning as early as in *Savitri Ammal v. Ramasami*, (1898) 8 M.L.J. 266. See also *Veerappa Thevar v. Venkatarama Iyer*, 69 M.L.J.

678: A.I.R. 1935 Mad. 872: 1935. M.W.N. 942: 42 L.W. 544: 158 I.C. 940: I.L.R. 59 Mad. 1. The entire case law is reviewed in *Diraviyam Pillai v. Veeranan Ambalam*, (1939)2 M.L.J. 822: A.I.R. 1939 Mad. 702: 49 L.W. 460: 1939 M.W.N. 329: I.L.R. 1939 Mad. 853: 185 I.C. 562. There, the suit properties belonged to a Hindu joint family consisting of five brothers and the sons of four of those brothers. A decree had been obtained for money payable by the five brothers personally and from out of the family properties in the hands of the brothers and sons. In execution of the decree, the decreeholder attached only the interest of the sons in the joint family properties on 15.3.1933, as the brothers had been already adjudicated insolvents in June, 1927. But even prior to the adjudication the brothers had on 24.7.1926, entered into a contract to sell the suit properties to one V and under orders of the Insolvency Court the Official Receiver executed a sale deed in favour of V on 6.11.1931. The decree-holder contended that the sale was invalid as by virtue of the attachment of the son's interest before the sale deed was executed, the power of the brothers and of the Official Receiver as representing their estate to convey the son's shares must be deemed to have come to an end. Varadachariar, J. speaking for the court, observed that as there was in existence, prior to the attachment a contract of sale entered into by the brothers at the time when the family was joint and as they had the power to sell also the son's interests in the properties, the sale in pursuance thereof is not one contrary to the terms of Sec.64, C.P.C. and was, therefore, not affected by the attachment. The learned Judge has pointed out that the right of the judgment-debtor in the property was on the date of the attachment qualified by the obligation, incurred by him under the earlier contract to sell and that the attaching creditor cannot claim to ignore that obligation. It was, therefore, held that sale by the contracting parties in pursuance of the pre-existing contract to sell cannot be said to prejudice the attaching creditor. In coming to this conclusion, the learned Judge has referred to Sec.64, Civil Procedure Code which merely provides that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the

attachment. It is not correct to read Sec.64 as putting an end to the power of sale because as between, the transferor and the transferee, the alienation will undoubtedly be operative. The attachment in execution of a decree does not create any interest in favour of the decree-holder in the property.

9. A single Judge of this Court Wadsworth, J. on *Athinarayana Konar v. Subramania Iyer*, (1941)2 M.L.J. 722: A.I.R. 1942 Mad. 67, had to consider a similar case of a prior contract of sale of a property that was subsequently attached in execution of a decree. Following *Diraviyam Pillai v. Veeranan Ambalam*, (1939)2 M.L.J. 822: A.I.R. 1939 Mad. 702: 49 L.W. 460: 1939 M.W.N. 329: I.L.R. 1939 Mad. 853: 185 I.C. 562, the learned Judge held that though a contract to sell land does not create any interest in or charge on the property it does give rise to an obligation which limits the right of the owner and any attachment of the right, title and interest of the owner's subject to any such limitation by which he was bound.

10. An attaching decree-holder attaches not the physical property but only the right of the judgment-debtor in the property. As recognised in Sec.40 of the Transfer of Property Act, the right of the judgment-debtor in the property is, on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell, and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. If the attachment is followed by a court sale and the purchaser at the court sale had no notice of the obligation, he may get a good title and the premises under the private contract would be left to seek his remedy against his promisor."

4. It will be thus not correct without knowing the nature of the claim of the appellant by virtue of transfer by the judgment-debtor of the property which has been attached in the suit alone, to hold that the transfer is void for all purposes or that the transferee cannot plead some interest in the property for the *locus standi* to object to any auction sale of the property in attachment for realisation/satisfaction of money decree. According to the appellant, we have already noticed, he had initiated for the purchase and paid a part of the

consideration money by means of a cheque dated 28.8.1971 in pursuance of a sale agreement followed by the sale deed dated 9.2.1973 and obtained delivery of possession in February, 1973 from which period he has been in possession of the property. Attachment is said to have been ordered in the money suit on 9.8.1971 and effected on 15.8.1971. It is a case thus wherein, if the case of the appellant is proved that he had entered into an agreement for the sale of the property before the attachment was effected, thus his case is one in which one may say, as has been said by a learned Single Judge of this Court in *Athinarayana Konar v. Subramania Iyer*, (1941)2 M.L.J. 722: A.I.R. 1942 Mad. 67, that though a contract to sell land does not create any interest in or charge on the property, it does give rise to an obligation which limits the right of its owner and any attachment of the right title and interest of the owner is subject to the limitation by which he was found. It will be erroneous in the absence of adjudication of this aspect of the case, therefore to hold as has been held by the learned single Judge in the first appellate judgment that the sale by the judgment-debtor in favour of the appellant of the property under attachment has been void. The auction-purchaser's plea of bar under Sec.64 has wrongly been sustained by him without taking notice of the fact whether there has been an agreement as alleged by the appellant or not and if such agreement existed, it had created an obligation subject to which alone the attachment operated or not.

5. On the question of limitation, again, we say so with respect, there appears to be an obvious error in the impugned judgment. The period of limitation of 60 days under Art.127 of the Limitation Act to set aside a sale in execution of a decree including any application by a judgment-debtor for the said purpose from the date of the sale, must mean from date of confirmation of the sale, because unless confirmed, there is no sale at all. How the sale in execution of a decree is effected is fully spelled out in Rules 64 to 106 of O.21 of the Code of Civil Procedure. The appellant, who has not been the judgment-debtor nor a tenant of the judgment-debtor, but according to him has been in occupation of the property, could resist the execution of the sale by delivery of possession to the auction purchaser and on such resistance or obstruction to possession by the appellant, the holder of the decree who in the instant case

happens to be the court auction purchaser, could make application to the court complaining of such resistance or obstruction and for orders to remove the obstruction. The decree-holder/auction-purchaser could obtain order of dispossession only after determination of the questions such as right, title on interest in the property arising between the parties, that is to say, the appellant on the one hand and the judgment-debtor and decree holder on the other hand, as contemplated under Rule 101 read with Rule 98 of O.21 of the Code. The plea that these rules were not applicable because the judgment-debtor had transferred the property *pendente lite* as is said under Rule 102 of O.21 of the Code, however, in the instant case would require adjudication of the effect of the agreement upon which the appellant relied for basing his claim to the suit property. In any case, however, Rule 90 of O.21 of the Code gave to the appellant, a right to apply to the court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it, if not as the purchaser, at least as the person whose interest was affected by the sale. The interest which operate as obligations upon his vendor under the agreement for sale and subject to which obligations alone the attachment operated. He could apply within 60 days of the sale for setting it aside. Sec.47 of the Code is a comprehensive provision which says that all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit, including the question whether any person is or is not a representative of another party. It is thus not against the Rules when the appellant moved the court for setting aside the sale by an application under Rule 90 of O.21 of the Code as the purchaser or at least whose interests were affected by the auction sale and invoked the court's jurisdiction under Sec.47 to decide his capacity as well as his objections to the sale of the property in question.

6. Sec.17 of the Limitation Act says where, in the case of any suit or application for which a period of limitation is prescribed by the Act, the suit or application is based upon the fraud of the defendant or respondent or his agent, or the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such

person as aforesaid, or the suit or application is for relief from the consequences of a mistake, or where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him, the period of limitation should not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production. Exception to this, however, are the following and no suit shall be filed affecting any property which-

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have person to believe, that any fraud had been committed, or
- (ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or
- (iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and did not at the time of purchase know, or have reason to believe, that the document had been concealed."

Besides the above, there is a specific provision in Sub-sec.(2) which states that where a judgment-debtor has, by fraud, or force, prevented the execution of a decree or under within the period of limitation, the court say, on the application of the judgement creditor made after the expiry of the said period extend the period for execution of the decree or order, provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.

It is thus seen that an application to set aside a sale which is required to be filed within 60 days of the sale under Art.127 of the Limitation Act has to be extended when it is alleged in the suit or proceeding that the defendant or respondent or his agent committed a fraud until the date of the discovery of the fraud and without adjudication in this behalf to say that the suit or application has been filed after the expiry of 60 days of the sale and

therefore, is barred by limitation will be entirely wrong. There is absolutely no attempt in the court below to ascertain as to when the appellant herein discovered the fraud and whether this has been a true or genuine allegation in his application to set aside the sale, except the words in the cross examination of P.W.1 first respondent before it i.e. the appellant herein, admitting that Annamalai who had signed Ex.B-8 was his employee and he worked from 1975 and that he used to go out often for business purposes. Learned appellate Judge has found that Ex.B-8 had been signed by an employee of the appellant and then said,

"...it is not the case of the first respondent that Annamalai was not authorised to receive letters on his behalf. It therefore, follows that the first respondent had knowledge of the proceedings in O.S.No.342 of 1971 even as far back as 8.1.1977 when Ex.B-5 had been received, and his case that he became aware of the proceedings only on 11.3.1980 at the time when the Amin came to deliver possession of the property pursuant to the court auction sale, cannot therefore be accepted."

We say so with all constraint that it is nothing but conjecture that has led learned single Judge to hold that the appellant had knowledge of the proceedings in O.S.No.342 of 1971 even as far back as 8.1.1977. It is well-settled that legal inferences are permissible but there is a clear line of division between an inference as a fact and a conjecture. There is no evidence that Annamalai was authorised any time by the appellant to receive any notice on his behalf or act as his agent or servant, so that the appellant could be bound by his acts. Merely because Annamalai has been found to be an employee of the appellant, it cannot be said that he has the authority to act on behalf of the appellant. It is indeed putting the cart before the horse, if it is said that the appellant had to plead a case that Annamalai was not authorised to receive letters on his behalf. If the decree-holder/auction-purchaser respondent disputed the case of the appellant that he came to know of the proceeding when the Amin came to deliver possession of the property, pursuant to, court auction sale, and pleaded that the appellant know about the proceedings in O.S.No.342 of 1971 from before, the onus was upon him to show that Annamalai who was an employee of the appellant was authorised to receive letters on his behalf and, therefore, the

acknowledgement in Ex.B-8 by Annamalai amounted to acknowledgement by the appellant himself. For the above reasons, we are inclined to hold that learned appellate Judge has erred in holding that the appellant had filed the application to set aside the sale beyond the period of limitation in Art.127 of the Limitation Act.

7. We have in our judgment made reference to the considerations that operated in the mind of the trial court in coming to the conclusion that the sale of the property in question is vitiated by fraud. Learned Appellate Judge, however, has dealt with this aspect of the case in these words, only:

"Though the first respondent has also stated that by practice of fraud, he did not have the knowledge of the proceedings he had not given the particulars with reference to the so-called acts of fraud and he had not also substantiated the same by reliable or acceptable evidence. On the evidence no fraud at all has been established and the case of the first respondent that owing to fraud he did not have the knowledge of the proceedings in O.S.No.342 of 1971 cannot, therefore, be accepted."

and has said nothing beyond this, on the specific findings recorded by the trial court that it was not possible to believe that there has been a valid sale proclamation and that it was a case where almost no sale proclamation was issued at all and the effective finding in this behalf of the trial court has been extracted by us in our judgment, that the first respondent had committed fraud in the matter of publication and the sale proclamation by actively taking part in creating record as if there was proper publication of the sale proclamation and publicity by beating of tom tom and as a result of lack of publication of sale, the property had been sold for a lower price and first respondent who is himself the decree-holder had purchased the property with the leave of the court. Since the appellate court had interfered with the judgment of the trial court, which is based upon such specific findings of substantial irregularities and of fraud in the matter of publication and sale proclamation and the substantially low value on which the decree holder has himself purchased the property, on a clearly erroneous view of law and fact, we have no other way but to interfere with the same and we accordingly set it aside.

8. We may however record before we part with the judgment that we thought that the matter can

come to an end by payment to the decree-holder/purchaser the amount specified in the proclamation of sale, for which recovery the sale was ordered as well as a sum equal to five per cent of the purchase money adjusted equitably to meet the decree and the cost, is any, which the decree holder incurred in realising the decretal money. We accordingly permitted the appellant to seek a withdrawal of the application under O.21, Rule 90 of the Code without which he could not take recourse to Rule 89 thereof and directed the appellant to deposit as above. In compliance with our order, the appellant has deposited the aforementioned amount in court and has also made an application to withdraw the application under O.21, Rule 90 of the Code, upon which application the instant proceeding started and has since been before us in appeal. Learned counsel for the respondent, however, has reasons to resist for, accordance to him, the limitation under Art.127 of the Limitation Act is for both the applications under Rule 90 as well as Rule 89 and if the application under Rule 89 is not filed within the period of limitation as is contemplated for the application under Rule 90 of the Code, it should be held to be barred by limitation and thus while it may be open to the appellant to withdraw the application under O.21, Rule 90 his application under Rule 89 will be barred by Limitation. He has for the said reason made serious objections and also drawn our attention to Sub-rule (2) of Rule 92 of O.21 of the Code. He has submitted that in the event of withdrawal of Rule 90 application, it would create another bar to the deposit must be made within 30 days from the date of sale in the case of an application under Rule 89 which is not complied with. He has drawn our attention to the judgment of the Supreme Court in *P.K.Unni v. Nirmala Industries, A.I.R. 1990 S.C. 933*, in which it has been held that the limitation for making deposit within 30 days from the date of sale under Rule 92(2) is independent of the Rule under Art.127 of the Limitation Act which prescribes 60 days time from the date of sale to file an application to set aside the sale. The Supreme Court has said that the words in Sub-rule (1) of Rule 89 may apply to have the sale set aside on his depositing in Court. When read with Sub-rule (2) of Rule 92 which says what in the case of an application under Rule 89 the deposit required by that rule is to be made within 30 days from the date of sale, means deposit is a condition

precedent to the making of an application to set aside a sale and the condition present is that the deposit should be made within 30 days of the sale.

9. Although we have been addressed at length at the Bar with respect to the role that these two rules come to play in the matter of making of an application under Rule 89 of O.21 of the Code, for setting aside the sale on deposit in court for payment to the purchaser and to the decree-holder, we think it is now inconsequential whether the deposit is made within 30 days from the date of sale or not in the instant case. It is however, necessary as we find from the judgment of the Supreme Court that there is no such inhibiting created to examine whether Sec.17 of the Limitation Act shall play its role in the matter of period of limitation under Sub-rule (2) of the Rule 92 of O.21 of the Code or not, and how the court in a situation when, in course of a proceeding under O.21, Rule 90 to set aside the sale on ground of irregularity or fraud, it is thought desirable to order deposit in terms of Rule 89 of O.21 would achieve the purpose on the face of the rule in Sub-rule (2) of Rule 92 of O.21. It is an objection, however, not confined to the technicality as to the deposit within or beyond the period of limitation, but also on the basis of the language in Rule 89(2) of O.21, wherein it is said that where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

10. It is no doubt true that the appellant herein has made the application to withdraw the application under O.21, Rule 90 of the Code. He has also deposited the money as above. The court, however, has made no order on the application to withdraw the application under O.21, Rule 90 of the Code. Learned counsel for the respondent, however, has urged that a person making such application cannot later back out and on his mere making the application to withdraw the application under O.21, Rule 90, the court must hold that O.21, Rule 90 application is no longer effective. We can, however, refer to two judgments of the Punjab and Haryana High Court in *Joginder Kaur v. Financial Commissioner, Punjab*, A.I.R. 1975 P. & H. 15 and *Parkash Kaur v. Sandhooran*, A.I.R. 1979 P & H. 36. Wherein a view has been expressed that application to set aside sale under O.21, Rule

89 is not maintainable after application to set aside sale under O.21, Rule 90 is dismissed and in the latter case is particular, it is said,

"From a reading of Rules 89 and 90 of O.21 it is apparent that the judgment-debtor has no right to apply for setting aside a sale under O.21, Rule 89. In case he has filed an application for setting it aside under O.21, Rule 90 and in case he first filed an application under O.21, Rule 39 and thereafter an application under O.21, Rule 90 he has no right to prosecute the earlier application."

and further,

"In view of O.21, Rule 89, if an application under O.21, Rule 90 as pending in the executing court, the petitioner had no right to make an application under O.21, Rule 89. If she wanted to do so, she should have withdrawn first the application under O.21, Rule 90. The petitioner filed an application under O.21, Rule 89, in spite of the fact that an application under O.21, Rule 90 was pending. The limitation for filing an application under O.21, Rule 89 or Rule 90, is 30 days from the date of the sale. She filed both the applications within 30 days of the sale and thus these were within limitation. But as already observed above, the application dated September 23, 1974 was not maintainable in view of the pendency of the application under O.21, Rule 90. The counsel for the petitioner withdrew that application on November 23, 1974. On that date, the time for filing an application under O.21, Rule 89 had passed. The application under O.21, Rule 89 can be said to be duly presented on November 23, 1974, but as the limitation for filing that application had expired, consequently it cannot be treated to be within limitation and is liable to be dismissed as such.

8. The contention of the learned counsel that it was the duty of the court to ask for the option of the petitioner as to whether she wanted to proceed with the application under O.21, Rule 89 or under O.21, Rule 90 has also no substance. The petitioner while making an application under O.21, Rule 89 stated specifically therein that she wanted to pursue the earlier application for setting aside the sale. In the circumstances the application under O.21, Rule 89 was not maintainable. The question of option therefore did not arise."

These objections, however, on the facts of the instant case, are of no consequence to the parties, since we have come to the conclusion that the finding recorded by the trial court is correct and affirm accordingly that there is no question of any deposit under Rule 89 of O.21. The deposit in such a situation can be, however, still permissible under Rule 55 of O.21 of the Code, which will automatically remove the attachment. We, accordingly order in the instant case that the amount in deposit in this Court shall be remitted to the executing court and allowed to be appropriated for the satisfaction of the decree and for consequential orders accordingly.

In the result, the Letters Patent Appeal is allowed. The impugned judgment in appeal viz. Transfer C.M.A.No.647 of 1988 is set aside and that of the trial court is affirmed. The money in deposit in Application (C.M.P.No.16879 of 1992) is directed to be remitted to the executing court for appropriation in satisfaction of the decree and consequential orders accordingly. No costs. The application under O.21, Rule 90 of the Code is allowed with costs throughout, hearing fee Rs.5,000 (Rupees five thousand).

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Swamidurai, J.

A.A.O.No.686 of 1992 11th February, 1994.

Mariastella and others ...Appellants
v.
Rajarajan and another ...Respondents.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973) - Lease of building - Lease deed executed by

firm through managing partner - Petition for eviction against firm ordered - Sons of managing partner - Filing suit for permanent injunction - Restraining landlords from enforcing order of eviction - Allegation that no application for eviction can be maintained against firm in firm name - Maintainability.

One 'JN' the husband of the 1st defendant was the owner of property situated in T.S.Nos.1127 and 1128 within the municipal limits of Mayiladuthurai. One 'JN' took lease of it from 'JN' on 29.11. 1959 for running a service station. He ran the business for 10 years. He then conveyed the superstructure along with the site to one 'TP' who executed a lease in favour of 'JN.' On 25.11.1976 the 4th defendant firm through its managing partner the fifth defendant purchased the business as a going concern. He also executed a lease deed in favour of 'JN'. The lease was to expire on 30.9.1991. 'JN' issued a notice on 3.9.91 to the defendant to vacate the premises after removing the superstructure. He then filed R.C.O.P.No.51 of 1981. The lease deed dated 25.11.1976 had been executed by the 4th defendant firm through the managing partner the 5th defendant and not by the 5th defendant in his personal or individual capacity. This fact was overlooked in the proceedings. Eviction order was passed and it was confirmed in appeal. A revision to the High Court also failed. Defendants 4 and 5 took the matter to the Supreme Court by a special leave petition which was also dismissed. During the pendency of the civil revision petition 'JN' died and defendants 1 to 3 were impleaded as legal representatives. The plaintiffs sons of 5th defendant filed a suit against defendants 1 to 3 for declaring that the order passed by the Rent Controller and confirmed by the Appellate Court and High Court was invalid as eviction proceedings cannot be taken against a firm and also for permanent injunction restraining defendants 1 to 3 from executing the said order of eviction. Interim Injunction was granted by the trial court. In appeal, *Held:* The plaintiffs are the sons of 'RV' who is the managing partner of 'RV' and Sons the first respondent in the R.C.O.P. and 'RV' in his individual capacity was the second respondent in the R.C.O.P. will not bind the sons of 'RV' who are the plaintiffs in the suit. The firm has been properly represented by 'RV' in the rent control proceedings even though it does not disclose the names of the partners. It cannot be said that the firm was not

properly represented by 'RV'. It cannot be contended that 'RV' committed any fraud in getting the order against him in the rent control proceedings. Rather, he has contested the same upto the highest court of this land. In the circumstances, the plaintiffs are not entitled to interim injunction and the petitioners in the R.C.O.P. are permitted to amend the decree by impleading plaintiffs also as respondents. In this view, the order of the lower court is set aside. [Para. 13]

Cases referred to:

M/s. Chhotelal Pyarelal v. Shikharchand, A.I.R. 1984 S.C. 1570: (1984) 4 S.C.C. 343. [Paras. 9, 12]

Doshi M/s. N.S. v. P. Ganesan, (1988) 1 L.W. 433. [Para. 10]

Common Wealth Packing Industries v. S.S. Perumar, Proprietor, Pioneer Engineering Works, (1988) 2 L.W. 62. [Para. 10]

Yousuff Sait and Sons v. A. Shafeed Ahamed, 100 L.W. 278. [Para. 11]

Shah Phoolchand Lalchand v. Parvathi Bai, (1989) 1 S.C.C. 556. [Para. 12]

Appeal against Order of the Court of the Subordinate Judge, Mayiladuthurai, dated 16.4.1992 and made in I.A.No.574 of 1992 in O.S.No.92 of 1992. *S. Adaikalam*, for Appellants.

N. Varadarajan, for Respondents.

The Court made the following

ORDER: Defendants 1 to 3 in O.S.No.92 of 1992 on the file of the learned Subordinate Judge, Mayiladuthurai are the appellants herein. The respondents are the plaintiffs. The suit is for declaration that the order of eviction dated 13.1.1983 made in R.C.O.P.No.51 of 1981 on the file of the learned Rent Controller, Mayiladuthurai (District Munsif) confirmed by the Appellate Authority in R.C.A.No.4 of 1983 and as confirmed by this Court in C.R.P.No.3220 of 1984 is invalid in law, null and void, inexecutable and unenforceable, having been passed without jurisdiction, and for permanent injunction restraining defendants 1 to 3 from enforcing the said order of eviction and interfering in any manner with the peaceful possession and enjoyment of the suit property by plaintiffs.

2. The plaintiffs are the sons of Rajagopala Vandaiyar and they had become divided already by partition of their joint family properties. Later on, they started a partnership business in the name and style of "Rajagopala Vandaiyar and Sons" with the father as managing partner on 5.4.1976.

Later on, Rajarajan, the 1st plaintiff herein expressed a desire to retire from the partnership and the other two partners agreed for reconstitution of the said partnership with the 2nd plaintiff and the 5th defendant alone as partners and a partnership agreement dated 1.3.1978 was entered into and the same continued till 1981 when the rent control proceedings in R.C.O.P.No.51 of 1981 was initiated. During this time, there were other partners in the firm besides Rajagopala Vandaiyar who were interested in the suit property. The suit property is situated in T.S.Nos.1127 and 1128 within the municipal limits of Mayiladuthurai. The total extent is 8,848 sq.ft., in which there are 3 small shops in 200 sq.ft. each and the remaining space being vacant site.

3. One Joseph Nadar, the husband of the 1st defendant was the owner of this property. One Nataraja Iyer took lease of the suit property from the aforesaid Joseph Nadar on 29.11.1959 for the purpose of opening and running a service station for heavy motor vehicles. He had run the lease from 20.5.1959 till the expiry of the lease period of ten years. The said Nataraja Iyer conveyed the superstructures along with site to one Thirunavukkarasu Pillai, who after his purchase, executed a lease in favour of the above said Joseph Nadar for a period of five years and he was running the service station thereafter till it was purchased by the fourth defendant herein.

4. The fourth defendant through its managing partner the 5th defendant, purchased the said business as a going concern on 25.11.1976 for a sum of Rs.40,000 and has been running the service station by making additional improvements. The fourth defendant has also executed the lease deed in favour of the above said Joseph Nadar for a period of 5 years and has been conducting business ever since 1.10.1976. The lease period granted to the 4th defendant was to expire on 30.9.1991 and before then, Joseph Nadar issued a notice calling on 3.9.1991 upon the latter to vacate the premises after removing the superstructure as he wanted to have the premises for demolition and reconstruction. Then, Joseph Nadar filed R.C.O.P.No.51 of 1981 against defendants 4 and 5 and obtained an order of eviction dated 13.1.1983. The said eviction order was passed after contest. Defendants 4 and 5 filed R.C.A.No.4 of 1983 against the order of eviction before the Appellate Authority and the same was dismissed and defendants 4 and 5 filed

C.R.P.No.3220 of 1984 in this court and the same was dismissed here also. Further defendants 4 and 5 took the matter to the Apex Court by a Special Leave Petition which was also dismissed. It is stated in the Plaint that an *ex parte* order was passed granting six months time to vacate with an opinion to the defendants to take steps against it if they felt aggrieved.

5. During the pendency of the civil revision petition in this Court, Joseph Nadar died and defendants 1 to 3 were impleaded as legal representatives and as such, they are lessors of the suit property entitled to proceed R.C.O.P.No.51 of 1981 and execute the eviction order. The purported lease deed dated 25.11.1976 has been admittedly executed by the 4th defendant firm through the managing partner, the 5th defendant as in the sale deed and not by Rajagopal Vandaiyar in his personal or individual capacity. This fact has been overlooked as inadvertent mistake in the earlier proceedings mainly the R.C.O.P. R.C.A. and C.R.P. and the same vitiated the orders passed in the above said proceedings. The firm has not been included in the definition of a "tenant" in the Rent Control Act and hence, the lessor could not resort to the said Act to evict the firm since there is no provision in the said Act similar to that of O.30 of the Code of Civil Procedure and so, the Rent Controller cannot have also any jurisdiction as against Rajagopala Vandaiyar, the 5th defendant in herein who figured as second respondent in the R.C.O.P., as he was not a lessee and had not executed the lease deed in his individual capacity and so, he can at best be deemed only to be a permissive occupier or a licensee only as against whom a suit alone would lie and not R.C.O.P.

6. The lessor has wilfully resorted to proceed under the Rent Control Act in order to avoid the filing of a suit also to deprive the plaintiffs of an opportunity to seek relief under the Madras City Tenants' Protection Act and the carelessness and negligence on the part of the 5th defendant in not raising proper legal defences to non suit the petitioners in the R.C.O.P. which resulted in an illegal and unenforceable order. The order of eviction dated 13.1.1983 cannot operate as against these plaintiffs who are not co-nominee parties to the said proceedings and it cannot be enforced against them especially when the second plaintiff has become a sole tenant. The partnership business was carried on by the second plaintiff and the 5th

defendant alone as partners as per the partnership agreement dated 1.3.1978 and 1.4.1978 till 31.3.1988, when by mutual consent the 5th defendant also retired and the second plaintiff alone became solely entitled to the entire assets and liabilities of the partnership firm. Defendants 1 to 3 are fully aware of the change in the original partnership and the fact that Rajagopala Vandaiyar and Sons solely belongs to the second plaintiffs.

7. The plaintiffs filed I.A.No.574 of 1992 for an interim injunction restraining defendants 1 to 3 from in any way executing the order and decree made in R.C.O.P.No.51 of 1981 on the file of the learned Rent Controller, Mayiladuthurai till the disposal of the suit. The first respondent/1st defendant filed a counter-affidavit stating as follows: The first respondent's husband Joseph Nadar filed R.C.O.P.No.51 of 1981 against respondents/ defendants 4 and 5 and defendants 4 and 5 filed R.C.A.No.4 of 1983 against the eviction order and it was dismissed. The 4th defendant was taking part in the earlier proceedings between 1981 and 1991 and the 4th defendant was one of the partners in the firm. The 4th defendant was the managing partner in the firm. The 4th defendant did not inform the court in the previous proceedings that the partnership was changed even otherwise, representation was made by defendants 4 and 5 in the earlier proceedings that the partnership was changed from 1.3.1978. The first respondent/ first defendant knew about the proceedings. Even in the application for impleading, the legal representatives of Joseph Nadar, the first defendant did not inform the court about the new partnership or the change of firm from 1.3.1978, whereas he has mentioned the court that he was one of the partners of the firm. The defendant does not admit the change of partnership from 1.3.1978. The partnership dated 1.3.1978 is a concocted document for the purpose of the suit. The plaintiffs are bound by an estoppel as they have taken part in the previous proceedings. The contention that the provision under the Tamil Nadu Buildings (Lease and Rent Control) Act will not apply to the facts of the case is not tenable.

8. In the course of enquiry, the plaintiffs filed Exs.A-1 to A-4 and the defendant has filed Ex.B-1. There is no oral evidence in this case. The lower court, after considering the rival contention of the parties, allowed the application by granting interim injunction as prayed for aggrieved with

that order, the present C.M.A. has been filed.

9. Learned counsel for the appellants contended that the provision under O.30, Rule 1 of the Code of Civil Procedure will not apply to the proceedings under the Madras Buildings (Lease and Rent Control) Act and so, the order obtained by the respondents in the R.C.O.P. is not null and void. In support of his contention, he relied upon a judgment in *M/s.Chhotelal Pyarelal v. Shikharchand*, A.I.R. 1984 S.C. 1570: (1984)4 S.C.C. 343. The Supreme Court observed as follows:

"Since the Code of Civil Procedure does not apply to proceedings under the Rent Control Order, no application for eviction can be maintained against a firm in the firm name. The firm is merely a compendious name for the partners constituting it and it is only by virtue of the provisions of O.30 of the C.P.C. that a firm can sue and be sued in its own name without the partners being impleaded as nominee. Therefore, the firm could not be sued in the firm name by the landlord insofar as the application for eviction under the Rent Control Order was concerned. However, this cannot by itself result in the dismissal of the application, filed for eviction of the firm by the landlord as it would be merely a case of misdescription. Such misdescription can be corrected at any stage of the proceedings as there can be no doubt that the partners of the firm were before the court though in a wrong name. Consequently, the landlord was allowed to amend the cause title of the original eviction application and to add the names of the partners of the firm along with the firm".

10. The judgment has been later on followed in *Doshi M/s. N.S. v. P.Ganesan*, (1988)1 L.W. 433. This Court (Sivasubramaniam, J.) has held as follows:

"It has been held in *M/s.Chhotelal Pyarelal v. Shikharchand*, A.I.R. 1984 S.C. 1570: (1984)4 S.C.C. 343. that the firm is "merely a compendious name for the partners constituting it and it is only by virtue of the provisions of O.30 of the C.P.C., that firm can sue and be sued in its own name without the partners being impleaded *eo nomine*". It is therefore, clear that the firm could not be sued in the firm name insofar as the application for eviction under the H.R.C. order was concerned". But it would be merely a case of misdescription of the respondents to

the application and this misdescription can be correct at any stage of the proceedings. There can be no doubt that the partners of the firm are before the court though in a wrong name. The eviction petitions cannot be dismissed solely on the ground that the partners have not been impleaded".

In another decision in *Commonwealth Packing Industries v. S.S.Perumar, Proprietor, Pioneer Engineering Works*, (1988)2 L.W. 62, this Court (Srinivasan, J.), held as follows:

"This revision was preferred by the tenant of the building, which comprised of a firm, against an order of the Rent Control Appellate Authority impleading the partners of the firm as parties to the proceedings and holding that there was no necessity to grant any liberty to the partner to file any additional counter to the original petition.

Held: In this case, there is no plea that the firm omitted to raise any important defence originally when the counter was filed in the eviction proceedings. Justice has been done by the court below by merely impleading partner as parties *eo nomine* and at the same time refusing to grant them any permission to file an additional counter in the original proceedings. The observations of the Supreme Court *M/s.Chhotelal Pyarelal v. Shikharchand*, A.I.R. 1984 S.C. 1570: (1984)4 S.C.C. 343, put the matter beyond doubt that even if the cause title refers only to the firm by its name and the names of partners are parties to the proceedings and they are before court though in a wrong name. This does not mean that the partners become parties to the proceedings for the first time only when they are described *eo nomine*. Hence, there is no question of granting any liberty to the partners to file any additional counter to the original petition".

11. In *Yousuff Sait and Sons v. A.Shafteed Ahamed*, 100 L.W. 278, this Court had an occasion to consider similar question. Therein, it is observed as follows:

"In *M/s.Chhotelal Pyarelal v. Shikharchand*, A.I.R. 1984 S.C. 1570: (1984)4 S.C.C. 343, it has been held that since the Civil Procedure Code did not apply to proceedings under the said Rent Control Order, no application for eviction could be maintained against a firm in the firm name because the firm was merely a

compendious name for the partners constituting it and it was only by virtue of the provisions of O.30 of the Civil Procedure Code, that a firm can sue and be sued in its own name without the partners being impleaded *eo nomine*. The Supreme Court also observed in the same case that where a party is described by his firm name, it would be merely a case of misdescription of the party which could be corrected at any stage of the proceedings. In view of this decision, the landlord filed a petition C.M.P.No.12331 of 1986 for joining the partners of the tenant firm as respondents 2 to 5. This petition is allowed. However, what was necessary to be done for proper adjudication was that the partners were required to be joined as respondents to the main petition for eviction”.

12. *Per contra*, learned counsel for the respondents relied upon a judgment in *Shah Phoolchand Lalchand v. Parvathi Bai*, (1989)1 S.C.C. 556. The Supreme Court observed as follows:

“Mr.Nayar, learned counsel for the appellants has urged before us that the impugned judgment must be set aside as the eviction petition is filed against the appellants firm and on other partnership firm, M/s.Adeshwar Class Mart without joining any of the partners of the said firms as respondents or serving them as partners and hence, the eviction petition was not maintainable at all. He placed strong reliance on the decision of this Court in *M/s.Chhotelal Pyarelal v. Shikharchand*, A.I.R. 1984 S.C. 1570: (1984)4 S.C.C. 343. In that case an eviction petition was filed by the respondent/ landlord against the appellant-a partnership firm under Clause 13(3)((vi) and (vii) of the Central Provinces and Berar Letting of Houses and Rent Control Order, 1949. The appellant raised a preliminary objection that the application against the partnership firm was not maintainable without joining its partners as respondents. It was held by this Court that it is only by virtue of the provision of O.30 of the Code of Civil Procedure, 1908, that a firm can sue and be sued in its own name without the partners being impleaded. It was pointed out by Mr.Nayar that the Code of Civil Procedure was not applicable to the proceedings under the said Rent Act either and hence, the ratio laid down in the aforesaid decision was directly applicable to

the case before us. In our view, it is open to Mr.Nayar to raise this contention at this stage at all. This contention is not one which would have been fatal to the eviction petition. Had this contention been raised in the trial court or even in the first appellant court, it would have been open to the respondent to amend the eviction petition and join the partners as respondents. In the aforesaid decision in *M/s.Chhotelal Pyarelal case*, A.I.R. 1984 S.C. 1570: (1984)4 S.C.C. 343, relied upon by Mr.Nayar the objection to the maintainability of the petition was raised at the earliest stage and was wrongly negatived by the trial court. In fact, this Court observed as follows: (1984)4 S.C.C. 343 at 345 para.2

“But, we agree with the Division Bench of the High Court that this cannot by itself result in the dismissal of the application. It would be merely a case of misdescription of the respondents to the application and this misdescription can be corrected at any stage of the proceedings. There can be no doubt that the partners of the firm are before the court though in a wrong name”.

In the case before us, no such objection has been raised at all till the stage of special leave and it is surely not open to the appellants to raise such an objection at a very late stage and thereby delay matters for a number of years. This contention must, therefore, be negatived”.

13. The plaintiffs are the sons of Rajagopala Vandaiyar who is the managing partner of Rajagopala Vandaiyar and Sons, the first respondent in the R.C.O.P. and Rajagopala Vandaiyar in his individual capacity was the second respondent in the R.C.O.P. Therefore, it cannot be said that the order passed in the R.C.O.P., will not bind the sons of Rajagopala Vandaiyar who are the plaintiffs in the suit. The firm has been properly represented by Rajagopala Vandaiyar in the rent control proceedings even though it does not disclose the names of the partners. It cannot be said that the firm was not properly represented by Rajagopala Vandaiyar. It cannot be contended that Rajagopala Vandaiyar committed any fraud in getting the order against him in the rent control proceedings. Rather he has contested the same upto the highest court of this land. In the circumstances, the plaintiffs are not entitled to interim

injunction and the petitioners in the R.C.O.P. are permitted to amend the decree by impleading plaintiffs also as respondents and in this view, the order of the lower court is set aside. The civil miscellaneous appeal is allowed. No costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *Raju and AR.Lakshmanan, JJ.*

W.P.No.7194 of 1991 *16th December, 1993.*

R.Thangavelu *...Petitioner*
v.
The Government of India represented by its Secretary, Ministry of Home Affairs (Freedom Fighter Division), New Delhi and another
...Respondents.

Constitution of India (1950), Art.226 - Central Scheme of Pension to freedom fighters and their families - Claims of such pensioners rejected on ground of delay, non-production of documentary evidence - Want of proof, etc. - Use of printed or cyclostyled forms for rejection - Non-grant of opportunity to the applicant before rejection - Held arbitrary and deprecated - Principles for consideration of such claims - Laid down.

In the opinion of the court, rejection of claim of genuine and real freedom fighters on the ground of delay or belated approach is not warranted. It may be in some cases, no necessity to avail of the benefit of the scheme and on account of change in

economic circumstances, he may approach the concerned Government for the grant of pension. In such cases, to reject the claim on the ground of delay would be defeating the very purpose and object of the scheme. Hence, if the claim is genuine and true, the same should not be rejected on the ground of delay or that the applicant approached the Government belatedly. As regards the production of documentary evidence like imprisonment/ detention certificate from the concerned jail authorities/District Magistrates or the State Governments, the Government should adopt a pragmatic approach instead of being hyper-technical. Once a certificate from a co-prisoner or INA Board is produced and if the Government is satisfied about the genuineness of the same, it will not be necessary to insist on jail records/ court records or Government records. Whenever rejection is made on the ground of want of proof, it is necessary for the Government to give opportunity to the concerned applicant to produce the necessary proof before rejection of the claim summarily. It is also in keeping with the principles of natural justice and fairness in action. Issuance of orders on printed/cyclostyled forms disclose non-application of mind. The Government have to apply their mind to all the circumstances and consider the claim of a freedom fighter in the light of the scheme framed by the Government. Therefore, the rejection of the claims should not be mechanical and the decision of the Government should indicate the mind of the Government. Whenever the Government feels that the materials produced are insufficient or some clarifications are needed, the Government should give an opportunity to the applicant under the scheme to produce the required materials. Similarly, if the claim is rejected on the basis of remarks/views/ recommendations obtained without affording an opportunity to the concerned applicant under the scheme to show cause against such rejection, the same would not be in order. Therefore, in such cases, it is obligatory on the part of the Government to apprise the applicants about the adverse remarks, recommendations, etc. and give them an opportunity to offer their views or explanations as such materials etc. It is necessary for the Government to give opportunity before taking a final decision on the question of cancellation of pension already granted. In the absence of jail records, the certificate issued by a co-prisoner should

be accepted. Once, either the State Government or the Central Government grants pension to a particular freedom fighter, he must automatically get the other pension either under the State or under the Central Government scheme without any further enquiry on the claimant's satisfying the guidelines and the Government cannot reject the claim summarily that he is not a freedom fighter at all. Further, when once Tamara Patra has been granted recognising the valuable services rendered during freedom struggle, the concerned Government should automatically grant pension without any further enquiry or proof.

[Paras. 37 to 43]

Cases referred to:

R.Narayanan v. Union of India, A.I.R. 1990 S.C. 746. [Paras. 24, 30]

G.Gabriel v. The Government of India, 1991 Writ L.R. 49. [Paras. 26, 30]

Surja v. Union of India, (1991) 4 S.C.C. 366. [Para. 28]

Venkatachalapathy Vengaiiah v. The State of Tamil Nadu, (1992) 2 M.L.J. 336. [Para. 29]

Tamil Nadu Freedom Fighters Association v. Government of Tamil Nadu, 1993 Writ L.R. 694. [Para. 31]

Sukh Lal v. Union of India, A.I.R. 1993 H.P. 65. [Para. 34]

Buvisheshamuthu v. State of Tamil Nadu, (1992) 2 L.W. 255. [Para. 35]

Mukund Lal Bhandari v. Union of India, A.I.R. 1993 S.C. 2127. [Para. 53]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records relating to the order of the 1st respondent passed in his order No.29/205/77 FF INA, dated 29.7.1986 and quash the same and direct the 1st respondent to pay Swadantrata Sainik Samman Pension from 12.8.1981.

N.Paul Vasantha Kumar, for Petitioner.

R.Santhanam, Additional Central Government Standing Counsel, for Respondent No.1.

P.Sadasivam, Special Government Pleader and assisted by *V.P.Sengottuvel*, Government Advocate, for Respondent No.2.

The Order of the Court was made by

AR.Lakshmanan, J.: The writ petitioner herein and others who claim to be the freedom fighters,

were refused the grant of pension under the Swadantrata Sainik Samman Pension Scheme by the Ministry of Home Affairs, Union of India. Hence, they approached this Court for issue of a writ of *certiorarified mandamus* to quash the order of the Government of India and for *mandamus* to pay the pension from a particular date. Some writ petitions were filed for the relief of *mandamus* directing the Government to consider their names and consequently to pay the pension from a particular date.

2. Some impugned orders were passed on merits. Some without assigning any reason. A few orders were issued on the printed/cyclostyled form by filling up the necessary particulars in the blanks left out for that purpose. Some orders were passed on the ground that the imprisonment undergone has not been established. Quite few orders have been passed rejecting the applications on the question of belatedness. Some claims were rejected on the question that the same can be considered only if official documentary evidence such as jail certificate, warrant of arrest, etc., are produced. It is seen from some orders that the certificate does not indicate the period of conviction and the actual date of release. A few cases were rejected on the ground that the co-prisoner's certificate was not filed or even the filed certificates are not genuine. Some cases have been rejected by the Government of India on the ground that the Government of Tamil Nadu has not recommended the case of the persons concerned for payment of pension. Some cases were rejected on the ground that the detention period was less than six months.

3. Since all the writ petitions raise a common question, all the writ petitions have been heard together to settle the general principles of law in controversy like this.

4. Learned counsel appearing for the petitioners stated that the rejection of pension on various grounds mentioned above is not correct and that the impugned orders were passed without giving opportunity to the petitioners before rejection of their claim. Hence, the principle of natural justice has been violated. It is also stated that the scheme itself says that the certificate from co-prisoner is sufficient and hence the rejection on the ground that sufficient documentary evidence such as jail records were not produced in respect of the date of imprisonment, date of release, etc., is against

the very scheme itself. According to them, the State Government's recommendation is not necessary, which is also not contemplated and the rejection of pensionary benefits on that ground by the Central Government is totally irregular. It is their contention that the rejection on the question of delay is also not warranted in view of some of the pronouncements. They have also brought to our notice one or two instances where the certificate issued by a national leader was not accepted and acted upon the claim was rejected. In another instance, the claim of a notable personality, a senior lawyer and a former Member of Parliament for pension was rejected without considering his status and the genuineness of his claim.

5. Mr.R.Santhanam, learned Additional Central Government Standing Counsel, has placed the relevant filed before us for our perusal. He would submit that the main criteria of six months imprisonment for grant of pension under the scheme is still retained and that many claims were rejected since the certificates produced by the persons concerned were not genuine. In all the rejected cases, the parties have furnished bogus certificates.

6. The principles governing the Central Scheme of Pension can be summarised as follows: A Central Scheme for the grant of pension to freedom fighters and their families from Central Revenues was introduced by the Government of India during the Silver Jubilee year of Independence. The scheme commenced from 15.8.1972 and provided for the grant of pension to living freedom fighters are not alive, the members of their families/martyrs are entitled to avail the benefit of the scheme. The minimum quantum of pension sanctioned to a freedom fighter was Rs.200 per month and in case of families, it varied from Rs.100 to Rs.200 in accordance with the size and number of eligible dependants in the family. Till 31.7.1980, the freedom fighters pension was admissible only to those who were in need of financial assistance on account of their meagre annual gross income. Thus, an annual income ceiling of Rs.5,000 was enforced for eligibility to pension. From 1.8.1980, the benefit of the pension scheme has been extended to all freedom fighters as a token of Samman to them. The Government not only removed the income ceiling from 1.8.1980 but also raised the quantum of monthly pension from Rs.200 to Rs.300 in case of living freedom fighters and Rs.100 to

Rs.200 to the widow of the late freedom fighter with additional Rs.50 per month each for unmarried daughter upto a maximum limit of Rs.300 per month.

7. According to the scheme, a person who had suffered a minimum imprisonment of six months in the main land jails before independence is eligible for the grant of Samman pension. However, ex-INA personnel will be eligible for pension if the imprisonment/detention suffered by them was outside India. The minimum period of actual imprisonment for eligibility of pension has been reduced to three months in case of women and SC/ST freedom fighters from 1.8.1980. Detention under the orders of the competent authority is considered as imprisonment and the period of normal remission upto one month will be treated as part of actual imprisonment.

8. Under the Scheme, the following class of persons are also eligible for the sanction of pension:

- (a) A person who remained underground for more than six months, provided he was a proclaimed offender or an award of arrest/head was announced, or detention order was issued but not served on him.
- (b) A person interned in his home or externed from his district provided such period was six months or more.
- (c) Likewise, a person whose property was confiscated or attached and sold due to participation in freedom struggle.
- (d) A person who became permanently incapacitated during firing or lathi charge; and
- (e) A person who lost his job, Central or State Government.

A martyr has also been defined as a person who died or was killed in action or in detention or was awarded capital punishment while participating in a National Movement for emancipation of India. It will also include an Ex. INA or Ex. Military person who died fighting the British.

9. The Scheme provides the procedure to apply for the Samman Pension in the prescribed application was originally fixed as 31.3.1974 and as a result of liberalisation of pension scheme from 1.8.1980, a period of one year, i.e. 1.8.1980 to 31.7.1981 was given for filing applications for Samman pension. The persons who could not apply earlier due to any reason or who were not sanctioned pension even though they were eligible, may also submit their applications before

31.7.1981. This date was again extended and the receipt of applications though was stopped after 31.3.1982, was again extended upto 30.6.1985, in respect of certain categories of cases.

10. A person who applies for Samman pension should furnish the documents indicated below:

(a) imprisonment/detention certificate from the concerned jail authorities/District Magistrates or the State Government.

(b) In case of non-availability of such certificate, co-prisoner's certificate from a sitting member of Parliament or Member of Legislative Assembly or from an Ex-Member of Parliament or an Ex-Member of Legislative Assembly specifying the jail period, as provided in Annexure I in the application form.

(c) A person who remained underground shall produce documentary evidence by way of court's order or Government order proclaiming him as an offender announcing award on his head or for his arrest or ordered his detention.

(d) In the absence of the above, a certificate from a veteran freedom fighter who had undergone imprisonment for five years or more. However, the veteran freedom fighter should be hailing from the same district.

(e) To prove the case of internment or externment, the applicants can produce an order of internment or externment or any other corroboratory documentary evidence and certificates from prominent freedom fighters who had themselves undergone imprisonment for five years or more if the official records are not available. The veteran freedom fighters are expected to give the certificates in respect of underground suffering, internment/externment and the applicant should belong to the same administrative unit before the reorganisation of States and their area of operation must be the same.

(f) Orders of confiscation and sale of property and orders of dismissal or removal from service are equated to the loss of property, job, etc.

11. The Scheme was liberalised in the year 1980 to the following effect. Certificate of co-prisoners of two renowned freedom fighters who have undergone imprisonment for not less than one year in connection with the freedom struggle and are recipient of Tamara Patra and pension from the Central Government is sufficient. Those certifi-

cates need not be from a Member of Parliament or a Member of Legislative Assembly or an Ex-Member of Parliament or an Ex-Member of Legislative Assembly. The person of INA, who had been sent to New Guinea and adjoining islands and had undergone extreme hardships of starvation, though they did not suffer any formal imprisonment, have also been admitted to the pension scheme from 1.8.1990. The last date for submission of applications for the pension scheme was extended upto 30.6.1985 and the petitioners herein applied for the sanction of pension enclosing co-prisoner's certificates as prescribed under the scheme.

12. The procedure for issue of sanction order is provided in the scheme itself. The claim of the applicants will be scrutinised in the State Government, Union Territory Administration in consultation with the State Advisory Committee on the basis of copy of application submitted to them. After receipt of State verification and entitlement to pension report, the claim of the applicant is scrutinised and if found eligible, pension is granted. Duration for receiving pension is also mentioned in the Scheme. Except in the case of unmarried daughters, the pension is for the lifetime of the recipient. In the case of unmarried daughters, pension ceases immediately after they are married or become otherwise independent. In the case of death of a pensioner, his/her heirs, though otherwise eligible for pension will not automatically succeed to such a pension. They shall have to apply afresh with proof of the pensioner and their applications will be considered in terms of the pension scheme. These are the salient features of the Swadantara Sainik Samman Pension Scheme, 1980, formerly known as Freedom Fighters' Pension Scheme, 1972.

13. Pension Scheme to freedom fighters provided by the Government of Tamil Nadu are as under. The Government of Tamil Nadu from time to time commencing from 28.9.1966 passed various Government orders conferring that benefit on the freedom fighters. The first Government Order in the series is G.O.No.2064, Public (General C) Department, dated 28.9.1966. The freedom fighters who were sentenced to imprisonment or were held under detention for not less than three months or who were killed in action or were awarded capital punishment or died due to firing or lathi charge on account of participation in the National Movement, the last campaign of which was

launched between 1942 and 1944, will be eligible for the benefit conferred on them under the said scheme. The Government, accordingly, have sanctioned the benefits under the said scheme with effect from 1.10.1966 for the grant of pension to freedom fighters. Rules relating to the scheme were also framed. Under the said scheme, the pension payable to each freedom fighter shall be Rs.50 per mensem. The Rules framed by the Government were called as Madras Freedom Fighters Pension Rules, which came into force from 1.10.1966. An 'eligible freedom fighters' has been defined to say, 'a freedom fighter whose income does not exceed Rs.100 per mensem'. A pension of Rs.50 per mensem shall also be payable to destitute freedom fighter. A pension as stated in Rule 5, shall also be payable to the wife/husband and minor children of a freedom fighter who is now dead, provided that the total grant payable in cases where there are two or more applicants claiming relationship with a deceased freedom fighter shall be limited to Rs.50 per mensem. The pension shall be payable till death if the grantee is the freedom fighter himself or herself, and if the grantee is the wife of a freedom fighter, the pension shall be payable till her death or re-marriage. If the grantee, however, is a minor son, or a minor daughter, the pension shall cease on the son's attaining the age of 18 or on the daughter's marriage or attaining the age of 21, whichever is earlier. The application for pension must be accompanied by certificates obtained from the Jail Department as proof for having been sentenced to imprisonment or held under detention for not less than three months. The procedure in regard to the consideration of application after the receipt of the same from a freedom fighter for the grant of pension has also been considered by the Government and necessary rules have been framed for that purpose.

14. The next Government Order in the series is dated 10.11.1966 issued by the Government of Tamil Nadu in Memo.No.FFP/6841/66-3, Public (General C) Department. A reference to the letter dated 25.5.1961 received from the Government of India has also been made and the suggestion made by the Government of India has also been incorporated therein. As per the suggestion, an Ex. INA personnel who participated in the INA movement will also be treated on par with freedom fighters who participated in the national movement, which

led to the country's independence. The suggestion given by the Union of India was accepted by the Government of Tamil Nadu and the Government of Tamil Nadu, therefore, decided to extend certain concessions to the Ex. INA personnel in the State of Tamil Nadu treating them on par with the freedom fighters, such as preference in the matter of employment in Government service, educational concessions, etc. subject to the following conditions:

(i) An Ex. INA person who applies for the grant of pension shall produce a certificate from the All India INA enquiry and relief committee, New Delhi, to the effect that he served in the INA.

(ii) An Ex. INA person who satisfied the other conditions laid down in the G.O. Third read above except those relating to imprisonment, detention, etc. and production of certificate from the Jail Department will be considered eligible for the grant of pension.

15. The next Government Order in the series in G.O.Ms.No.951, Public (Political Pension I) Department, dated 18.5.1981. In the said Government Order the Government have reduced the minimum period of imprisonment/detention/remand specified in Rule 4(i) of the Tamil Nadu Freedom Fighters Pension Rules, 1966, from one month to three weeks. In G.O.Ms.No.817, Public (Political Pension II) Department, dated 1.4.1980, the Government have already reduced the minimum period of imprisonment/detention/remand from three months to one month, which was further reduced to three weeks in this Government Order. Accordingly, necessary amendments to the Rules were also directed to be made.

16. It appears that the freedom fighters have been frequently representing to the Government that the period of last campaign mentioned under the State scheme, may be extended from 1944 to 1947 as in the case of Central Government Freedom Fighters Pension Scheme, taking into account the various incidents such as the nation-wide hartal and agitations conducted against the arrest of Jawaharlal Nehru on the Kashmir Border in 1946, the hartal at Harvey Mills, Madurai agitation by the Army and Air Force men against the Britishers as also in support of the Bombay Naval Mutiny 1946, etc. It appears, they represented to Government that pension may also be sanctioned to those freedom fighters who went underground or

whose property was confiscated or attached or who were dismissed or removed from service on account of their participation in the freedom movement. The Government, in consultation with the State Advisory Committee constituted for screening Central Freedom Fighters Pension applications, directed that the following categories of freedom fighters also be made eligible for grant of pension under the Tamil Nadu Freedom Fighters' Pension Rules:

(i) Freedom fighters who suffered imprisonment or were kept in remand/detention for not less than three weeks or who were killed in action or were awarded capital punishment or have become permanently incapacitated due to firing or lathi charge on account of their participation in the various incidents including those who were imprisoned in what was known as the Madurai conspiracy case, that took place in connection with the Freedom Movements during 1945-47.

(ii) Members of Army and Air Force who agitated against the Britishers as also in support of Bombay Naval Mutiny, 1946, and suffered imprisonment for three weeks or lost their jobs.

(iii) Freedom Fighters who went underground or whose property was confiscated/attached or who were removed/dismissed from service on account of their participation in the Freedom Movement, provided that such claims are supported by Court or other official documentary evidence.

The above direction was given by the Government of Tamil Nadu in G.O.Ms.No.910, Public (Political Pension II) Department, dated 7.6.1982. It is also mentioned in that Government Order that the same will take effect from 15.5.1982. The persons whose annual income does not exceed Rs.5,000 may apply to the Chief Secretary, Public (Political Pension) Department, Madras-600009, with a copy to the Collector of the District concerns. The last date fixed for receipt of applications is 15.9.1982.

17. The next Government order in the series is G.O.Ms.No.581, Public (Political Pension II) Department, dated 11.4.1983, by which the Government directed that the existing annual income ceiling of Rs.5,000 prescribed under Rule 4(ii) of the Tamil Nadu Freedom Fighters Pension Rules, 1966, as amended, be removed *in toto* with effect

from 11.3.1983, from which date the pension shall be payable to those who become eligible on account of this concession. The freedom fighters including ex.INA personnel and their dependants, who become eligible consequent on the removal of the income ceiling, were also permitted to apply direct to the Chief Secretary, Public (Political Pension) Department, Madras-600009, in the form already prescribed under the Rules, with a copy marked to the Collector of the District concerned on or before 15.7.1983.

18. G.O.Ms.No.740, Public (Political Pension II) Department; dated 4.5.1988 refers to the several representations received from the widows of freedom fighters who have migrated to other States in India to live with their children consequent on the demise of their husbands, that they are unable to receive the pension in view of the provisions, *viz.* that if the pensioner resides outside Tamil Nadu for more than three calendar months he/she is not eligible for the receipt of pension. The Government of Tamil Nadu considered their request and have decided to amend Rule 8 of the Tamil Nadu Freedom Fighters' Pension Rules providing for the payment of pension to persons who have migrated to other States also subject to certain conditions. Certain conditions which have been imposed for eligibility to receive pension under this category have also been more fully explained in paragraphs 2 to 4 of the said Government Order.

19. The next Government Order in the series is G.O.Ms.No.2015, Public (Political Pension II) Department, dated 16.11.1988, wherein the Government of Tamil Nadu have directed that the applications for the grant of State Freedom Fighters' Pension may be received from persons who are aged 70 and above as on 15.10.1988 and who produce co-prisoner's certificate from any one of the persons mentioned in the annexure to that Government Order. Considering the claim of several aged and genuine freedom fighters who apply for the grant of State Freedom Fighters Pension in spite of the fact that the last date was over, the Government have decided to extend the last date and to accept the co-prisoner's certificate of ex-Legislatures and freedom fighters, whose integrity and morality is beyond question, atleast to persons who are sufficiently aged, as a gesture in connection with the 40th Anniversary of India's Independence. The names of persons who are

authorised to issue the co-prisoner's certificate have been mentioned in the annexure to that Government Order, which is reproduced hereunder:

- (i) Dr.M.P.Sivagnanam, Madras District - Former Chairman, Legislative Council, State Advisory Committee.
- (ii) Thiru O.V.Alagesan, Chengalpattu District - Former Union Minister.
- (iii) Thiru C.Subramaniam, Madras District - Former Union Minister for Finance.
- (iv) Thiru R.Govindaswami, Madras District - Retired Joint Director of Rural Development.
- (v) Thiru S.Lakshmikanthan Bharathi, Madras District - retired Assistant Development Commissioner, Rural Development Department.
- (vi) Thiru M.S.Selvarajan, Thirunelveli District, Ex.M.L.A.
- (vii) Thiru Thookumedai Rajagopal, Madras District (belongs to Tirunelveli formerly) Journalist.
- (viii) Thiru M.S.Viswanathan *alias* Savi, Madras District, Editor, Savi.
- (ix) Thiru K.Subramaniam, Madras (belongs to Coimbatore) Freedom Fighter, former Member, State Advisory Committee.
- (x) Thiru L.Krishnaswami Bharathi, Madras (belongs to Tirunelveli) freedom fighter.
- (xi) Tmt.K.Manjubashini, Madras District - Social Worker.
- (xii) Thiru A.N.Sivaraman, Madras District - formerly Editor, Dinamani.
- (xiii) Thiru C.Rajavelu, Madras District- Retired Director of Translations, formerly Member, State Advisory Committee.
- (xiv) Thiru T.R.Ramamirtha Thondaman, Thanjavur District - Ex.M.L.A.
- (xv) Thiru T.S.Avinasilingam Chettiar, Coimbatore District - Ex.Education Minister of Tamil Nadu.

20. In partial modification of the orders issued in G.O.Ms.No.2015, Public (Political Pension II) Department, dated 16.11.1988, the Government directed in Letter No.53920/90-1, Public (Political Pension II) Department, dated 28.8.1990, that the applications for the grant of State Freedom Fighters Pension may be received for consideration from persons who are aged 70 and above as on 15.10.1988 and who produce co-prisoner's certificate from any two of the persons mentioned in the

annexure G.O.Ms.No.2015, Public (Political Pension II) Department, dated 16.11.1988. However, it is mentioned that the general certificates issued by these certifiers will not be taken as valid evidence for fresh sanction of State Freedom Fighters Pension.

21. The last Government Order in the series is G.O.Ms.No.877, Public (Political Pension II) Department, dated 9.8.1992 wherein the Government, in recognition of the sacrifices made and the patriotic fervour of those who fought for the freedom of the nation have announced among others, many concessions. Accordingly, the Government directed that the quantum of pension now granted to the freedom fighter pensioners including ex.INA personnel and their dependants be increased as follows with effect from 1.8.1992.

- (i) The pension of Rs.400 per mensem (Rupees four hundred only) now being drawn by the State Freedom Fighters alone be raised to Rs.1,000 (Rupees one thousand only) per month.
- (ii) The Freedom Fighters who are drawing Swadantrata Sainik Samman Pension of Rs.750 per month (Rupees seven hundred and fifty only) from the Central Revenue will be paid a sum of Rs.250 (Rupees two hundred and fifty only) from the State funds.
- (iii) The State pension of Rs.100 per mensem (Rupees one hundred only) now being drawn by Freedom Fighters who are in receipt of Central Freedom Fighters' Pension of Rs.750 be raised to Rs.250 per mensem (Rupees two hundred and fifty only).
- (iv) The pension of Rs.400 per mensem (Rupees four hundred only) now being drawn by the wives/husbands/ minor children of deceased State Freedom Fighters Pensioners be raised to Rs.500 per mensem (Rupees five hundred only)

22. Consequently on the enhancement of Central Pension from Rs.750 to Rs.1,000 per mensem with effect from 12.8.1992, the Director of Treasuries and Accounts has requested the Government of Tamil Nadu to issue clarification as to whether the category of pensioners mentioned in the said communication may be paid Rs.250 per mensem. It is a matter of record that Mr.R.Dalavai, President, Tamil Nadu Freedom Fighters' Association has filed W.P.No.19240 of 1992 on behalf of the Tamil Nadu Freedom Fighters' Association,

Madras, in this Court seeking directions among others on the following issues: To order payment of pension from State funds to those drawing Central Pension alone, Rs.250 per mensem from 1.8.1992 onwards and to those drawing State pension of Rs.100 per mensem, additional pension of Rs.150 per mensem from 1.8.1992 onwards. On 12.4.1993, one of us (D.Raju, J.), while deciding W.P.No.19240 of 1992, issued a writ of *mandamus* directing the Government to disburse the amount due to the categories of pensioners visualised in para.3(ii) and (iii) of G.O.Ms.No.877, Public (Political Pension II) Department, dated 9.8.1992 in terms of the said order. The Government have therefore, decided to implement the directions of this Court with effect from 1.8.1992 and issued the following directions:

- (1) All the freedom fighters drawing only Central Pension i.e. Swatantrata Sainik Samman Pension, be paid a sum of Rs.250 (Rupees two hundred and fifty only) from the State Funds, and
- (2) All the freedom fighters drawing both State Freedom Fighters Pension and Swatantrata Sainik Samman Pension, be paid an enhanced State Pension of Rs.250 (Rupees two hundred and fifty only) instead of Rs.100 (Rupees one hundred only)

23. Many judicial pronouncements of the Apex Court, our High Court and also of the other High Courts were cited by the learned counsel for the petitioners in support of their case. The decision reported in *D.S.Nakara v. Union of India*, A.I.R. 1983 S.C. 130; (1983) 1 L.L.J. 204, has been cited to show that the sanction of pension creates a vested right on the person and it is neither a bounty nor a matter of grace depending on the sweet will of the employer. The Supreme Court in the above decision held that the pension is not an ex-gratia payment but it is a payment for the past service rendered and that it is a social welfare measure rendering socio-economic justice to those who in the heyday of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in the lurch. The Supreme Court while answering the question as to whether the petitioners before the Supreme Court are entitled to receive the superannuation or retiring pension under the Central Civil Services (Pension) Rules, 1972, forming a class as a whole, has made the above observation.

24. Next, we will refer to the judgment of the Supreme Court reported in *R.Narayanan v. Union of India*, A.I.R. 1990 S.C. 746. The appellant before the Supreme Court, who is a freedom fighter was refused the grant of pension under the Swadantrata Sainik Samman Scheme by the Ministry of Home Affairs and hence, he approached the Madras High Court for the issue of a writ of *certiorarified mandamus*. That writ petition was dismissed by a learned single Judge. The writ appeal filed against the said order was also dismissed by a Division Bench of our High Court. Hence, he presented an appeal before the Supreme Court. Initially, the appellant sought the grant of pension on the ground that as a freedom fighter, he was kept in police custody for 15 days and after conviction, he underwent imprisonment for three and a half months and under the scheme, a freedom fighter must have undergone a minimum period of imprisonment for six months for his participation in the freedom struggle in order to get pension under that head. So, the appellant was refused pension. Thereupon, he applied for grant of pension on another ground viz. that he had suffered permanent loss of vision in his left eye due to brutal lathi charge by the police against freedom fighters. The appellant's claim of permanent loss of vision in the left eye was duly certified by Government doctors. The District Collector, after making a detailed enquiry, certified the claim of the appellant as a *bona fide* one and recommended his case for grant of pension. Accepting the report of the Collector, the Deputy Secretary to Government of Tamil Nadu addressed the 2nd respondent. In spite of the medical certificates issued by the Government doctors and the recommendations of the District Collector and the State Government for grant of pension under the Swadantrata Sainik Samman Scheme, the Ministry of Home Affairs declined to grant pension to the appellant on the ground that it is not possible to grant pension in terms of permanent incapacitation. It was in such circumstances, the appellant moved the Madras High Court for the relief mentioned above but failed to meet with success. Counsel for the appellant before the Supreme Court urged that the respondents are not justified in construing Clause 3(e) of para.4 of the Pension Scheme to mean that the incapacity besides being permanent, should also be of a total nature and as such, the denial of pension to the appellant under Clause

(e) is unjust. Under the scheme, a freedom fighter is eligible to receive pension if he satisfies one of the following clauses, viz:

(a) Had suffered a minimum imprisonment of six months (three months in the case of women)

(b) Had remained underground for more than six months provided.

(i) he was a proclaimed offender; or

(ii) he was a person on whom an award for arrest had been announced; or

(iii) he was a person against whom detention order had been issued but not served.

(c) Had been interned in his home or externed from his district provided the period of internment/externment was for six months or more.

(d) Had his property been confiscated or attached and sold due to participation in the freedom struggle.

(e) Had become permanently incapacitated during firing or lathi charge.

(f) Had lost his job (Central or State Government) and been thus deprived of his means of livelihood on account of his participation in the National Movement.

25. In the above case, the Supreme Court while construing clause 3(e) of the scheme, which only refers to permanent incapacitation due to fire or lathi charge and not to total incapacitation, hold that the appellant will be eligible for the pension for the reasons stated in the order. The Supreme Court held that the interpretation given by the respondents before the Supreme Court to Clause 3(e) of para.4 of the scheme cannot be sustained because the words used in the clause are 'permanently incapacitated' and not 'permanently totally incapacitated'. While rejecting the contention of the respondents, the Supreme Court has observed that the stand of the respondents would be opposed to the plain meaning of the words and result in addition of more conditions to the clause what the framers of the scheme have laid down. In paragraphs 10 and 11, the Supreme Court has observed as follows:

"The scheme has been formulated with a view to acknowledge the services rendered to the country by patriotic citizens during the the freedom movement and who had suffered at the hands of the British Rulers in one way or the other and to compensate them in some measure for their sacrifices for the sake of the country. The respondents are therefore not

justified in refusing to grant pension to the appellant under Clause (e) of the Scheme on the ground that the permanent incapacitation suffered by him does not satisfy the requirements of Clause (e) of the Scheme. The learned single Judge and the Division Bench of the High Court, while rejecting the writ petition and writ appeal filed by the appellant, have only taken into account the period of imprisonment undergone by the appellant and the said period falling short of the prescribed minimum of six months and have not considered the appellant's claim for pension under clause (e).

11. Before concluding the judgment we may also refer to two other objections that have been raised by the respondents in their counter affidavits. The first one is that the appellant's claim for pension under clause (e) is an afterthought since he had put forth such a claim only after his claim for pension on the ground of incarceration had been rejected. The second objection put forth is that: 'the petitioner has not been able to produce any documentary evidence from office records of the relevant period in support of his claim of loss of vision in one eye'. There is neither justice nor grace in the respondent's putting forth such objections. No one can really expect official records to have been preserved for a period of 40 years to prove the treatment given to the petitioner for the injuries sustained by him during the freedom struggle. Hence, the objection relating to non-production of official records of the relevant period by the appellant to prove the sustenance of injury by him deserves outright rejection as well as outright condemnation. As regards the criticism that the appellant's claim under clause (e) appears to be an afterthought, this too merits instantaneous rejection. As we have already pointed out, the Government doctors who have examined the appellant have found his claim of permanent incapacitation of the left eye to be true and the State Government authorities have, after due enquiry, accepted the *bona fides* of the appellant's claim and recommended his case for grant of pension under the S.S.S. Scheme by the respondents. Consequently, merely because the appellant, perhaps out of ignorance of the several heads under which the claim of pension

could be made, had applied initially for grant of pension under clause (a), it can never be said that the present claim of the appellant is an afterthought".

26. We would next prefer to refer the judgment of our learned brother J.Kanakaraj, J. in W.P.No.7606 of 1990 dated 25.3.1991 reported in *C.Gabriel v. The Government of India*, (1991)1 L.W. 279: 1991 Writ L.R. 49. The said writ petition was filed challenging the order of the Central Government rejecting the claim preferred by the petitioner for grant of freedom fighter's pension on the ground that the petitioner had not produced any acceptable documentary evidence in support of his claim and that the State Government had not recommended his case for the grant of pension and praying for a direction to the 1st respondent to pay freedom fighter's pension from 27.5.1979 with 18% interest. On a consideration of the materials, on record J.Kanakaraj, J. has held as follows:

"The rules for the grant of Central Government pension and the mode of proof are set out in the Freedom Fighters Pension Scheme, 1972. In a subsequent Press Note this requirement was slightly modified. I am at a loss to know why the respondents are denying the claim of the petitioner on purely technical grounds. Schemes are introduced by the Government not for the purpose of adding feathers to their cap. Such claims are not for the sake of adding to the record of achievement. These schemes are essential to benefit the freedom fighters who had suffered for the cause of freedom. To say that the petitioner has no statutory right and the grant of pension is gratuitous is most uncharitable. The proof of the pudding is in its eating. This is certainly not a case where the respondents can take an inflexible attitude and try to interpret the rules too strictly. The razor edge interpretation is certainly not called for in a case like this. It is really surprising to see as to why the State of Tamil Nadu should be so anxious to prevent the petitioner from getting the pension.

Neither the counter-affidavits nor the replies of the respondents give any specific reason as to why the certificates produced by petitioner should not be accepted. The certifiers are admittedly persons who are receiving pension from the Central Government. Necessity of the certifiers being a sitting legislator or a past

legislator has been dispensed with under the present guidelines. I am, therefore, clearly satisfied that the petitioner is entitled for the grant of pension by the Central Government under the Swadantara Sainik Samman Pension Scheme, 1980.

I have already pointed out that in cases like this one must look into the overall aspect of the claim and not dissect the requirements of law in such a manner so as to deny the claim of the petitioner. It is not as if the petitioner is not a freedom fighter at all. What he lacks according to the respondents is proof as required by the guidelines prescribed by the Government. I, therefore, set aside the order of the 1st respondent dated 6.11.1989 and direct the 1st respondent to grant pension under the abovesaid scheme from the date of the petitioner's second application, viz. from 27.5.1979. However, I am not inclined to grant interest at the rate of 18% as claimed in the writ petition. The payment of arrears to some extent will alleviate the sufferings of the petitioner. The arrears of pension shall be paid by the 1st respondent on or before 30.4.1991. Further, pension will be paid every month in accordance with the scheme".

27. It is seen from the above ruling that the scheme which have been formulated by the Government are essentially to benefit the freedom fighters who had suffered for the cause of freedom and that to say that the petitioner has no statutory right and the grant of pension is gratuitous was most uncharitable. According to the learned Judge, this is certainly not a case where the respondents can take an inflexible attitude and try to interpret the rules too strictly and, if we may use the expression of the learned Judge, "razor edge interpretation is certainly not called for in a case like this".

28. The next decision cited by the learned counsel for the petitioners is reported in *Surja v. Union of India*, (1991)4 S.C.C. 366. The learned Chief Justice speaking for the Bench and while considering the claim of the persons who had participated in Arya Samaj Movement and suffered minimum six months imprisonment, has observed that if the petitioners suffered the minimum sentence of six months imprisonment on account of their participation in the Arya Samaj Movement, they would be entitled to pension under the Swatantrata Sainik Samman Pension Scheme. While deciding

the issue, the Supreme Court has observed as follows:

"It had already been indicated that each of the petitioners had been convicted and was ordered to suffer imprisonment of more than six months. The petitioner's assertion that they did not claim remission has not been doubted or disputed. In the facts of the case it would be appropriate to hold that each of the petitioners satisfied the condition for earning the benefit of pension and the fact that while undergoing sentence which was for a period beyond six months remission had been granted and they were let off earlier would not take away their right to earn pension. Learned Attorney General appearing for the respondents has accepted this construction of the entitlement clause".

29. Next, we refer to the judgment of our learned Brother K.S.Bakthavatsalam, J., in the decision reported in *R.S.Venkatachalapathy Vengaiiah v. The State of Tamil Nadu*, (1992) 2 M.L.J. 336. The petitioner before the learned Judge was a freedom fighter. He was granted pension for having suffered imprisonment for the freedom struggle from 8.5.1941 to 23.6.1941. He got the pension on the basis of a letter issued by a co-prisoner, who is also an Ex.M.L.A. He was receiving the pension from 1980. On 23.6.1989, a notice to show cause why it should not be cancelled was issued to him. He gave a reply. However, the pension was cancelled on the ground that his name was not found in the Convict Register kept in the Central Jail, Madurai, for the period 8.5.1941 to 26.3.1941. He filed the writ petition challenging that order. The learned Judge, while considering the claim of the petitioner, observed as follows:

"When the petitioner made sincere efforts in the years 1977 and 1980, he was informed that the records were not available and as such he has a right to produce a co-prisoner's certificate in the year 1980 to prove his case. There is no sanctity in stating that his name should be found in the convict register to prove his case. The rules themselves say that it is enough to produce a co-prisoner's certificate obtained either from Ex.M.L.A. or from Ex.M.P."

The learned Judge has further observed as follows:

"The stand of the respondent is wholly inconsistent. When the petitioner made sincere and

serious efforts in the year 1977 and 1980, he was informed that the records were not available and as such he has a right to produce a co-prisoner's certificate in the year 1980 to prove his case. I do not see any sanctity in stating that his name should be found in the convict register to prove his case. The rules themselves say that it is enough to produce a co-prisoner's certificate obtained either from Ex.M.L.A. or from Ex.M.P. In such circumstances, I fail to see how the petitioner's freedom fighter's pension can be cancelled by the 2nd respondent on the ground that he has not produced any records to prove that he was imprisoned for freedom movement stating when an officer inspected the Madurai Jail, he found that the petitioner's name has not been found in the convict register. It is also seen that when the petitioner applied in the years 1977 and 1980 he was informed that no records were available as white ants had eaten away the records. In view of that, the impugned order is quashed, the writ petition will stand allowed and the respondents are directed to pay the petitioner the freedom fighters' pension and also the entire arrears. However, there will be no order as to costs."

30. A writ appeal was filed by one freedom fighter by name K.Murugaiyan against the order of Mr.Srinivasan, J. in *W.P.No.10014 of 1992 dated 10.8.1992*. The writ appeal was heard and decided by K.Venkataswami, J. and K.Swamidurai, J. on 22.6.1993. The learned Judges of the Division Bench after considering the relevant materials placed before them, have allowed the writ appeal after following the Supreme Court verdict in *R.Narayanan v. Union of India*, A.I.R. 1990 S.C. 746. The learned Judges have also referred to the judgment of J.Kanakaraj, J., reported in *C.Gabriel v. The Government of India*, (1991) 1 L.W. 279; 1991 Writ L.R. 49, and affirmed the said decision and held that the only reason given by the respondents for rejecting the claim of the appellant for pension under the scheme cannot be sustained.

31. The decision rendered by one of us (D.Raju, J.) and reported in *Tamil Nadu Freedom Fighters Association v. Government of Tamil Nadu*, 1993 Writ L.R. 694 was also cited before us. The said writ petition was filed to order payment of pension from the State Funds to those drawing Central Pension alone at Rs.250 per mensem from 1.8.1992

onwards and to those drawing State Pension of Rs.100 per mensem, a further sum of Rs.150 per mensem as additional pension from 1.8.1992 onwards and to order payment of medical allowance of Rs.15 per mensem to those freedom fighters who have been paid from 1.8.1990 onwards. After referring to the salient features of G.O.Ms.No.1825, Transport Department, dated 6.4.1990, G.O.Ms.No.3658, Transport Department, dated 21.1.1992 and G.O.Ms.No.877, Public (Political Pension II) Department, dated 9.8.1992, this Court has observed as follows:

"A careful analysis and consideration of the relevant Government Order apparently and indisputably issued in exercise of the powers under Art.162 of the Constitution of India would justify the claim made for the petitioner in respect of free travel facilities. The Government Orders dated 6.4.1990 directed the grant of free travel facility in the buses of the State Transport undertakings to the freedom fighters and those who participated in the border and/or language stir and who are recipients of pension or financial assistance as such from the State Government. Such persons could also be the recipients of Central pension as well, but initially the privilege was not available to those who were the recipients of Central pension alone. In G.O.Ms.No.3658, Transport Department, dated 21.8.1992 on the event of the Golden Jubilee Celebration of 'Quit India Movement' of 1942 the respondent/Government have ordered that the freedom fighters domiciled in Tamil Nadu and drawing Central pension alone also be given free bus passes to travel in the buses of all State Transport undertakings including the Thiruvalluvar Transport Corporation Limited. While that be so, in the communications which are in the form of letters dated 12.3.1991, 2.11.1992 and 18.11.1992 of the Transport Department, the petitioner as well as the concerned Transport Corporation have been informed that the dependants of the pensioners who are recipients of the pension are not eligible for free travel concession and it is only the freedom fighters themselves who actually participated in the freedom struggle and language stir alone could avail of such a concession. The question that falls for consideration is as to whether the stand taken for the respondent that it is the

freedom fighters who actually participated in the freedom struggle alone would be entitled to the concession of the other recipients of the freedom fighters' pension as well would equally be entitled to such concession. The very object of the concession is to ameliorate the conditions of those who fought for the country and in recognition of the sacrifice made and the patriotic fervour of those who fought for the freedom of the nation and the payment of the pension to the dependants of such freedom fighters even after the lifetime of the freedom fighters itself appears to be in recognition of such meritorious and selfless service rendered for the nation at a crucial phase of the country's freedom struggle. The file relating to the Government Order dated 9.8.1992 contains a note about the proposals which emanated from the office of the Chief Minister (page 7 of the file) and the said note would give an impression in unmistakable terms that the object was to benefit the recipients of the pension in question with the issue of free bus passes in the various State Transport undertakings. As a matter of fact, the very same note is available at page 1 of the file relating to the Government Order dated 21.8.1992. Having regard to the laudable object of the scheme as well as the purpose behind the same, I am of the view that interests of justice would require to have a construction of the Government Order made in such a manner as to give effect to the said object in substance and spirit. After all, the claim is not in respect of the dependants even during the lifetime of the freedom fighters as such. If the scheme for the grant of pension postulates the grant of pensionary benefits to such of those dependants who deserve pension even after the lifetime of the freedom fighter who actually participated in the freedom struggle, the same reasoning would help and come to the rescue of the dependants not only to receive the pensionary benefits, but also avail of the free travel concession in the buses of the State Transport Undertakings. In view of the above, I am of the view that the stand taken in the letters dated 12.3.1991, 2.11.1992 and 18.11.1992, run counter to the object, substance and spirit of the Government orders dated 6.4.1990 and 21.8.1992 and consequently it becomes necessary to declare that the free

bus travel concession in the buses of the State Transport Undertakings in terms of the existing Government orders would enure to all the recipients of the pension irrespective of the fact whether such recipient was himself the person who actually participated in the freedom struggle or in receipt of the pension as the eligible dependant of such participant."

32. Insofar as the second claim made relating to the payment of the amounts due in terms of G.O.Ms.No.877, Public (Political Pension II) Department, dated 9.8.1992, was concerned, it was held that there shall be a declaration that the categories of pensioners covered by paragraph 3(ii) and (iii) shall be entitled to the benefits of the State Government Order and to the disbursement of the amounts as per its terms notwithstanding the subsequent increases said to have been effected by the Central Government of the rate of pension payable from their funds.

33. Insofar as the medical allowance was concerned, the learned Judge has observed that there was no dispute whatsoever to the entitlement of the pensioners and the category of pensioners to the said allowance. Thus, this Court has allowed the writ petition for *mandamus* by declaring and directing the respondents to allow the benefit of free travel concession in the buses of the State Transport undertakings to all the recipients of the pension, Central or State or both. It is further directed that the disbursement of the amount due to the categories of pensioners visualised in para 3(ii) and (iii) of G.O.Ms.No.877, Public (Political Pension II), dated 9.8.1991 in terms of the said order, be made. This Court also directed the issuance of appropriate directions to the various disbursing authorities to effectively disburse the medical allowance as and when claimed within a time-bound limit.

34. The next decision cited by the learned counsel for the petitioners is reported in *Sukh Lal v. Union of India*, A.I.R. 1993 H.P. 65, wherein a Division Bench while considering the claim for freedom fighters pension, upheld the contention of the petitioner. In the said case, the claim was rejected on 28.1.1984 on the ground that there was paucity of proof in support of the claim preferred by the petitioner. It is seen from the said order that the State of Himachal Pradesh had recommended the case of the petitioner on the basis of the recommendation made by the Deputy Commissioner of

the area concerned. The Division Bench observed that there was no reason to disbelieve the version of the petitioner that his externment was on the basis of oral orders since the Bench has accepted this kind of plea in many other similar cases as well. Further, the petitioner has produced certificates of Kahna Ram, a freedom fighter and Tamar Pattar Holder and receiver of this pension from the Centre. In view of the contents of the certificate, the Bench held that it was not possible to accept the contention of the counsel for the respondents that the freedom fighter could not know about the externment of the petitioner when he himself was in jail. In paragraphs 6 and 7, the Bench has observed as follows:

"In view of the satisfactory proof of the nature recorded above, there is no manner of doubt that the petitioner was a freedom fighter involved in the movements for the freedom of this country and annexation of princely State of Bilaspur in the dominion of India. His participation is distinctly and squarely established and it would be highly unreasonable to demand any further proof from a freedom fighter like the petitioner to substantiate his case for pension.

Lastly, Shri Dharam Chand Chaudhary contended that the case is thoroughly belated. The case of the petitioner had been rejected in 1984 and he did not pursue the matter vigorously. We are not inclined to accept this contention. The petitioner had been moving from pillar to post to seek pension for his participation in the movement. However, he had been facing rough weather at every place. He had not left the efforts and then now ultimately he has approached this Court by way of this petition. We do not see that there is any culpable delay in pursuing and initiating the present case before this Court. The plea based on delay is, therefore, rejected".

35. The last decision in the series is that of K.S.Bakthavatsalam, J. reported in *Buvishamuthu v. State of Tamil Nadu*, (1992) 2 L.W. 255. The learned Judge, while considering the grant of pension by the Government of the Center and the State has held as follows:

"A careful reading of the impugned order clearly shows that there is absolutely no application of mind on the part of the respondent herein. The Freedom Fighters' Pension Scheme has been

formulated with a view to acknowledge the services rendered by freedom fighters to the country and to compensate the services of the freedom fighters who have suffered in one way or other for the sake of the country. The respondent herein has not understood the spirit behind this petition scheme and has rejected the application on a ground which is totally erroneous.

In this case, the Central Government has considered the claim of the petitioner for freedom fighters' pension and sanctioned the same. In such a situation, the court does not see how the State Government can say that he is not a freedom fighter and he is not entitled to get freedom fighters' pension under the State Scheme. If a stand is taken by the respondent that the petitioner herein is not a freedom fighter. It is highly irrational and arbitrary. Surely, there cannot be a different yardstick to identify the beneficiary, i.e. the freedom fighter in this case. Once a person is accepted as a freedom fighter by the Central Government, the State Government cannot take a different stand and say that he is not a freedom fighter. A person cannot be treated in a different way for the purpose of getting benefits under the State Scheme, when he has been already claimed as a freedom fighter under the Central Government Scheme".

36. It is clear from the scheme referred to above that the Government wanted to grant pension to the freedom fighters who had suffered imprisonment for liberating our nation from the yokes of foreign rule. The object of the scheme appears to be that the persons who suffered imprisonment during the freedom struggle should not be left to suffer in their old age. This pension is granted to freedom fighters and that class of persons are slowly becoming extinct. Having regard to the above laudable object and purpose behind the scheme it is but necessary that the appropriate Government should adopt a liberal approach in the matter of grant of pension to the real freedom fighters. When we say this, it does not mean that when a person makes a claim under the scheme for pension, he should be granted the same as a matter of course. No doubt, the applicant should satisfy the conditions stipulated in the scheme.

37. *Rejection on the ground of delay:* In our opinion, rejection of claim of genuine and real freedom fighters on the ground of delay or belated approach is not warranted. It may be in some cases, the freedom fighters would have felt no necessity to avail of the benefit of the scheme and on account of change in economic circumstances, he may approach the concerned Government for the grant of pension. In such cases, to reject the claim on the ground of delay would be defeating the very purpose and object of the scheme. Hence, in our opinion if the claim is genuine and true, the same should not be rejected on the ground of delay or that the applicant approached the Government belatedly.

38. *Production of documentary evidence:* As regards the production of documentary evidence like imprisonment/detention certificate from the concerned Jail authorities/District Magistrates/ or the State Governments, the Government should adopt a pragmatic approach instead of being hyper technical. It is common knowledge that on account of long passage of time, the freedom fighters may not be in a position to produce the aforesaid certificates. In fact, the Government is also aware of the difficulties in insisting on the production of such certificates. It is, therefore, the scheme itself provided for acceptance of co-prisoner's certificate and INA Board's recommendation. Therefore, once a certificate from a co-prisoner or INA Board is produced and if the Government is satisfied about the genuineness of the same, it will not be necessary to insist on jail records/Court records or Government records. In such cases, it will be but fair that the concerned Government should act on the co-prisoner's certificate if it is genuine and found to be reliable.

39. *Rejection of claim for want of proof:* In some of the cases, the claims have been rejected summarily on the ground of want of proof. Whenever rejection is made on the ground of want of proof, it is necessary for the Government to give opportunity to the concerned applicant to produce the necessary proof before rejecting the claim summarily. It is also in keeping with the principles of natural justice and fairness in action.

40. *Issuance of orders on printed forms/cyclostyled forms:* Issuance of orders on printed/cyclostyled forms disclose non-application of mind. The Government have to apply their mind to all the circumstances and consider the claim of a freedom

fighter in the light of the Schemes framed by the Government. Therefore, the rejection of the claims should not be mechanical and the decision of the Government should indicate the mind of the Government.

41. Opportunity before rejection: Whenever the Government feels that the materials produced are insufficient or some clarifications are needed, the Government should give an opportunity to the applicant under the Scheme to produce the required materials. Similarly, if the claim is rejected on the basis of remarks/views/recommendations obtained without affording an opportunity to the concerned applicant under the scheme to show cause against such rejection, the same would not be in order. Therefore, in such cases, it is obligatory on the part of the Government to apprise the applicants about the adverse remarks, recommendations, etc. and give them an opportunity to offer their views or explanations on such materials, etc.

42. There are instances where the pension already granted has been cancelled without giving any opportunity to the persons concerned. It is necessary for the Government to give opportunity in such matters before taking a final decision on the question of cancellation of pension already granted. In the absence of jail records, the certificate issued by a co-prisoner should be accepted.

43. Materials to be taken into account before passing orders: The Government should also take into account the book published by them under the title "who is who" containing the names of freedom fighters and act upon the same. Equally, when once the Central Government grants the pension after satisfying themselves about the fulfilment of the conditions stipulated in the scheme, it will not be fair for the State Government to reject the claim of the State pension. Similarly, if the State Government grants pension to a freedom fighter, the same should be accepted by the Central Government and no further proof should be insisted upon. In other words, once either the State Government or the Central Government grants pension to a particular freedom fighter, he must automatically get the other pension either under the State or under the Central Government Scheme without any further enquiry, on the claimants satisfying the guidelines, and the Government cannot reject the claim summarily that he is not a freedom fighter at all. Further, when once Tamara

Patra has been granted recognising the valuable services rendered during freedom struggle, the concerned Government should automatically grant pension without any further enquiry or proof.

44. We are laying down the above principles by keeping in mind the various legal principles contained in the decisions of the Apex Court and this Court and also the object and purpose of the laudable schemes and the further fact that a genuine and true freedom fighter should not be harassed.

45. In the light of the above principles, we will now take up W.P.No.7194 of 1991. That writ petition was filed to quash the order of the 1st respondent/ Government of India represented by its Secretary, Ministry of Home Affairs (Freedom Fighter Division), New Delhi in Order No.29/205/77-FF INA, dated 29.7.1986 and consequently direct the 1st respondent to pay Swatantrata Sainik Samman Pension to the petitioner from 12.8.1981.

46. According to the petitioner, during his younger age, he was inspired by the Freedom Movement and joined in the Indian National Army headed by Nethaji Subash Chandra Bose as Sippoy in the year 1943 at Kitta, Malaysia and was in service in ENA for about two years. His Regimental Number was 37813 and he served in the Unit 1/2, Gorilla Regiment. He was given training at Sinnamban and at Jogurbag. During the war, the petitioner was arrested with thousand soldiers and all his belongings were confiscated by the British Army. He was kept at Central Jail for nine months, viz. from September, 1945 to June, 1946. He was in Malaysia for six years. It is further stated by the petitioner that considering his participation in the Freedom Movement, the 2nd respondent/ Government of Tamil Nadu by order FFPO.3237/69, dated 11.8.1969 granted freedom fighters pension and he is still receiving the same. He was given a certificate by the All India INA Enquiry and Relief Committee headed by the then Prime Minister Shri Jawaharlal Nehru by Certificates No.8/2/882/IMP, dated 1.10.1953. It is further stated that since he is a freedom fighter he was given Tamara Patra by the Government of Tamil Nadu in the year 1973 during the Silver Jubilee Celebrations of the Independence Day. The petitioner is also given a free pass to travel in Transport Corporation buses of Tamil Nadu Government as he is a freedom fighter.

47. The petitioner would submit that he applied to the 1st respondent on 20.7.1977 through the 2nd respondent for Central Freedom Fighter Pension. The same was rejected by the 2nd respondent by Letter No.57639/77-1, dated 26.8.1977 stating that the application was received after the last date fixed. The 1st respondent has also rejected the application stating that the same was received after the last date fixed for receipt of application, i.e. 31.3.1974. The petitioner submitted an application on 10.4.1978 to condone the delay but the same was rejected by the 1st respondent by order dated 27.3.1979. Again, the petitioner applied for pension to the 1st respondent on 12.5.1981. By letter dated 26.7.1982, he was directed to produce the original Movement Order, if any, and also the Civilian Proforma duly filled and signed by the petitioner. The petitioner furnished the above along with a certificate issued by the All India INA and Relief Committee and also the 2nd respondent's Freedom Fighters' Pension Sanction Order. The petitioner's application for pension was duly recommended and forwarded by the 2nd respondent in Letter No.56490/81-A, Public (PPI) dated 5.9.1981. The original INA certificate was also submitted to the 1st respondent to prove his participation and imprisonment in the Freedom Movement. In spite of the same, the 1st respondent by the impugned order, rejected the petitioner's claim for Freedom Fighters' Pension stating that the documentary evidence sent by the petitioner along with the application does not prove his claim for suffering. The said order is challenged in the present writ petition.

48. The 1st respondent filed its counter-affidavit through the Under Secretary, Ministry of Home Affairs. It is stated in paragraph 5 that the co-prisoner's certificate along with the proforma from one K.Manickam, who certified the co-prisonership with the petitioner in the Rangoon Central Jail from May, 1945 to February, 1946 is a bogus one and as such the said Manickam is not entitled to certify that the petitioner was in Rangoon Central Jail upto February, 1946 and the claim of the petitioner for pension was rejected keeping in view the bogus nature of the co-prisonership certificate. It is also stated that the petitioner has not furnished satisfactory proof with regard to his jail sufferings. According to the petitioner, he was detained in the Rangoon Central Jail from May, 1945 to February, 1946 and he was repatriated to

India in March, 1946 whereas the certificate of Manickam, who is a recipient of Central Pension, furnishes the information in his own case that he was sent back to India in 1945 itself. Thus, it is contended by the 1st respondent that this discrepancy in the co-prisoner's certificate issued by Manickam proves that the said certificate is a bogus one and as such he is not entitled to certify that the petitioner was in Rangoon Central Jail upto February, 1946. It is also stated that the receipt of State Pension by the petitioner and the Tamara Patra given by the State of Tamil Nadu are not relevant factors for considering the petitioner's claim for Central Pension and that the conditions for the grant of State Pension are totally different from that of the Central Pension, and as per the Central Scheme, pension is granted to those who had suffered imprisonment for not less than six months during freedom struggle. In the above circumstances, it is contended that the petitioner is not entitled to any relief and the order passed by the 1st respondent rejecting the claim of the petitioner is just and legal.

49. We have heard Mr.N.Paul Vasantha Kumar for the petitioner, Mr.R.Santhanam, Additional Central Government Standing Counsel for the 1st respondent and Mr.P.Sathasivam, Special Government Pleader for the 2nd respondent.

50. We are unable to accept the contention of the 1st respondent for the following reasons. The impugned order of the 1st respondent is in printed form. It only states that the documentary evidence sent by the petitioner along with his application does not prove his claim or suffering. We have held that the Government should adopt a pragmatic approach instead of being hyper technical in directing the applications to produce the documentary evidence like imprisonment/ detention certificate from the Jail authorities or from the State Government. It is common knowledge that on account of the long passage of time, the freedom fighters may not be in a position to produce the certificate asked for. The scheme itself provides for acceptance of co-prisoner's certificate and INA Board's recommendation. Therefore, when once a certificate from a co-prisoner of INA Board is produced, it will not be necessary, in our view, to insist on jail records/court records/ Government records. In such cases, it will be but fair that the concerned Government should act on the co-prisoner's certificate..

51. In the instant case, though it is contended in the counter-affidavit that there is some discrepancy in the co-prisoner's certificate, the Government of India ought not to have rejected the claim of the petitioner for Central Pension summarily without giving an opportunity to the petitioner. Whenever rejection is made on the ground of want of proof or otherwise, it is necessary for the Government to give opportunity to the concerned applicant to produce the necessary proof or explain the discrepancy found out by the Central Government. It is also in keeping with the principles of natural justice and fairness in action. In the instant case, the impugned order was issued on a printed form, which discloses the non-application of mind. The 1st respondent is expected to apply its mind to all the circumstances and consider the claim of a freedom fighter in the light of the scheme framed by the Government. In our opinion, the rejection of the claim of the petitioner is mechanical. The Government have not indicated their mind to the petitioner. The Government should have given an opportunity to the petitioner to explain the discrepancy pointed out by the 1st respondent. But the claim of the petitioner in the instant case was rejected without affording an opportunity to the petitioner and hence, in our view, the same would not be in order. It is obligatory on the part of the Government to apprise the applicants concerned about the adverse remarks, etc., and give an opportunity to offer their views or explanations on such materials. We have already held that the Government also should take into account the book published by them under the title 'who is who' containing the names of freedom fighters, and act upon the same. Equally, when once the Central Government grants pension after satisfying themselves about the fulfilment of the conditions stipulated in the scheme, it will not be fair for the State Government to reject the claim for State Pension. Similarly, if the State Government grants pension to a freedom fighter, the same should be accepted by the Central Government and no further proof should be insisted upon.

52. In the instant case, as already observed, the petitioner is receiving the State Pension. He was also awarded Tamara Patra Certificate. Further, the All India INA Enquiry and Relief Committee headed by the then Prime Minister Shri Jawaharlal Nehru has given a certificate to the petitioner.

This apart, the petitioner's application for Central Pension was duly recommended and forwarded by the Government of Tamil Nadu. The original INA certificate was also submitted by the petitioner to the 1st respondent to prove his participation and imprisonment during the freedom movement. As stated already, the State Government has also granted pension to the petitioner as a freedom fighter. He must, in our view, automatically get the order of pension under the Central Scheme without any further enquiry on the claimant satisfying the guidelines and the 1st respondent cannot summarily reject that he is not a freedom fighter at all. We have laid down the above principles by keeping in mind the various legal pronouncements of the Supreme Court and also our High Court, and also the object and purposes of the scheme. Since the impugned order has been passed in a mechanical manner, the same is liable to be quashed.

53. For the foregoing reasons, the writ petition is allowed, the impugned order is quashed, and consequently, we direct the 1st respondent to consider the claim of the petitioner for Central Pension under the Scheme in the light of the observations and guidelines evolved by us in paragraphs supra for grant of such pension to persons like the petitioner. The 1st respondent, while passing order, will keep the above principles laid down in this judgment and pass appropriate orders accordingly within three months from the date of receipt of a copy of the order either from this Court or on production of the same by the petitioner whichever is earlier and after affording sufficient opportunity to the petitioner as indicated above. The petitioners concerned, whose claims are ultimately sustained in the light of the above orders, shall be entitled to be paid with effect from the date of the respective applications or with effect from the respective dates indicated in the individual orders, concerned, in the light of the decision of the Supreme Court reported in *Mukund Lal Bhandari v. Union of India*, A.I.R. 1993 S.C. 2127. There will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Raju, J.

C.R.P.No.1955 of 1993 18th November, 1993.

Habeeb Rahman ...Petitioner
v.
Meenakshi and others ...Respondents.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.11 (4) and Civil Procedure Code (V of 1908), Sec.151 - Landlord obtaining order of eviction of tenant - Execution petition filed - Court ordering that execution cannot be pursued - Review application against that order allowed - Tenant filing appeal - Appeal pending - Landlord filing petition under Sec.11(4) of Act - Petition ordered - Order, if sustainable.

The respondents filed a petition R.C.O.P.No.209 of 1982 and obtained an order of eviction against the petitioner. Since the petitioner did not vacate the premises, E.P.No.114 of 1985 was filed. In an earlier execution petition on a joint endorsement of both the parties, petitioner had been granted time till 31.12.1984 for delivery possession. The petitioner filed E.A.No.1319 of 1985 to set aside the execution proceedings. He claimed that a mere tenancy came into being and that execution could not be pursued. His claim was upheld. The respondent filed an application to review the order and it was allowed. The petitioner then filed C.M.A. No.30 of 1988. When it was pending, the respondents took out application under Sec.11(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act and Sec.151 of the Civil Procedure Code directing the petitioner to deposit the arrears of rent of Rs.8,300 and on failure to do so to stop all proceedings and pass an order of eviction. The petitioner was directed to deposit the arrears of rent. He filed a revision petition contending that the provisions of Sec.11(4) of the Act had no application to the case and that it could not be sustained.

Held: The court is of the view that the contentions on behalf of the petitioner could be sustained only partly to the extent that the order under challenge could not be treated as one having been passed in exercise of the powers of the Court below under

Sec.11(4) of the Act. Consequently, the power and authority of the court below to strike of the defence of the petitioner or order for summarily eviction for non-payment of the arrears available under Sec.11(4) of the Act cannot be invoked. At the same time, the order having been passed also invoking and in exercise of the inherent powers of the court under Sec.151, Civil Procedure Code. It is not only tenable, but can be justified as one passed under Sec.151, Civil Procedure Code, the petitioner having obtained the order of stay from that court and continuing under the protection of such orders of stay, to prevent abuse of the indulgence shown by the grant of stay. Except clarifying the petition that the penal consequences that would normally get attached to an order passed under Sec.11(4) of the Act, in cases of default of a direction would not be attracted to the present case, the order and as such could be sustained and upheld as one passed under Sec.151, Civil Procedure Code. In the view of the court, thus construed, the order under challenge really ensures and secures substantial justice to the parties.

[Para. 6]

Cases referred to:

R.Radha v. C.R.Govindarajulu. 91 L.W. 443. [Para. 4]

Gnambal v. Perumal Pillai, (1992) 2 M.L.J. 60. [Para. 5]

Ram Deo v. Umrao Singh, (1980) 1 S.C.C. 59. [Para. 6]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the Principal Subordinate Judge, dated 16.6.1993 and made in I.A.No.1195 of 1993 in C.M.A.No.3 of 1990.

S.R.Sundaram, for Petitioner.

E.Padmanabhan, for Respondents.

The Court made the following

ORDER: The above civil revision petition has been filed under Art.227 of the Constitution of India, against the order dated 16.6.1993 in I.A.No.1195 of 1993 in C.M.A.No.3 of 1993 on the file of the Principal Sub Court, Coimbatore. The respondents in the above revision petition have obtained an order of eviction against the petitioner herein in R.C.O.P.No.209 of 1982 on 10.2.1984. Since the petitioner did not vacate the premises pursuant to the order of eviction, E.P.No.114 of 1985 came to be filed to execute the order of eviction. From the copy of the execution

petition and the orders made available at the time of hearing, it is seen that in an earlier E.P., as per the joint endorsement made, the petitioner was granted time till 31.12.1984 for delivering possession. It is only since the petitioner did not comply with the assurance made in the earlier E.P., the present E.P., came to be filed. In the present E.P., the petitioner appears to have filed E.A.No.1319 of 1985 under Sec.47 read with Sec.151 of the Code of Civil Procedure to set aside the execution proceedings. In the said proceedings, the petitioner herein has admitted that the petitioner was a tenant on a monthly rent of Rs.100 that he was regularly paying the rents and that from 1982 onwards there was a revision of rent by increasing the monthly rent from Rs.100 to Rs.250 and inasmuch as the petitioner was assured in view of the revision and enhancement of the monthly rent that the R.C.O.P. could not be pursued, the petitioner did not take steps to effectively defend the eviction proceedings and that the petitioner has been remitting the revised enhanced rent regularly till 31.3.1985 and that therefore, the respondents have no right to initiate any execution proceedings to execute the order of eviction in question.

2. The respondents herein opposed the said applications and the claim made by the petitioner about the new tenancy coming into force was denied. The court below has chosen to accept the claim of the petitioner that a new tenancy came into existence with a revised and enhanced monthly rent of Rs.250 and that, therefore, the execution cannot be pursued to evict the petitioner pursuant to the order of eviction. This order came to be passed on 1.9.1986. Thereupon, the respondents herein filed E.A.No.1211 of 1986 to review the order and by an order dated 6.4.1987, the review application was allowed. Aggrieved against the order passed on review in E.A.No.1211 of 1986, the petitioner herein filed C.M.A.No.3 of 1990 on the file of the District Court, Coimbatore. This appeal is said to be since transferred to the Principal Sub Court, Coimbatore and entertained as C.M.A.No.3 of 1990.

3. While the said appeal was pending, the respondents herein have taken out an application in I.A.No.1195 of 1993 in C.M.A.No.3 of 1990 invoking the powers of Sec.11(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, as amended by Act 23 of 1973 as well as Sec.151 of the

Code of Civil Procedure, seeking for a direction against the petitioner herein, who was the appellant before the said court, to deposit the arrears of rent of Rs.8,300 into the said court and on failure to do so to stop all further proceedings and pass an order of eviction against the petitioner herein, who was the respondent in the said application in the court below in terms of Sec.11(4) of the Act. The affidavit filed in support of the said application by the respondent disclosed, at paragraph 5, that he was in arrears of rent for 83 months from 1.5.1986 to 31.3.1993 amounting to Rs.8,300 and it is this amount that is sought to be recovered during the pendency of the appeal. It may be noticed at this stage that the respondents have not even claimed the arrears of rent at the so-called revised and enhanced rate, but they have claimed only the admitted and indisputable original rate of rent of Rs.100 per month. The petitioners herein was directed to pay the amount and in spite of the initial time granted and further adjournments and extension of time, the petitioner does not appear to have complied with the directions and at that stage by the impugned order dated 16.6.1993, the court below has stated that as a last chance, time was extended by 15.7.1993 and that no further adjournments will be granted for payment and for filing counter. At that stage, the petitioner has come before this Court.

4. The main and only ground of challenge to the order of the court below is that the provisions of Sec.11(4) of the Act has no application to the case on hand and that the impugned order purported to have been passed in exercise of the powers under the said provision cannot be sustained. The learned counsel for the petitioner, while raising the said point at the time of hearing, placed reliance upon a Division Bench of this Court reported in *R.Radha v. C.R.Govindarajulu*. 91 L.W. 443. That was a case wherein a Division Bench of this Court held that an application under Sec.11(4) of the Act cannot be filed during the pendency of a civil revision petition in the High Court against the order of eviction. It was also clarified that a reading of Sec.11(1) and 11(4) of the Act together will exclude their applicability to all other cases except the cases where an application for eviction is pending under Sec.10 before the Rent Controller and the appeal preferred by tenant under Sec.23 of the Act to the appellate authority is pending. The C.M.A.No.3 of 1990 in the court below was

filed to the petitioner herein under O.43, Rule 1 and Sec.104 of the Code of Civil Procedure and not under Sec.23 of the Rent Control Act. That being the position having regard to the law declared by the Division Bench in the decision referred to supra, there is no scope or right in the respondents to file an application under Sec.11(4) of the Act, and the court below could not have validly passed an order invoking the powers under Sec.11(4) of the Act.

5. Mr.E.Padmanabhan, learned counsel appearing for the respondents in this Court (the applicants in the court below which resulted in an order culminating the filing of the C.M.A.No.3 of 1993 and the above revision petition) contends that the application filed by the respondents in the court below was not only under Sec.11(4) of the Act, but also invoking the jurisdiction of the said court under Sec.151 of the Civil Procedure Code. It is the contention of the learned counsel for the respondents that the petitioner by filing the appeal in the court below, had the benefit of stay and he had been continuing all along by virtue of such stay without paying the rents from 1.5.1966 onwards and that therefore, the respondents are entitled, at any rate, to move the court below, invoking the power under Sec.151, C.P.C., in the interests of justice to issue suitable directions to the petitioner to pay the arrears of rent and that the order could be construed and sustained in that limited context and extent and justified as one passed under Sec.151, C.P.C., without attracting or applying the penal consequences that follows if the provisions of Sec.11(4) of the Act are applied. The learned counsel for the respondents further brought to my notice a decision of a learned single Judge of this Court reported in *Gnambal v. Perumal Pillai*, (1992) 2 M.L.J. 60, whereunder it has been held that if the order of the court below challenged in a revision is ultimately found to be in the interest of justice, the court can refuse to interfere under Sec.115, C.P.C., even if the court has no jurisdiction to pass such an order. The learned Judge, while coming to the said conclusion, has adverted to an earlier Division Bench judgment of this Court and the decisions of the Supreme Court in support of the view taken to come to such conclusion. If that be the position even in respect of an order of the court below, while exercising jurisdiction under Sec.115 of the C.P.C., the position would be all the more still

better in the case of a revision filed invoking the jurisdiction of this Court under Art.227 of the Constitution of India, the object of the conferment of power under Art.227 of the Constitution of India being, only to prevent grave miscarriage of justice or injustice as to ensure that the Subordinate Courts and Tribunals act in furtherance of Justice, within their well defined jurisdiction.

6. After a careful consideration of the submission of the learned counsel appearing on either side, I am of the view that the contentions on behalf of the petitioner could be sustained only partly to the extent that the order under challenge could not be treated as one having been passed in exercise of the powers of the court below under Sec.11(4) of the Act. Consequently, the power and authority of the court below to strike off the defence of the petitioner or order for summary eviction for non-payment of the arrears available under Sec.11(4) of the Act cannot be invoked. At the same time, the order having been passed also invoking and in exercise of the inherent powers of the court under Sec.151, C.P.C., it is not only traceable but can be justified as one passed under Sec.151, C.P.C., the petitioner having obtained the order of stay from that court and continuing under the protection of such orders of stay, to prevent abuse of the indulgence shown by the court of stay. Except clarifying the position that the penal consequences that would normally get attracted to an order passed under Sec.11(4) of the Act, in cases of default of a direction would not be attracted to the present case, the order as such could be sustained and upheld, as one passed under Sec.151, C.P.C. In my view thus construed the order under challenge really ensures and secures substantial justice to the parties. Consequently, nothing prevents this Court from containing the order as one passed under the powers otherwise available with the said court under Sec.151, C.P.C., particularly when the application has been filed in the court below by the respondents herein invoking the said inherent powers of the Sub Court as an ordinary civil court exercising appellate jurisdiction. Mr.Sundaram, learned counsel for the petitioner relied upon a decision of the Supreme Court reported in *Ram Deo v. Umtrao Singh*, (1980) 1 S.C.C. 59, to contend that the only right of the respondents is to file a suit for recovering the arrears of rent and not to invoke the jurisdiction of the Sub Court in the pending appeal proceedings. The case which was

considered by the Supreme Court in the decision referred to above is one where the parties appear to have executed an agreement by which the past arrears were agreed to be paid in instalments. It was under such circumstances the court held that the arrears lost the character of arrears of rent and the agreement so entered between the parties created a new cause of action for the recovery of the said sum independent of the lease, that is not the position in the present case. It is not even the case of the petitioner that the respondent is seeking to recover any amount which is not a rent or an arrears of rent. Even the case of the petitioner is that in the place of an earlier tenancy at a monthly rent of Rs.100 a revised enhanced rent at Rs.250 has been agreed to between parties resulting in a new tenancy. This issue about the subsequent new tenancy projected by the petitioner is the subject matter to be decided in the main appeal pending before the court below. That does not, in any manner, alter the character or position of the petitioner as a tenant and absolve him of his liability to pay the arrears of rent or enable him to equal on the property without paying any rent whatever. In my view that is what the petitioner is trying to do in this case in abuse of the orders of stay granted by the appellate court, and the order of the court below to the extent it had directed the remittance of a sum of Rs.100 per month which is the rate of the rent admitted in the courts below as well as in the memorandum of grounds filed in this Court cannot therefore be said to be bad in law. If only such an order can be justified under Sec.151, C.P.C., without getting the penal consequences under Sec.11(4) of the Act attracted to the same, there is nothing wrong either in law or otherwise in upholding the same. As noticed already, the petitioner had the benefit of stay before the court below in his appeal and has been equating on the property pursuant to the order of the stay granted by the court without paying any rent and that being the position, there is no infirmity or illegality in the order of the court below directing the remittance of the indisputable rent due and payable. The vexatious claim of the petitioner is further highlighted by the plea raised in this Court that an enquiry is called for before the amount should be directed to be paid. I am really surprised to hear such submission which is directly contrary to the very stand taken by the petitioner before the executive court. It is never the case of the petitioner

that the rate of rent claimed is on the higher side. On the other hand, even according to the petitioner Rs.100 was the original rate of rent and that it has been subsequently revised and enhanced to Rs.250 per month. The petitioner is not only taking inconsistent but opportunist stands, in gross abuse of the process of court. After all, the respondents have claimed the arrears only at the rate of Rs.100, the original agreed rent which alone has been directed to be paid by the court below. Having regard to all these indisputable facts on records, I am of the view that the order is liable to be modified and declared to have been made in exercise of the powers of the court below under Sec.11(4) of the Rent Control Act and Sec.151, C.P.C., but only under and in exercise of the powers of the court below under Sec.151, C.P.C. The very same order, passed by the court below, for the reasons stated supra is, therefore, justified and having been validly passed under the provision of Sec.151, C.P.C., and to that extent the parties are entitled to work out their remedies and the court below is entitled to enforce the order as one passed under Sec.151, C.P.C. without applying the penal provisions of Sec.11(4) of the Act to the situation in question. The revision shall stand partly allowed to the extent of modification indicated above. In other respects the revision shall stand dismissed. No costs.

B.S.

---- *Petition partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thanikkachalam, J.*

C.R.P.Nos.2499 and 2500 of 1986 *28th July, 1993.*

G.Kanniah Chetty and another . ..*Petitioners*
v.

M/s.Sha Magajee Asal Das, Madras ...*Respondent*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960 as amended by Act 23 of 1973), Secs.4 and 5(3) - Petition for fixation of fair rent under Sec.4 in 1973 - Fair rent fixed as on that date

- *Second petition for fixation of fair rent under Sec. 4 in 1982 - Whether maintainable.*

Sec.5(3) of the Tamil Nadu Buildings (Lease and Rent Control) Act states that where the fair rent of any building has been fixed before the date of the commencement of the Tamil Nadu Buildings (Lease and Rent Control) Amendment Act, 1973, the landlord or tenant may apply to the controller to refix the fair rent in accordance with the provisions of Sec.4 and on such application the controller may refix the fair rent. Therefore, once the fair rent is fixed after 29.6.1973, a second petition for fixation of fair rent under Sec.4 is not possible. This was the view expressed by this Court in the case of *Sha Dhanraj Chunilal v. C.Vedachalam Chetty*, 99 L.W. 672. [Para. 4]

Cases referred to:

M.A.Ethirajulu Naidu v. Haji Abu Baker and Sons, (1964)2 M.L.J. 98. [Para. 1]

Sha Dhanraj Chunilal v. C.Vedachalam Chetty, 99 L.W. 672. [Paras. 1, 2]

Petitions under Sec.25 of Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by Act 23 of 1973 praying the High Court to revise the order of the Court of Small Causes (VI Judge) (Appellate Authority), Madras, dated 16.3.1985 and made in R.C.A.Nos.1147 of 1983 and 1172 of 1983 (R.C.O.P.Nos.3230 of 1982 on the file of the Court of Small Causes (X Judge), (Rent Controller), Madras.

The Court made the following

JUDGMENT: The landlords are the petitioners in both the revisions. C.R.P.No.2499 of 1986 is directed against the order passed in R.C.A.No.1147 of 1983 which in turn arose out of the order passed in R.C.O.P.No.3230 of 1982. C.R.P.No.2500 of 1986 is directed against the order passed in R.C.A.No.1172 of 1983 which in turn arose out of the order passed in R.C.O.P.No.3230 of 1982. The landlords filed a petition for fixation of fair rent under Sec.4 of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by Act 23 of 1973, hereinafter referred to as 'Act'. The petition premises is situated at 69, Govindappa Naicken Street, Madras-1. Originally, the tenant was paying a sum of Rs.350 by way of monthly rent. The landlords filed R.C.O.P.No.3120 of 1975 under Sec.4 of the Act for fixation of fair rent. The Rent Controller fixed the fair rent at Rs.550 per month. On appeal in R.C.A.No.47 of 1979, the fair rent was determined at Rs.538 per month. Thereafter,

the landlords filed the present petition under Sec.4 of the Act to determine the fair rent in R.C.O.P.No.3230 of 1982 in July, 1982. The landlords claimed the fair rent at the rate of Rs.1,415 per month. The authorities below held that in view of the fact that the fair rent was fixed in R.C.O.P.No.3120 of 1975 and R.C.A.No.47 of 1979, it is not open to the landlord to file a second petition R.C.O.P.No.3230 of 1982 for fixation of fair rent in view of the provisions contained in Sec.5(3) of the Act. The Rent Controller held that the second petition filed under Sec.4 of the Act is maintainable in view of the decision rendered in *M.A.Ethirajulu Naidu v. Haji Abu Baker and Sons*, (1964)2 M.L.J. 98 and the Rent Controller also determined the fair rent at the rate of Rs.915 per month. As against the order passed by the Rent Controller, both the tenant as well as the landlords preferred appeals before the Rent Control Appellate Authority. The Rent Control Appellate Authority dismissed the appeal filed by the landlords in R.C.A.No.1147 of 1983 and allowed the appeal R.C.A.No.1172 of 1983 filed by the tenant. The Rent Control Appellate Authority held that a second petition for the fixation of fair rent after 29.6.1973 is not possible. Relying upon a decision of this Court rendered in *Sha Dhanraj Chunilal v. C.Vedachalam Chetty*, 99 L.W. 672, he held that the second petition filed by the landlord for the fixation of fair rent is not maintainable. Accordingly, the appeal filed by the tenant was allowed and the appeal filed by the landlord was dismissed. Ultimately, the order passed by the Rent Controller in determining the fair rent at Rs.915 was set aside. Consequently, the rent payable is at Rs.538 per month.

2. As against the orders passed in R.C.A.No.1147 of 1983 and R.C.A.No.1172 of 1983, the landlords are in revisions before this Court. Learned counsel appearing for the landlords the petitioners herein, submitted as under:

Even though the second application for the fixation of fair rent was filed, after 29.6.1973, inasmuch as the cost of living was increased, the fair rent fixed at the rate of Rs.538 per month in R.C.A.No.47 of 1979, is inadequate. It was further submitted that even though there is no addition to the existing building, in view of the fact that the value of the properties is increased periodically, the fair rent should also be fixed according to the increased market value. Again, it was submitted

that the principle of *res judicata* may not be applicable to the matter like this, where the cause of action is different for claiming fair rent for subsequent period. Again, it was pointed out that if once the fair rent was fixed, it cannot remain for ever inspite of the fact that the value of the properties is increased day by day. In view of these facts, it was submitted that the Rent Control Appellate Authority was not correct in setting aside the fair rent fixed by the Rent Controller in R.C.O.P.No.3230 of 1982 and so also, the Rent Control Appellate Authority was not correct in dismissing the appeal filed by the landlords and allowed the appeal filed by the tenant. On the other hand, learned counsel appearing for the respondent/tenant, while supporting the order passed by the Rent Control Appellate Authority, submitted that in view of the provisions contained in Sec.5(3) of the Act, if once the fair rent is fixed after 29.6.1973, it is not possible for the landlord to file a second petition under Sec.4 of the Act for the fixation of fair rent. In support of his contention, reliance was placed on the decision reported in *Sha Dhanraj Chunilal v. C.Vedachalam Chetty*, 99 L.W. 672.

3. I have heard the rival submissions. The fact remains that originally the tenant was paying the rent at the rate of Rs.550 per month for the premises situated at No.69, Govindappa Naicken Street, Madras-1. The landlords filed R.C.O.P.No.3120 of 1975 for the fixation of fair rent. The Rent Controller fixed the fair rent at Rs.350 per month. On appeal in R.C.A.No.47 of 1979, the rent was fixed at Rs.530. Thereafter, in the year 1982 July, the landlords filed R.C.O.P.No.3230 of 1982 for the fixation of fair rent. The landlords claimed the fair rent at the rate of Rs.1,415 per month. But the second petition filed under Sec.4 of the Act was held to be maintainable by the Rent Controller in view of the decision reported in *M.A.Ethirajulu Naidu v. Haji Abu Baker and Sons*, (1964) 2 M.L.J. 98 and accordingly, the Rent Controller fixed the fair rent at Rs.915. Aggrieved by this order both the landlords as well as the tenant preferred appeals before the Rent Control Appellate Authority. The Rent Control Appellate Authority held that the second petition for the fixation of fair rent after 29.6.1973 is not maintainable in view of the provisions contained in Sec.5(3) of the Act.

4. According to Sec.5(1) of the Act, when the fair rent of a building has been fixed or refixed under

this Act, no further increase in such fair rent shall be permissible except in cases where some addition, improvement or alteration has been carried out at the landlord's expense and if the building is then in the occupation of a tenant at his request. Sec.5(2) of the Act states that where, after the fair rent of a building has been fixed under this Act, there is a decrease of diminution in the accommodation or amenities provided, the tenant may claim a reduction in the fair rent as so fixed. Sec.5(3) states that where the fair rent of any building has been fixed before the date of the commencement of the Tamil Nadu Buildings (Lease and Rent Control) Amendment Act, 1973 the landlord or the tenant may apply to the Controller to refix the fair rent in accordance with the provisions of Sec.4 and on such application, the controller may refix the fair rent. Therefore, after the amendment, which came into effect from 29.6.1973, the second petition for the fixation of fair rent under Sec.4 of the Act is not possible. This was the view expressed by this Court in *Sha Dhanraj Chunilal v. C.Vedachalam Chetty*, 99 L.W. 672. Thus considering the facts arising in this case in the light of the provisions contained in Sec.5(3) of the Act, and keeping in mind the decision of this Court cited supra. I hold that the common order passed by the Rent Control Appellate Authority in dismissing the appeal filed by the landlords and allowing the appeal filed by the tenant is in order. Accordingly, I am not inclined to interfere with the impugned orders passed by the Rent Control Appellate Authority. Hence, both these revision petitions are dismissed, but however, there will be no order as to costs.

B.S.

Petitions dismissed.

**IN THE HIGH COURT OF JUDICATURE AT
MADRAS.**

Present: *Bellie and Abdul Hadi, JJ.*

App.No.780 of 1986 17th September, 1993.

P.P.V. Annamalai and others ...*Appellants*
v.
The Tamil Nadu Civil Supplies Corporation represented by its Managing Director, Madras and another ...*Respondents.*

Limitation Act (XXXVI of 1963), Arts. 54 and 113 - Applicability - Suit for specific performance - Written agreement dated 27.4.1978 - Defendants not repudiating claim made by plaintiffs except with regard to quantum of amount claimed - Suit filed on 16.2.1984, if barred by limitation.

Obiter: Per Abdul Hadi, J.: The trial court took into account Art. 113 of the Limitation Act. But that residuary article will have no application since there is a specific article viz., Art. 54 dealing specifically with suits for specific performance. As per the said article, the prescribed period of limitation is three years from the date fixed for the specific performance of the contract and if no date has been fixed, when the plaintiff has notice that performance is refused. In the present case, there was no specific date fixed for the performance of the contract. Then the time will begin to run only from the date when the plaintiffs had notice that performance is refused by the defendants. But in the present case, there is absolutely no such refusal at all. All that the defendants say is that the price payable as per the agreement between the parties is only Rs.12,121 per acre and not as claimed by the plaintiffs, that is Rs.2 per sq.ft. This cannot be taken as refusal on the part of the defendants to perform the contract. The price of the suit lands having been not fixed at the time of the sale agreement, at worst, it could be said that there was dispute between the parties in the fixation of price and in the interpretation that has to be put to the phraseology used in Ex.A-2 (based on which the defendants took possession of the suit lands and impliedly agreed to buy the said lands accordingly), regarding fixation of price. That is all. Therefore, time has not begun to run at all against the plaintiffs. Therefore, the suit is not barred by limitation. [Para. 18]

Per Srinivasan, J.: The defendants have never repudiated the claim made by the plaintiffs except with regard to the quantum of the amount. They only disputed the quantum of amount claimed by the plaintiffs. Even in the present proceedings, the stand taken by the defendants is that they would pay the sum fixed by the District Revenue Officer at Rs.12,121 per acre and that they would not pay the value fixed on the properties in the land acquisition proceedings. Art. 54 of the Limitation Act will govern the situation. The suit is certainly within time as there was no refusal on the part of the defendants to perform the contract. The suit has been filed on 16.2. 1984. Even in the letter dated 29.11.1982, the defendants had only called for certain documents from the plaintiffs and they have not repudiated the contract as such.

[Para. 27]

Appeal against the decree of the Court of the Subordinate Judge, Sivaganga, dated 27.9.1985 and passed in O.S.No.24 of 1984.

The Judgment of the Court was delivered by *Bellie, J.:* The four plaintiffs (who are brothers) who have lost their case in the trial court are the appellants.

2. The plaintiffs' case is that the suit lands of 19 cents in Survey No.43/1B, 30 cents in Survey No.43/1A and 25 cents in Survey No.43/3B all totalling to 74 cents in Paiyur Pallavayal village belong to them. While the adjacent land of an extent of 2.26 acres in Survey No.43/3B was being acquired by the Government for the purpose of a bus depot for the Pandian Roadways Corporation, Madurai, the suit lands were also sought to be acquired for the defendant-Corporation for the purpose of construction of operation godown. Since the defendant-Corporation required the suit lands for urgent construction of the godown it directly entered into a deal with the plaintiff to straightaway purchase the lands and in that connection on 27.4.1978 the parties entered into a written agreement and as per the terms and conditions of the said agreement the defendants agreed to purchase the land at the price to be fixed under the provisions of the Land Acquisition Act. In pursuance of this agreement the defendant-Corporation has been put in possession of the land on 22.11.1978. Since the adjacent land in Survey No.43/3B has been acquired it was thought by the parties that the amount that would be awarded to that land would be adopted as the price for the suit land.

Therefore no separate acquisition proceedings were initiated in respect of the suit lands.

For the adjacent land in Award No.4/79-80 the Land Acquisition Officer fixed the value of the land at Rs.12,121 per acre. The claimants therein dissatisfied, sought a reference to the court and in the court in O.P.No.4 of 1980 enhanced compensation was fixed at Rs.2.00 per sq.foot. Thereupon, the plaintiffs demanded from the defendants to pay compensation at the rate of Rs.2.00 per sq.foot. with solatium and interest as awarded to the adjacent land in the land acquisition proceedings. The defendants asked the plaintiff to send the title deeds, and also informed them that the matter would be referred to the Collector for fixing the value of the land and payment would be made as soon as the sale is effected. The plaintiffs in their letter dated 12.11.1979 informed the defendants that the lands belong to them ancestrally and they have not been encumbered in any way. The plaintiffs then referred to a number of correspondences and they have stated ultimately that they have sent a lawyer's notice demanding payment of the amount on the basis of the award amount fixed in O.P.No.4 of 1980, but in spite of that no payment was made. The plaintiffs would further state that on the basis of the value of the land fixed in O.P.No.4 of 1980 and solatium and interest awarded therein the defendants are liable to pay the plaintiffs for the suit land a sum of Rs.89,623.69. Then stating that the plaintiffs are always ready and willing to perform their part of the contract by executing a sale deed, they have prayed for a decree for specific performance of the contract by the defendant by payment of the said sum of Rs.89.623.69.

3. The defendants in their written statement contended that there was no agreement entered into between the plaintiffs and defendants as alleged. The plaintiffs agreed to receive the compensation amount which would be fixed by the Land Acquisition Officer later on and they handed over possession of the land to them under the consent letter dated 24.4.1978, and therefore there is no agreement to enforce and hence the suit for specific performance of the agreement is not maintainable. Even if it is to be held that the consent letter dated 27.4.1978 is an agreement then the suit is hopelessly barred by limitation. If the said letter is an agreement then the only remedy of the plaintiffs is to enforce for acquisition of the land and passing an order for compensation. The

present suit is really not for enforcement of any agreement but only for money. The revenue officials have fixed the value of the suit land at Rs.12,121 per acre. The defendants never agreed to pay a price of the suit land an amount calculated at the rate of compensation to be fixed for the adjacent land.

4. The trial court on consideration of the evidence adduced in the case held that the defendants never agreed to pay sale price to the suit lands on the basis of the amount awarded in O.P.No.4 of 1980, and that there is no agreement for specific performance and the plaintiffs are not entitled to the amount claimed in the suit. It further held that the suit is barred by limitation. On these findings the trial court has dismissed the suit.

5. The question that arises for consideration in the appeal is whether the defendants are liable to pay the amount claimed in the suit viz., Rs.89.623.69 to the plaintiffs. It is not in dispute that the defendants have taken possession of the plaintiffs' land under the consent letter Ex.A-2 given by the plaintiffs on 27.4.1978. The plaintiffs' case appears to be that the defendants agreed to pay, in a written agreement, the price to the land calculated on the basis of the award to be passed in respect of the adjacent land. The defendants deny that they so agreed.

6. The plaintiffs have filed Ex.A-2 as the agreement. In this document only the plaintiffs have signed and not the defendants. Therein the plaintiffs have stated that they have learnt that there is a proposal for acquisition of this land and the defendants are in urgent need to take possession of the land and therefore they are giving possession of the land to the defendants and they have agreed to receive the amount that would be arrived at as per the provisions of the Land Acquisition Act.

From this the only thing that could be understood is that the price for the land would be the award amount that would be passed by the Land Acquisition Officer on acquisition of this land. But so far, this land has not been acquired. But in the suit the plaintiffs would claim that the defendants are liable to pay the amount for the land calculated on the basis of the award passed in respect of the adjacent land in O.P.No.4 of 1980, but the defendants have never agreed to such a course. Neither in Ex.A-2 nor in any one of the subsequent correspondences the defendants have agreed to pay in

the manner in which it is now claimed by the plaintiffs. Therefore the suit filed for recovery of Rs.89,623.69 calculated on the basis of the award passed for the adjacent land certainly cannot be maintained. Clearly the suit is mis-conceived. May be they have a right to require the Government to acquire the land and pass an award, but that is not the prayer in the present suit and such a remedy cannot also be granted in this suit. They may also ask for alternative relief of re-delivery of possession and damages.

7. In this view of mine, I am not giving a decision as to the maintainability of the suit on the question of limitation. In the result the appeal is dismissed. No costs.

Abdul Hadi, J.: Since my learned senior brother has set out briefly the pleadings and the conclusions reached by the court below in the first four paragraphs of his judgment, I am not setting them out separately in this my differing judgment also, and I proceed to the discussion.

8. The question that arises for consideration in this appeal is whether the plaintiffs are entitled to specific performance directing the defendants to pay a sum of Rs.89,623.69 to the plaintiffs towards the value of the suit lands with interest at 4% per annum from the date of the suit till the date of execution of the sale deed and payment of the said price and take a sale deed duly executed and registered in respect of the said lands by the plaintiffs. The specific performance prayed for is pursuant to Ex.A-2 consent letter given by the plaintiffs on 27.4.1978. It is also not in dispute that the defendants have taken possession of the plaintiffs' land on 22.11.1978 pursuant to the said consent letter and as shown by Ex.A-3 signed by both the parties.

9. In the said letter Ex.A-2, after referring to the suit lands of 74 cents in S.Nos.43/1B, 43/1C and 43/3C, it is recited as follows:

“மேற்படி நிலங்களுக்காக நில ஆர்ஜித சட்டப் படி நட்பு ஈட்டுத் தொகையையும் (Compensation Amount) மற்றும் தொகையின் மேல் நாளது தேதி முதல் நில ஆர்ஜித Award உத்திரவு தேதி வரையில் ஏற்படும் வட்டித் தொகையையும் பின்னர் நில ஆர்ஜித அதிகாரி மூலம் பெற்றுக் கொள்ளவும் சம்மதிக் கிறோம்.”

So, as per Ex.A-2, the plaintiffs have agreed to receive the compensation amount and interest

thereon in respect of the said lands as per the Land Acquisition Act.

10. In the above context, it cannot also be said that there was no sale agreement as such between the parties. No doubt Ex.A-2 is a letter written by the plaintiffs alone. But pursuant to Ex.A-2, the defendants have taken possession of the suit lands mentioned in Ex.A-2 and are enjoying it all these years by putting up construction etc. So, it is clear that impliedly a valid agreement of sale had come into force between the parties.

11. No doubt as per Ex.A-2, the plaintiffs agreed to receive the said compensation amount and interest thereon as per the above said Act through the Land Acquisition Officer. But, Ex.A-2 does not say that the compensation amount payable is only the amount fixed by the Land Acquisition Officer. All that it says is that the amount payable to the plaintiffs is the compensation amount as per the Land Acquisition Act.

12. D.W.1, the Superintendent of the defendants-Corporation has admitted in cross-examination that the defendants agreed to buy the said lands as per the conditions mentioned in Ex.A-2. His deposition in this regard is as follows:

“வா.சா. ஆ.2 -வின் ஒரிஜினலில் கண்ட கண்டிஷன்படி நிலத்தை வாங்க பிரதிவாதி ஒப்புக் கொண்டது”

Therefore, it is clear that the defendants have to pay compensation for the suit lands as per the Land Acquisition Act.

13. But, that does not mean that the land acquisition proceeding has to be initiated even with reference to the suit lands just to determine the compensation that could be paid in respect of the suit lands. Ex.A-2 also does not specifically say that the said compensation amount should be arrived at only by initiating a land acquisition proceeding in respect of the suit lands. All that it says is that the suit lands should get compensation amount as per the Land Acquisition Act. No doubt, it also adds that on the above said compensation amount, the plaintiffs are also entitled to interest from the date of Ex.A-2, that is 27.4.1978 till the date of the award. From the use of the word “award” in Ex.A-2, it may be argued that a land acquisition proceeding has to be initiated even in respect of the suit lands. But, so far, even though 14 years have elapsed, no such land acquisition

proceeding has been initiated in respect of the suit lands. Now it would be very much inequitable if a direction is given for initiation of land acquisition proceedings in respect of the suit lands at this distance of time. Further, supposing a land acquisition notification under Sec.4(1) of the Act is to be issued in respect of the suit lands now for the first time, strictly speaking the compensation amount could be fixed in accordance with the said Act taking into account the market value of the suit lands as on the date of the publication of the said notification. That also will not be reasonable or fair from the point of view of the defendants also.

14. That apart, there is clear evidence as to how much compensation is payable for the suit lands as per the Land Acquisition Act, in view of the fact that for the very land adjacent to the suit lands belonging to the plaintiffs themselves, compensation has been fixed by the court in O.P.No.4 of 1980 as shown by Ex.A-10 has also been confirmed by the High Court by judgment dated 16.6.1989 in A.S.No.324 of 1984. While the suit lands are 74 cents in S.Nos.43/1B, 43/1A and 43/3B, the lands for which the abovesaid compensation has been fixed as per Ex.A-10 are only in S.No.43/3B. Even one of the suit lands and the above said Ex.A-10 lands are in one and the same survey number. Further, even in the present plaint in paragraph 6 it is specifically stated that the above said 2.26 acres of lands are only adjacent to the suit lands. With reference to these allegations, there is no denial. Further, Ex.A-10 judgment was given by the civil court in the reference under Sec.18 of the Land Acquisition Act in respect of the abovesaid 2.26 acres of land. I find that as per the evidence of P.W.5 in the said proceeding, who is the Record Clerk of the District Registrar's office, the Government is collecting Rs.2.25 as stamp duty per sq.ft. in case of sales "in the very same ward and its neighbourhood". For this reason and other reasons, the learned Judge, passed the award in the said proceeding came to the conclusion that the claimants therein including the present plaintiffs are entitled to compensation at the rate of Rs.2 per sq.ft. In the above circumstances, it is clear that the same rate of compensation could be awarded, to the present suit lands also and there is no necessity to initiate another land acquisition proceeding in respect of the suit lands just to determine the compensation payable under the

said Act.

15. It is highly deplorable that the defendants have not paid the compensation amount so far even though 14 years have gone by since they took possession of the suit lands and enjoying the same all these years by putting up construction. In view of the said attitude of the defendants, the plaintiffs were even forced to file W.P.No.6407 of 1983 on the file of this Court claiming the present suit relief. The defendants entered appearance in the said writ petition. But the said writ petition had to be dismissed by this Court on the ground that the matter could be better resolved in a civil court by way of a suit. However, it is to be noted that even in the said dismissal order in the said writ petition, this Court has observed that there is some legitimate basis for the petitioners to claim compensation at the rate of Rs.2 per sq.ft. Yet, the defendants even after the disposal of the said writ petition, did not take steps to pay compensation to the plaintiffs as per the agreement reached with the plaintiffs. Even in their written statement dated 29.3.1985 it is stated, "the price fixed by the Revenue Authorities as Rs.12,121 per acre on the date of taking possession by T.N.C.S.C. is fair and reasonable. The defendant is prepared to pay the cost of land value *immediately* as fixed by the Revenue Authority." [*Italics supplied*]. Further even in Ex.A-12 letter dated 26.3.1980, the learned counsel for the plaintiffs stated that the plaintiffs are willing to receive at the rate of Rs.12,121 per acre, without prejudice to the plaintiffs' right to move the court for fixing the compensation at Rs.2 per sq.ft. But even at the above said rate of Rs.12,121 per acre, compensation has not been paid. It is indeed very sad that a public undertaking like the defendants-Corporation is behaving in this fashion with the citizens of the country like the plaintiffs, especially when the value of the money is going down every day steeply. The sadness is further aggravated when it is seen that in order to enable the said defendants to put up godowns on the suit lands urgently to meet the public needs, the plaintiffs themselves consented to part with possession of the suit lands in 1978 itself pursuant to Ex.A-2, without forcing the Government to initiate actual land acquisition proceeding under the Act, which would, apart from other things, only postpone taking delivery of possession of the suit lands, to a great extent.

16. Looking at from another angle also, it is clear

that the defendants have been acting in a deplorably callous manner. Though they have taken possession of the suit lands in 1978 itself, they have not realised that they have not secured title to the suit lands since a registered sale deed has not been obtained in respect of the suit lands from the plaintiffs. At least for securing the title, the defendants should have taken necessary steps to see that the compensation amount was fixed pursuant to Ex.A-2 expeditiously. On the other hand, it is defendants who have been delaying the matter as shown by the correspondence between the parties.

17. It must also be stated that the above said price of Rs.12,121 per acre is only an amount fixed unilaterally by the above said Revenue Authority while Ex.A-2, as already stated, stipulates that the compensation should be fixed as per the Land Acquisition Act. If the procedure prescribed under the Land Acquisition Act is applied and the compensation is fixed, the plaintiffs-land owners would have had the opportunity to adduce evidence relating to the market value of the property in the enquiry that would have been held pursuant to the provisions of the said Act. Without affording any such opportunity, if some amount is fixed unilaterally and that too by some "Revenue Authority", the said amount cannot be termed "fair and reasonable", nor the plaintiffs are bound by the said amount fixed unilaterally. The said amount cannot be termed as the amount arrived at pursuant to the terms of Ex.A-2.

18. There is also another question raised in the suit, viz., the question of limitation since the defendants contend that the suit is barred by the law of limitation. No doubt the court below went into this question also and held against the plaintiffs by holding that the suit is barred by the law of limitation. It took into account Art.113 of the Limitation Act. But that residuary Article will have no application since there is a specific article, viz., Art.54 dealing specifically with suits for specific performance. As per the said Article, the prescribed period of limitation is three years from the date fixed for the specific performance of the contract and if no date has been fixed, when the plaintiff has notice that performance is refused. In the present case, there was no specific date fixed for the performance of the contract. Then time will begin to run only from the date when the plaintiffs had notice that performance is refused by the defendants. But in the present case, there is

absolutely no such refusal at all. All that the defendants say is that the price payable as per the agreement between the parties is only Rs.12,121 per acre and not as claimed by the plaintiffs, that is, Rs.2 per sq.ft. This cannot be taken as refusal on the part of the defendants to perform the contract. The price of the suit lands having been not fixed at the time of the sale agreement, at worst, it could be said that there was dispute between the parties in the fixation of price and in the interpretation that has to be put to the phraseology used in Ex.A-2, (based on which the defendants took possession of the suit lands and impliedly agreed to buy the said lands accordingly), regarding fixation of price. That is all. Therefore, time has not begun to run at all against the plaintiffs. Therefore, the suit is not barred by limitation.

19. In the result, the suit is decreed as prayed for with costs and accordingly the appeal is allowed with costs.

In pursuance of the directions of the Hon'ble the Acting Chief Justice, this appeal coming on for hearing before the Hon'ble Mr. Justice SRINIVASAN, on Friday, the 12th day of February, 1993.

The Court delivered the following

JUDGMENT: This appeal is posted before me on a difference of opinion between Bellie and Abdul Hadi, JJ. The facts are set out in detail in the Judgment of Bellie, J. I do not find any necessity to repeat the same in this judgment.

20. The point which arises for consideration in short is whether the plaintiffs are entitled to claim the value of the land at Rs.2 per sq.foot. as decided in O.P.No.4 of 1980, a proceeding arising out of acquisition for an adjacent land belonging to the plaintiffs. Yet another question will be whether the suit is barred by limitation. Bellie, J. has expressed his opinion that the suit is not maintainable, as there is no agreement between the parties for the sale of the land at the price claimed by the plaintiffs. He has not gone into the question of limitation. On the other hand, Abdul Hadi, J has taken the view that the agreement is evidenced by Ex.A-2, the document which is signed by the plaintiffs, though not signed by anybody on behalf of the defendants. He has also held that the suit is in time.

21. Ex.A-2 agreement is dated 27.4.1978. All the plaintiffs have signed the same in the presence of the headman viz., Village Karnam. It is stated in

the document that the plaintiffs are the owners of the lands described therein and they are aware that the lands are required for the purpose of construction of a godown for the defendant viz., Tamil Nadu Civil Supplies Corporation. It is also stated that the lands are required immediately for the purpose of the Corporation and that the plaintiffs will be handing over possession of the lands to the Corporation. The last sentence in the document is most relevant part of it and it reads as follows:

“மேற்படி நிலங்களுக்காக நில ஆர்ஜித சட்டப் படி நட்ட ஈட்டுத் தொகையையும் (Compensation Amount) மற்றும் தொகையின் மேல் நாளது தேதி முதல் நில ஆர்ஜித Award உத்திரவு தேதி வரையில் ஏற்படும் வட்டித் தொகையையும் பின்னர் நில ஆர்ஜித அதிகாரி மூலம் பெற்றுக் கொள்ளவும் சம்மதிக்கிறோம்.”

The plaintiffs have stated in the above sentence that they are agreeable to accept the compensation which may be fixed in the acquisition proceedings, as per the Land Acquisition Act and that they are also agreeable to accept the interest as per the Act till the date of award.

22. Admittedly, there was no document executed by the defendants. The defendants have also admittedly taken possession of the land as evidenced by Ex.A-3, dated 22.11.1978. Ex.A-3 refers to two letters dated 28.10.1978 and 4.11.1978 of the Regional Manager of the Corporation, Ramanathapuram at Madurai. The purpose of the transfer is mentioned as construction of operational godown in the Taluk Headquarters at Sivaganga. The transfer is dated 22.11.1978. The document bears the title Land Transfer statement'. The fact that the defendants have taken possession of the land as per Ex.A-3 without there being any other document containing the terms of transfer shows that the defendants have agreed to pay the price as set out in Ex.A-2.

23. Apart from that D.W.1 the only witness examined by the defendants has clearly admitted that the land was taken by the defendants on transfer only according to the conditions contained in Ex.A-2. The relevant part of the deposition reads thus:

“வா.சா. ஆ.2 -வின் ஒரிஜினலில் கண்ட கண்டிஷன்படி நிலத்தை வாங்க பிரதிவாதி ஒப்புக்

கொண்டது”

In view of the admission by D.W.1, it is not open to the defendants to contend that they had not agreed to pay the amount as stated in Ex.A-2.

24. There was no proceeding for acquisition of the suit land in question. It was also unnecessary to have acquisition proceedings as it would take long time for occupation. The defendants wanted to take possession immediately of the property and it was handed over by the plaintiffs only on the basis of the terms set out in Ex.A-2. Hence, the defendants are bound to pay the compensation as per the terms contained in Ex.A-2. It is not in dispute that in O.P.No.4 of 1980, compensation has been fixed by the Subordinate Judge, Sivaganga at Rs.2 per sq. foot. It is also now admitted that the said award has been affirmed in an appeal by this court in A.S.No.324 of 1984.

25. Learned counsel for the respondents placed reliance on Ex.A-6, which is a letter written by the defendants to the plaintiffs' lawyer on 10.8.1979. It is stated therein that the defendant have addressed the Collector of Ramanathapuram to fix the rate of land cost at an immediate date and payment will be done as soon as the documentation for the same was effected. The said letter does not take the defendants anywhere. The defendants cannot go back on the terms agreed to in Ex.A-2. It is not open to the defendants to contend that they will pay only the amount that may be fixed by the District Revenue Officer or the Collector and not the amount fixed in the land acquisition proceedings.

26. It is also seen from the correspondence that the defendants have been protracting the matter by repeatedly asking for certain kist receipts and documents of title. The plaintiffs have made it clear to the defendants that there was no document of title as it was an ancestral property and that they had also furnished all the documents which were available with them. In the circumstances it is not possible for the defendants to contend that they would be liable to pay a sum much lesser than the sum fixed in the land acquisition proceedings.

27. There is also no substance in the contention that the suit is barred by limitation. The defendants have never repudiated the claim made by the plaintiffs except with regard to the quantum of the amount. They only disputed the quantum of amount

claimed by the plaintiffs. Even in the present proceedings the stand taken by the defendants is that they would pay the sum fixed by the District Revenue Officer at Rs.12,121 per acre and that they would not pay the value fixed on the properties in the land acquisition proceedings. Art.54 of the Limitation Act will govern the situation. The suit is certainly within time, as there was no refusal on the part of the defendants to perform the contract. The suit has been filed on 16.2.1984. Even in the letter dated 29.11.1982 the defendants had only called for certain documents from the plaintiffs and they have not repudiated the contract as such.

28. In the circumstances, I agree with the view taken by Abdul Hadi, J. and I hold that the appeal has to be allowed and that the suit has to be decreed as prayed for.

JUDGMENT: Pursuant to the aforesaid judgment, this appeal coming on for hearing on this day, the court delivered the following

JUDGMENT: In conformity with the majority view, the appeal is allowed with costs and the suit is decreed with costs as prayed for.

B.S. --- Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Thanikkachalam, J.

C.R.P.No.2546 of 1993 24th December, 1993.

T.Anandan ...Petitioner
v.
Noorjahan ...Respondent.

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(3)(a)(iii) - Landlady asserting that she was carrying on business - No denial by tenant in counter or evidence - No suggestion put to landlady's witness - Held, landlady proved that she was carrying on business on the date of petition.*

The landlady has stated that she was carrying on her business under the memo and style of Asian Enterprises in a rented premises. She is also carrying on a business as a partner in the partnership firm under the name and style of United Corporation. In her evidence she has stated that she started her business in 1978-79 as a proprietrix concern under the name and style of Asian enterprises. She has filed her assessment order for the year 1978-79. She shifted the business to Gengee Street and she is carrying on the said business in a rented premises in which she is now residing. Neither in the counter nor in the oral evidence the tenant has denied the fact that the landlady was carrying on her business even on the date when the petition was filed. Even when P.W.2 was in the witness box, no suggestion was made to him that the petitioner was not carrying on business on the date of filing the petition. Therefore, on facts the landlady proved that she was carrying on business on the date of filing of the petition.

[Para. 16]

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(3)(a)(iii) - Landlady shifting her place of business and residence - Claim under Sec.10(3)(a)(3) - Whether bona fide.* The landlady must not only show that she is not having a non-residential premises of her own in the City of Madras and she is carrying on her business in a rented premises, but also prove her *bona fide* requirement of the premises under Sec.10(3)(a)(iii) of the Act. According to the landlady she was originally carrying on the business in a rented premises at Triplicane. Later on she shifted her residence and accommodated her business in another rented premises. Again according to the landlady she shifted her business to another area. Therefore, the landlady is badly in need of her premises for the purpose of accommodating her business.

[Para. 17]

(C) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(3)(a)(iii) - "Carrying on business" - Essentially a question of fact in - Meaning of mixed question of fact and law.*

What constitutes "carrying on business" is essentially a question of fact or a mixed question of fact and law. Each case will have to be decided on facts and no general proposition can be evolved as to what constitutes carrying on business. [Para. 15] **Cases referred to:**

T.K.Krishna Iyer v. Karur Vysia Bank Limited, Coimbatore, (1959)1 M.L.J. 215. [Para. 11]

K.Gopalan Nair v. V.Kamalammal, (1981)1 M.L.J. 40. [Para. 12]

P.N.Raju Chettiar v. The State of Tamil Nadu, represented by the Secretary, Home Department (Accommodation controller) and others, (1970)1 M.L.J. 249; A.I.R. 1970 Mad. 306. [Para. 12]

K.Rangaswamy Naidu v. The Tamil Nadu Handloom Weavers Co-operative Society Limited, (1982)1 M.L.J. 130. [Para. 13]

Gillanders Arbuthnot and Company Limited v. Badhrunnisa, (1982)1 M.L.J. 437. [Para. 14]

Phiroze Bamanji Desai v. Chandrakant M.Patel, A.I.R. 1974 S.C. 1059. [Para. 17]

Mattulal v. Radhe Lal, A.I.R. 1974 S.C. 1596. [Para. 17]

Hameedia Hardware Stores v. B.Mohan Lal Sowcar, A.I.R. 1988 S.C. 1060. [Para. 17]

Petition under Sec.25 of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by Act 23 of 1973 praying the High Court to revise the Order of the Rent Control Appellate Authority (Court of Small Causes VIII Judge), Madras, dated 2.7.1993 and passed in R.C.A.No.622 of 1991 (R.C.O.P.No.2274 of 1960 on the file of the Rent Controller (Court of Small Causes XIV Judge), Madras.

K.Sampath, for Petitioner.

K.Balasubramaniam, for *Ms.C.Rajammal*, for Respondent.

The Court delivered the following

JUDGMENT: The tenant is the petitioner. The petition for eviction was filed under Secs.10(2)(ii)(b), 10(2)(iii) and 10(3)(a)(iii) of Act 18 of 1960 as amended by Act 23 of 1973. Ultimately, the only one ground that arises for consideration in this revision is the eviction sought for under Sec.10(3)(a)(iii) of the Act.

2. The respondent herein is the owner of the entire premises at No.7, Thayar Sahib Road, Mount Road, Madras-2 and the petitioner herein is the tenant under the landlady in respect of the petition premises on a monthly rent of Rs.200. According to the landlady, though the petition premises was let out to the tenant for the purpose of his residence, the tenant is using the same for non-residential purpose. According to the landlady, the tenant installed in the petition premises a commercial banking even deliberately and thereby caused damage to the ceiling of the building. The landlady is residing at premises No.34, Veerasami Pillai Street, Egmore, Madras-8, which is a rented

premises. The landlady is also carrying on a business under the name and style of Asian Enterprises in the 2nd Floor of premise old No.200/210, Triplicane High Road and present D.No.75, Quide Millath Salai, Madras-5 on a monthly rent of Rs.650. She vacated the said premises and is now carrying on the said business at No.36, Veerasami Street, Madras- 8. Therefore, the landlady requires the petition premises in the occupation of the tenant *bona fide* for her own use and occupation. The landlady further states that she is not having any other non-residential premises of her own in the City of Madras. Hence the petition.

3. In the counter, the tenant states as under: The back portion of the petition premises was let out by the original owner of the petition premises for non-residential purposes to erect a oven to make bread, biscuits, cakes etc., and to carrying on business in such products as early as January, 1970. The respondent has put up a superstructure adjacent to the bakery with the permission of the original owner, to prepare the bakery products. The tenant has also obtained necessary license from the Corporation of Madras for conducting the business in bakery. The landlady never used to repair the petition premises. The tenant used carry on the repairs periodically. It is not correct to state that the tenant caused damage to the building and committed act of waste. The requirement of the petition premises by the landlady is not *bona fide*. The landlady cannot ask for the petition premises both for non-residential and residential purposes. The landlady know that the back portion of the petition premises was let out to the tenants for the non-residential purpose and the tenant is using the same for the said purpose from January, 1970 onwards. She never raised any objection prior to the issue of notice dated 25.4.1988. The landlady has already acquiesced in the use of the said portion for non-residential purpose by the tenant for the last 18 years. The landlady filed petition for eviction against the tenant several years back and she was not successful. The front portion of the premises measuring about 300sq.ft. is lying vacant since its roof fell down sometime back. If the landlady's requirement is *bona fide*, she can put up a roof over the said front portion and use it for the business purpose. It was therefore pleaded that there is no *bona fide* on the part of the landlady in requiring the petition premises under Sec.10(3)(a)(iii) of the Act.

4. One Abdul Basith Khan was examined as P.W.1 and the tenant examined himself as P.W.1. The landlady filed 57 documents, the tenant filed 12 documents. Considering the facts and circumstances in this case, the learned Rent Controller held that the requirement of the landlady is *bona fide* under Sec.10(3)(a)(iii) of the Act and accordingly eviction was ordered. On appeal, the Rent Control Appellate Authority confirmed the order passed by the Rent Controller and dismissed the appeal filed by the tenant. It is against that order, the present revision has been preferred by the tenant.

5. The learned counsel for the petitioner submitted as under: It is not correct to state that originally the petition premises was let out for residential purpose and the tenant was using the same for non-residential purpose. The tenant is using the petition premises for non-residential purposes in order to conduct his bakery business. Therefore, the landlady cannot ask the petition premises for her residential purpose. In fact, in the petition the landlady is requiring the petition premises for both residential and non-residential use. This is not permissible under law. The three shops in the front portion fell down and the vacant place is now available for the landlady and she can put up a superstructure and conduct her business if she really is requiring for the place for her business. The rear portion under the occupation of the tenant is fit for conducting only the bakery business. On the date of the filing of the petition, the landlady was not carrying on any business. There is no scrap of paper to prove that the landlady was engaged in any business activity on the date when the petition was filed. All the documents filed by the landlady relates to either four years prior to the date of the petition or subsequent to the filing of the eviction petition. Therefore, they are not relevant for the material period. The documents filed by the landlady would go to show that she did not carry on any business at that time when the petition was filed. The courts below erred in not considering the relative hardship which would be caused to the tenant who had modified the portion to suit his needs and had been carrying on his avocation for more than 20 years. The prior eviction petition filed by the landlady was dismissed. The oven was built up with the permission of the landlady. The present landlady knew that the tenant had put up the oven. She did not object for the

same. The tenant is having licence to conduct the banking business. The landlady did not produce any accounts to show that between 1985-88 she was conducting any business. For all these reasons, it was stated that the courts below were not correct in holding that the landlady established her *bona fide* in requiring the petition premises under Sec.10(3)(a)(iii) of the Act.

6. On the other hand, the learned counsel for the respondent/landlady submitted as under: The petition premises was originally let out to the defendant/tenant for residential purpose and without the permission of the landlady the tenant converted the petition premises for his non-residential purpose. In the front portion there were three shops. These three shops were fell down because of the damage caused by the tenant. The tenant did not allow the landlady to repair the building in the front portion. He gave a complaint against the landlady when she attempted to repair the front portion which was fell down. Therefore, the landlady was unable to occupy the said three shops in the front portion. The landlady is residing in a rented premises and she is also carrying on her business in a rented premises. Originally she was conducting her business at 208/210, Triplicane High Road, (present No.75, Quide Millath Road), Triplicane and after vacating the said premises she is now carrying on her business at 36, Veerasamy Street, Madras where she is residing. The said premises also is rented premises. She is not having a premises of her own in the City of Madras. By erecting the oven, the tenant caused damage to the building. Ex.P-1 is the notice sent by the landlady dated 25.4.1988 and Ex.P-6 in the reply sent by the tenant dated 12.5.1988 and in the reply the tenant did not dispute with regard to the business being carried on by the landlady. Neither in the counter nor in the evidence the tenant did dispute the said fact. The documents filed by the landlady would go to show that she was conducting her business at the time when the petition for eviction was filed. No suggestion was made when P.W.1 was in the witness box that the landlady was not carrying on any business at the time of filing the petition. For all these reasons the courts below were correct in coming to the conclusion that the landlady requires the petition premises *bona fide* for her own use and occupation. Since the authorities below concurrently held that the requirement of the petition premises by the landlady is *bona fide*

under Sec.10(3)(a)(iii) of the Act, it was submitted that no interference is called for.

7. I have heard the rival submissions. The fact remains that the petitioner herein is the tenant in respect of the petition premises on a monthly rent of Rs.200 under the respondent. The tenant is conducting a bakery business. The petition for eviction was filed on the ground of owner's occupation. Acts of waste and using the premises for the purpose other than the purpose for which it was let out. Petition for eviction was dismissed by the authorities below on the ground of Act of waste and using the premises for the purpose or other than for which it was let out. Therefore, the only one ground that survives for consideration in this revision is one relating to eviction sought for owner's occupation. According to the landlady, she is residing in a rented premises at 36, Veerasamy Street, Madras-8 which is a rented premises. She was also conducting business under the name and style of Asian Enterprises in the 2nd Floor of premises old No.208/210, Triplicane High Road and present No.72 Quide Millath Salai, Madras-5 by paying a monthly rent of Rs.650. Since she vacated from the said premises, now she is carrying to business at 36, Veerasamy Street, Madras-8.

She has also stated that she is not having or in occupation of a non-residential building of her own in the City of Madras.

8. According to the tenant, the original landlord let out the premises to the tenant for the purpose of going his business. After having obtained licence for conducting a bakery business, he is carrying on the said business from the year 1970 onwards. There is no written agreement between the landlady and the tenant to show that the petition premises was let out for non-residential purpose. The petition premises was originally belonged to one Ghouse Mohideen. Thereafter, the father-in-law and the brother-in-law of the landlady became the owner of the petition premises. No documents were also produced from Ghouse Mohideen or his brother to show that the premises was let out for residential purpose. No document from the brother-in-law of the landlady was also produced to show that the petition premises was let out for residential purpose. The abovesaid persons were not also examined to show that the petition premises was let out for the purpose of residence. Therefore, the authorities below came to the conclusion that the tenant has not used the

petition premises for the purposes other than the purpose for which it was let out. The courts below also pointed out that the landlady visited the petition premises in the year 1982 and seen that the petition premises was being used as bakery. According to the landlady and sent a notice objecting to this conversion of the petition premises, but a copy of the notice was not filed. On the other hand, the tenant produced Ex.P-1, dated 25.1.1970 which is a licence issued by the Corporation of Madras giving permission to the tenant to conduct a bakery. Ex.P-2, dated 24.2.1970 is the receipt for payment of amount to the Corporation. Exs.P-3 to P-5 also would get show that the tenant was conducting bakery business in the petition premises. Ex.P-8 is the letter dated 16.4.1981 sent by Ahamed Bhai *alias* Abhu Khan. In view of all these documents, the authorities below concurrently came to the conclusion that the petition premises was let out for non-residential purposes. In view of the documentary evidence produced by the tenant, I am also of the opinion that the tenant was conducting bakery business from the year 1970 in the petition premises and the petition premises was let out only for non-residential purposes. The landlady requires the petition premises for her own use and occupation. She is residing at No.21, Gangu Street, Egmore, Madras-8. That was disclosed under Ex.P-13 which is a receipt issued by the L.I.C. dated 27.11.1990. Exs. P-9 to P-12 are the rental receipts showing that the said premises is a rented premises. According to the landlady, she was conducting her business under the name and style of Asian Enterprises at No.75, Quide Millath Road, Triplicane, Madras-5. After vacating that premises, she shifted the business to No.36, Veerasamy Street. At present it is stated that at No.21, Gangu Street she is conducting her business. According to Exs.P-22, P-25, P-43 and P-46, the landlady is also conducting her business in the name and style of United Corporation at 75, Triplicane High Road, she was a partner in the said business as per the document dated 3.2.1981 which is marked as Ex.P-26, Exs.P-25 to P-30 would show that the landlady is a partner in the business called United Corporation. The landlady shifted her timber business to the premises in which she is residing and has conducted the business in the name and style Shrimathi Timber Corporation. This can be seen from the letter written by the Indian Bank, Commercial Branch,

Egmore to the landlady. Therefore, the authorities below came to the conclusion that in a rented premises she is residing as a tenant, and she is also carrying on her business in the said premises.

9. In his evidence P.W.1 the husband of the petitioner has stated that previously the landlady was residing at 39, Veerasamy Street and at present at No.21, Gangu Street, Egmore, Madras-8. No further states that she started her business in 1978-79 which is a proprietrix concern at Veerasamy Pillai Street initially under the name and style of Asian Enterprises. She has not filed any account, but she filed her assessment orders. Her gross turn over for the year 1978-79 was Rs.31 lakhs approximately. In 1989 she shifted her business to Gangu Street and she is still carrying on her business under the name and style of Asian Enterprises. Neither in the counter nor in the evidence, the tenant stated that the landlady is not carrying on her business on the date then the petition was filed. Even when P.W.1 was in the witness box no suggestion was made to him that the business was not being continued. When the petition for eviction was filed. Therefore, there is no other option except to accept the contention put forth by the landlady that she was conducting her business even during the time when the petition for eviction was filed.

10. According to the tenant, in the front portion of the petition premises, there were three shops and the roof of those shops fell down. If the landlady really require any premises for conducting her business. She could have repaired in front portion and occupied the same. According to the landlady, the three shops in the front portion fell down because of the damage caused by the tenant by constructing his oven and the chimney. The landlady submitted that whenever she attempted to repair the front portion, the tenant did not allow her to do so. According to the landlady, the tenant gave a criminal complaint against the landlady when she attempted to repair the said portion. Therefore, due to the unlawful conduct of the tenant, she was unable to occupy the front portion of the petition premises. The landlady even in the year 1983, attempted to repair the front portion, but that was prevented by the tenant by giving a complaint against her. Therefore, it remains to be seen that the landlady was unable to occupy the front portion.

11. According to the learned counsel for the

petitioner, on the date when the petition for eviction was filed, the landlady was not carrying on any business and therefore, she cannot ask for eviction under Sec.10(3)(a)(iii) of the Act. In support of this contention reliance was placed upon a decision of this Court rendered in *T.K.Krishna Iyer v. Karur Vysia Bank Limited, Coimbatore, (1959)1 M.L.J. 215*, wherein this Court while considering the provisions of Sec.7(3)(a)(iii) of Madras Buildings (Lease and Rent Control) Act (XXV of 1949), held as under:

"In the case before us, there is no allegation, except that the petitioner had purchased this building in 1957 for the purpose of that he describes as "accommodating the business" which he was then carrying on under the name of "Ranjitha Vilas" that he had done any Act in the way of carrying on or preparing for carrying on a business as hotel proprietor on the date on which he filed the application. He said expressly that he had to start a business of his own and that for that purpose he wanted the building. It is true that the avocation of hotel proprietor was with him and old avocation and that nothing was more natural than that he should want to become a hotel proprietor again. But that would not render him, on the date on which he made the application, a person who was carrying on a business as hotel proprietor. He was on that date a person who had done business in the past as a hotel proprietor and who was intending to do business in the future as a hotel proprietor. Such a person is not, in my opinion, a person who is carrying on a business. To hold otherwise would be to delete from Sec.7(3)(a)(iii) the words which he is carrying on", a function which the court is powerless to perform. It is true that the petitioner needed the building for the purpose of a business. But it is not correct to say that he needed it for the purpose of a business which he was carrying on. On the allegations made in the petition, the petitioner was not entitled to supply for relief under Sec.7(3)(a)(iii) of the Act."

12. So also, the learned counsel for the tenant relied upon another decision rendered by this Court in *K.Gopalan Nair v. V.Kamalammal, (1981)1 M.L.J. 40*, in support of his contention that the landlady is not entitled to possession under Sec.10(3)(a)(iii) of the Act wherein this Court

held as under:

"It is not possible to sustain the order of the learned appellate authority. As already stated, the allegation in the eviction petition is that the non-residential buildings is required for the business of the respondent's husband who is a Government contractor. But the respondent's husband examined as P.W.1 has admitted that he has ceased to be a Government contractor at present. But he added that he intends to start a textile business in the demised property, on the ground that he has previous experience in that kind of business. I am firmly of the opinion that the learned Appellate Authority should not have looked into this piece of evidence of P.W.1 in the absence of any allegation that the non-residential building is required for any textile business of the respondent's husband, for no amount of evidence can be looked into on a plea which has not been put forward. The evidence P.W.1 shows that he has merely an intention to start a textile business because he claims to have previous experience in such kind of business and the respondent in, therefore, stated to require the non-residential building *bona fides* for that purpose. A Bench of this Court has in *P.N.Raju Chettiar v. The State of Tamil Nadu, represented by the Secretary, Home Department (Accommodation controller) and others*, (1970)1 M.L.J. 249: A.I.R. 1970 Mad. 306, held, on a consideration of the language employed in Sec.10(3)(a)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act of 1960 that while literal construction placed by the Honourable Judges of this Court does not commend itself to them the other view appears to be reasonable and that they think as because "carrying on a business" may consist of a series of steps, and even if one step is proved, they did not see why the requirement is not satisfied, but if there is no step at all whatever and the matter is only in the stage of intention, it is difficult to bring such a case within the phrascology of the statute, namely Sec.10(3)(a)(iii) of the Act. This decision squarely applies to the facts of the present case."

13. Yet another decision relied upon by the learned counsel for the tenant was not reported in *K.Rangaswamy Naidu v. The Tamil Nadu Handloom Weavers Co-operative Society Limited*, (1982)1

M.L.J. 130, wherein, while considering Sec.10(3)(a) (iii) of the Act this Court held as under:

"The facts of the above case are similar to the case under revision. Here also the landlord who was conducting a business as a hotel keeper had put an end to his business and delivered the entire hotel business as a going concern to his landlord Krishnaswamy Naicker as per Ex. A-4. On a reading of Ex.A-4 it shows that the entire business was handed over to Krishnaswamy Naicker on 14th June, 1978. After transferring the entire business to Krishnaswamy Naicker. The landlord had not done anything by which it can be said that he is carrying on the hotel business. In his evidence before the Rent Controller as P.W.2 the landlord who is the civil revision petitioner herein had not spoken to anything from which the landlord's carrying on a hotel business can be inferred. No doubt the civil revision petitioner had a rich previous experience in running the hotel but that will not help him in any way in getting the tenant evicted. Subrahmanyam, J. in *T.K.Krishna Iyer v. Kanur Vysya Bank Limited, Coimbatore*, (1959)1 M.L.J. 215, observed as follows:

"It is true that the avocation of hotel proprietor was with him on old avocation and that nothing more was natural than that he should want to become a hotel proprietor again. But that would not render him on the date of which he made the application a person who was carrying on business as a hotel proprietor."

6. On the same reasoning the civil revision petitioner herein cannot be said to be carrying on a hotel business for which he needed the premises. Since the requirement of the Sec.10(3)(a)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act, that the landlord should be actually carrying on the business is not complied with in this case the appellate court acted rightly in allowing the appeal and dismissing the rent control application."

14. The learned counsel for the tenant further relied upon a decision of this Court in the case of *Gillanders Arbuthout and Company Limited v. Radhrunnisa*, (1982)1 M.L.J. 437, wherein while considering the provisions of Sec.10(3)(a)(iii) of the Act, this Court held as under.

"Firstly, there was nothing to show that the landlady's husband was actually carrying on any business at Madras. Secondly, the

premises that fell vacant had not been occupied by the husband. Thirdly, there was no evidence at all to show that the landlady's husband had made any preparation for starting the business. These vital points had been ignored by the Appellate Authority which had come to an erroneous conclusion that the requirement must be *bona fide*."

15. What constitutes in the matter of carrying on business is essentially a question of fact or a mixed question of fact and law. Each case will have to be decided on facts and be general propositions can be evicted as to what constitutes carrying of business. The ingredient of Sec.10(3)(a)(iii) are: (1) the building should be non-residential character, (2) the landlord should be carrying on business. The meaning put by to carry on business to be gathered from judicial pronouncement, (3) he should not be keeping any non residential building of his own in the City of Madras, and (4) the landlady must specify that her claim is *bona fide*.

16. According to the facts arising in the instant case, the landlady has stated that she was carrying on her business under the name and style of Asian Enterprises in a rented premises. She is also carrying on business as a partner in the partnership firm under the name and style of United Corporation as per Ex.P-26 partnership deed. In her evidence, she has stated that she started her business in 1978-79 as a proprietrix concern under the name and style of Asian Enterprises. She has also filed her assessment order for the year 1978-79. She shifted the said business to Gangu Street and she is carrying on the said business in a rented premises in which she is now residing. Neither in the counter nor in the oral evidence, the tenant has denied the fact that the landlady was carrying on her business even on the date when the petition was filed. Even when P.W.1 was in the witness box, no suggestion was made to him that the petitioner was not carrying on business on the date of filing the petition. Therefore, on facts, the landlady proved that she was carrying on business on the date of filing of the petition. Therefore, on facts, the decisions cited supra by the learned counsel for the tenant are distinguishable and hence these decisions are not applicable to the facts of this case.

17. It must also be remembered that in order to obtain possession under Sec.10(3)(a)(iii) of the Act, the landlady must not only show that she is

not having a non-residential premises of her own in the City of Madras and she is carrying on her business in a rented premise but also proved her *bona fide* in requiring the petition premises under Sec.10(3)(a)(iii) of the Act. According to the landlady she was originally carrying on the business in a rented premises situated at Triplicane High Road. Later on, she shifted non residence and accommodated her business in another rented premises at 36, Veerasamy Street. Again, according to the landlady, she shifted her business to Gangu Street, Egmore. Therefore, the landlady is badly in need of her premises for the purpose of accommodating her business. According to the landlady, she was paying a monthly rent of Rs.650 for the premises at Triplicane High Road. According to the landlady if her business is accommodated in her own premises, then that would render great advantage to her. Ex.P-16, dated 22.1.1981 is certificate of registration. Ex.P-17 is a copy of the summon, Ex.P-18 is the telephone bill. Ex.P-19 dated 19.6.1975 is a letter from Reserve Bank of India, and Exs.P-26 to P-30 are documents relating to partnership firm. All these documents would go to show that the landlady was carrying on her business on the date when the petition was filed in the year 1988. All that we have to consider in a petition filed under Sec.10(3)(a)(iii) of the Act is that the landlady should deserve to be put in possession and the possession should not be asked for by the landlady under an oblique active. This view was expressed by the Supreme Court in the case *Hameedia Hardware Stores v. B.Mohan Lal Sowcar*, A.I.R. 1988 S.C. 1060, in the following manner:

"By merely proving that the premises in question is a non-residential building and that the landlord or any number of his family is not occupying for the purpose of a business which he or any member of his family is carrying on any residential building in the city, town or village concerned which is his own, the landlord cannot in the context in which Sec.10(3)(a)(iii) appears get a tenant evicted. He must show in view of clause (e) of Sec.10(3) that his claim is *bona fide*. The word "claim" means "a demand for something as due" or "to seek or ask for on the ground of right" etc. In the context of Rent Control Law which is enacted for the purpose of giving protection to tenants against on reasonable evictions and

for the purpose of making equitable distribution of buildings amongst persons who are in need of them in order to prove that his claim is *bona fide* a landlord should establish that he deserves to be put in possession of the premises which is in the occupation of a tenant. Any decision on the question whether a landlord deserves to be put in possession of a premises in the occupation of a tenant should naturally depend upon the *bona fides* of the landlord's requirement or need. The word "claim" in clause (e) of Sec.10(3) of the Act should, therefore, as construed as "the requirement of the landlord of his deservedness. "Deserve" means "to have a rightful claim" or "a just claim". Since Clause (e) of Sec.10(3) of the Act is also applicable to a petition filed under Sub-clause (iii) of Sec.10(3)(a) of the Act it becomes necessary to examine whether the requirement of the landlord is *bona fide*. Otherwise a landlord will be able to evict a tenant to satisfy his whim by merely proving the ingredients mentioned in Sec.10(3)(a)(iii) of the Act. If the requirement of "claim" being "*bona fide*" as contained in Sec.10(3)(c) is construed to mean that genuineness of the need of the landlord for the non-residential building is not to be considered and the circumstance that the landlord on the date of making the application is factually carrying on business and has non-residential building of his own in his occupation in the city, town or village concerned is to be construed sufficient to make his claim *bona fide*, the tenancy of non-residential building will be occurs. It will be preposterous to attribute such an intention to the legislature. Such a contingency should be avoided as it could be against the very object of the Act itself. The need of the landlord should be genuine. That is the object of on acting clause (e) of Sec.10(3) of the Act. Therefore, it is not enough that the landlord should merely desire to use or occupy the premises. What is necessary to that he should *bona fide* need them for h's own use and occupation by any of the members of his family. *Phiroze Bamanji Desai v. Chandrakant M. Patel*, A.I.R. 1974 S.C. 1059 and *Mattulal v. Radhe Lal*, A.I.R. 1974 S.C. 1596, foll."

18. In the present case, on the basis of the evidence both the authorities below concurrently case to the conclusion that the requirement of the

landlady under Sec.10(3)(a)(iii) of the Act is *bona fide*. If the finding is concurrent on the basis of the facts and the evidence on record, this Court cannot interfere with the same by exercising the revisional jurisdiction under Sec.25 of the Act. On a careful consideration of the facts arising in this case in the light of the judicial pronouncements cited supra, I hold that the order passed by the Rent control Appellate Authority in ordering eviction under Sec.10(3)(a)(iii) of the Act, is in order. Accordingly, I am not inclined to interfere with the same. In the result, the revision is dismissed. However, there will be no order as to costs.

19. And this petition having been posted this day for being mentioned, the court delivered the following

JUDGEMENT: This case having come up for being mentioned today, the court makes the following order: After hearing the counsel for the petitioner, the tenant is granted three months time to vacate the petition premises from the date of the order passed in the abovesaid revision.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.No.1123 of 1993

13th October, 1993.

The Collector of Customs, Customs House,
Madras-1

...Appellant

v.

Madras Electric Castings P. Ltd., Madras.

...Respondent.

(A) Constitution of India (1950), Art. 226 - Jurisdiction under - Exercise of - Remedy of statutory appeal - If can be bypassed - If can be exercised to defeat object of law - If can be exercised to grant interim relief only when matter is pending before another authority. It is a settled position of law that jurisdiction

under Art.226 of the Constitution of India cannot be exercised to circumvent or by-pass the remedy of statutory appeal and only for the purpose of granting a relief of an interim nature without deciding the subject-matter of the dispute. The jurisdiction under Art.226 shall not be exercised in such a case and in such a manner which will result in defeating the object of the law and causes loss to the public Revenue and does not advance jurisdiction under Art.226 of the Constitution cannot be exercised only for the purpose of granting the relief of interim nature when the main is to be decided by another authority and further consequence of granting such interim relief is to injunctinate the very order of confiscation passed by the authority. [Paras. 5 & 7]

(B) *Customs Act (LII of 1962), Sec.129-B - Customs Excise and Gold (Control) Appellate Tribunal (Procedure) Ruling (1982), Rule 4 - Powers of Customs, Excise and Gold (Control) Appellate Tribunal under - Tribunal, if has jurisdiction to issue interim orders.*

Sec.129-B of the Customs Act empowers the Customs; Excise and Gold (Control) Appellate Tribunal to confirm, modify or annul the decision or order appealed against. It is also open to it to remit the matter back for fresh adjudication. In addition to this, Rule 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 specifically provides that the Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice. The words 'secure the ends of the justice' are wide enough to clothe the tribunal with powers to pass such interim orders as it may deem fit in the facts and circumstance of the case. In addition to this, the power of Appellate Tribunal to confirm, modify or annul the decision or order appealed against also takes in its fold to pass such interim orders as are necessary in order to aid the main relief sought for in the appeal. To put it in other words, the interim relief is granted to preserve in *status quo* the rights of the parties. In *Madan Gopal's case*, A.I.R. 1952 S.C. 12, it has been pointed the main relief. Therefore, it is quite inherent in the appellate power and more so in the case of the CEGAT to pass such interim orders as are necessary for the purpose of ensuring that the main relief sought in the appeal is available to the party at the end of the

proceeding. The fact that Sec.129-B only provides for relieving the appellant from the undue hardship that would be caused to him in depositing the duty and interest as demanded or penalty as levied does not, in any way, take away the inherent powers of the Appellate Tribunal to pass such interim orders as are necessary. This is only re-stated in Rule 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982.

[Para. 8]

(C) *Constitution of India (1950), Art.226 - Customs Act (LII of 1962), Sec.129-B - Order of Collector of Customs - Appealable - Appellate order also challengeable in Supreme Court - Alternate remedy, efficacious - Validity of order of Collector - If can be adjudicated upon under Art.226.*

It would not be just and appropriate for this Court to entertain the writ petition because the order is appealable to the Customs, Excise and Gold (Control) Appellate Tribunal which can go into questions of fact and law and can Act aside or affirm or annul the order or remand it for fresh consideration. The order passed by the Customs, Excise and Gold (Control) Appellate Tribunal can also be challenged before the Supreme Court. When there is efficacious alternative remedy provided, it would not be just and appropriate for this Court even to adjudicate up on the validity of the order of the Collector. Even otherwise, the validity of the order of collector cannot appropriate by be adjudicated ignoring the appeal provision. [Para. 9]

Cases referred to:

Kihoto Hollohan v. Kachillhu, (1992) 2 S.C.C. (Supp.) 651. [Para. 5]

State of Orissa v. Madan Gopal, (1951) 2 M.L.J. 645: 1951 S.C.J. 764: A.I.R. 1952 S.C. 12: 1952 M.W.N. 13. [Para. 6]

Appeal under Clause 15 of the Letters Patent against the Order of Kanakaraj, J., dated 27.9.1993 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.16738 of 1993 presented under Art.226 of the Constitution of India to issue a writ of *mandamus* directing the respondents to permit the petitioner to clear the goods viz. 138.83 Mts. of scrap lying at the warehouse maintained by the Container Corporation of India at Thiruvottiyur, Madras-19, covered by Bill of entry No.21954 dated 25.6.1993.

V.T.Gopalan, Senior Central Government Standing Counsel for K.Ramakrishna Reddy, Additional

Central Government Standing Counsel, for Appellant.

P.S.Raman, for Respondent.

The Judgment of the Court was delivered by *K.A.Swami, C.J.*: This appeal is preferred against the order dated 27.09.1993 passed in W.P.No.16738 of 1993. Learned single Judge has allowed the writ petition and issued the following direction to the Customs, Excise and Gold (Control) Appellate Tribunal:

"Taking the above into consideration, I direct the release of the subject goods pending the filing of the appeal before CEGAT on the following conditions:

(1) The petitioner should pay the differential duty in cash to the tune of Rs.2 lakhs.

(2) The petitioner should furnish a book guarantee to the tune of Rs.2 lakhs.

(3) The petitioner is permitted to give a personal bond, as provided in the Customs Act, for the balance of the differential duty, redemption fine and penalty.

The writ petition is ordered on the above terms.

There will be no order as to costs. This order is subject to the final order of the CEGAT."

2. At the outset, it may also be pointed out that the learned single Judge has recorded a clear finding in the following terms:

"The petitioner is said to be a well known importer of scrap metal shavings from Singapore and other countries. In respect of the Bill of Entry dated 25.6.1993 relating to a total of 138.83 mts. of scrap metals, there was an inspection and it was found that they contained stainless steel scrap also. In fact a total of 95 MT was said to comprise of such stainless steel scrap. There are two types of stainless steel metal scraps, one being magnetic stainless steel and the other being non-magnetic stainless steel. It is admitted that the non-magnetic stainless steel is superior and costlier. The goods in question comprised of magnetic stainless steel scrap. The only question, therefore, it is as to the value of the goods for the purpose of customs duty. For this, the petitioner had relied on the quotation given by M/s. The Projects and Equipments Corporation of India (Government of India undertakings), New Delhi. This is rejected by the Collector on the ground that it is only a quotation for sale and not actual price. The first respondent has

proceeded to consider the price quoted by several companies ranging between US \$ 550 and \$ 850 BT. According to the petitioner, these relate to the prime quality of stainless steel. After considering all the points, the first respondent comes to the conclusion that the value of the subject goods should be determined for the purpose of duty at US \$ 330/MT CIF. In other words, the assessable value is worked out at Rs.10,14,597. Consequently, the order of the first respondent has directed confiscation of 96.65 MT of stainless steel scrap and has permitted the release of the goods on payment of redemption fine of Rs.1,50,000 and imposed penalty of Rs.30,000 on the petitioner. The differential duty on the subject goods worked out at Rs.5,43,126."

Thus, without deciding the validity of the order dated 3.9.1993 passed by the respondent, against which an appeal is provided to CEGAT the order under appeal is passed directing the release of the goods. The Collector on examining the relevant material has passed the order dated 12th August, 1993 despatched on 3rd September, 1993, in No.58/217/93 CR 3 & 4, 859/83/93 3 & 4 in the following terms:-

"In the light of above facts and in the absence of any reliable evidence there is no option but to determine the value for assessment on reasonable means in terms of Rule 8 of the Customs Valuation Act and is accordingly determined at US \$ 330/MT CIF. Accordingly, the assessable value works out to Rs.10,14,597.

The stainless steel scrap is not assessable under Heading 7204.49/7204.90 and also not eligible for concessional assessment under Customs Notification 83/90 as amended. The impugned goods are correctly assessable under Custom Tariff Heading 7204.21 and Central Excise Tariff Heading 7204.20, with Customs Notification 150/81 as amended at the rate of 50% *ad valorem*, + 12.5% CVD. The differential duty works out to Rs.5,43,126. Thus there has been an attempt to evade customs duty to the extent of Rs.5,43,126. Therefore, the goods are liable for confiscation under Sec.111(m) of the Customs Act, 1962 and the importer is also liable for penalty under Sec.112(a) of the Customs Act, 1962. I also note that they are actual users. Accordingly, I pass the following order: I direct that 96.65 MT of stainless steel scrap

contained in five of the seven containers covered by Bill of Entry No.21954, dated 25.6.93 and referred to above, be classified under heading Customs Tariff Act. 724.21 and Central Excise Tariff Act 7204.20 and be charged to duty at appropriate rates.

I also order that the impugned goods, namely 96.65 MT of stainless steel scrap (magnetic type) be assessed on a value of US \$ 330/Mt. CIF.

In order confiscation of the above said 96.65 MT of stainless steel scrap contained in five containers covered by the B.E. No.21954 dated 25.6.1993 referred to above under Sec.111(m) of the Customs Act, 1962.

However, taking into account the entire facts and circumstances of the case, I order the release of goods, on payment of redemption fine of Rs.1,50,000 (Rupees one lakh fifty thousand only), under Sec.125 of the Customs Act, 1962, the fine will be in addition to the duty payable at appropriate rates.

I also impose a penalty of Rs.30,000 (Rupees thirty thousand only) on the importer, M/s. Madras Electro Castings Pvt. Ltd., Madras, under Sec.112(a) of the Customs Act, 1962."

3. The aforesaid order of the Collector is appealable and an appeal lies to the Customs, Excise and Gold (Control) Appellate Tribunal (for short CEGAT) under Sec.129-A of the Customs Act, (hereinafter referred to as the Act). It is submitted by learned counsel for the respondent in the appeal that such an appeal is preferred before the Customs, Excise and Gold (Control) Appellate Tribunal. The conditions for preferring an appeal are stated in Sec.120-B of the Act, thus:

"Sec.120-B, Deposit, pending appeal, of duty and interest demanded or penalty levied: Where in any appeal under this Chapter, the decision or order appealed against relates to any duty and interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the duty and interest demanded or the penalty levied: Provided that where in any particular case, the Collector (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty and interest demanded or penalty levied would

cause undue hardship to such person, the Collector (Appeals) or as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue."

Thus, from the aforesaid provisions contained in Sec.129-B of the Act, it is clear that along with the appeal, the appellant is required to deposit the duty and interest as demanded in respect of the goods not being under the control of the customs authorities and the penalty as levied. If the appellant is not in a position to deposit, and compliance with the condition laid down in Sec.129-B of the Act is going to cause undue hardship to him, the proviso to Sec.129-B of the Act enables him to make an application to the CEGAT, requesting it to relieve him of the undue hardship. In such an event, if the CEGAT is satisfied, it is open to the CEGAT to dispense with such deposit, subject to such conditions as it may deem fit to impose so as to safeguard the interests of the Revenue. In the appeal, the CEGAT after hearing the parties, may pass orders thereon as it thinks fit, confirming, modifying or annulling the decisions or order appealed against or it may refer the case back to the Authority which passed such decision or order with such directions as it may think, fit for a fresh adjudication or decision on the case may be, after taking additional evidence if necessary.

4. The ground on which the respondent/petitioner has approached this Court under Art.226 of the Constitution of India is that in an appeal preferred against the order of the Collector under Sec.129-A of the Act, the CEGAT has no power to pass on interim order, directing the release of the goods, therefore, the respondent/petitioner has no remedy, hence it has become necessary for it to approach this Court to seek a relief of interim nature. Along with Sec.129-B of the Act, Rule 41 of Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 has to be read which empowers the Tribunal to pass interim orders.

5. Before considering the question as to whether the CEGAT has got power to pass an interim order, it is to be seen whether in exercise of the jurisdiction under Art.226 of the Constitution, without deciding the correctness of the order of adjudication, this Court can direct the release of the goods, which are confiscated and in lieu of

confiscation, the party is permitted to redeem the same on payment of redemption fine. In the writ petition, it is not the order of the Collector that is challenged. Only a writ in the nature of *mandamus* is sought directing the collector to release the goods. No adjudication on the merits of the order passed by the collector is sought. It is already pointed out that the order passed by the Collector is appealable and an appeal lies to the Customs, Excise and Gold (Control) Appellate Tribunal, which can confirm, modify or annul the decision of the Collector appealed against. Further, if the appellant is not able to deposit the duty, penalty or the interest as the case may be, it is open to him to seek an order from the CEGAT to relieve him from the undue hardship that could be caused, if the deposit has to be made. It is a settled position of law that jurisdiction under Art.226 of the Constitution of India cannot be exercised to circumvent or by-pass the remedy of statutory appeal and only for the purpose of granting a relief of an interim nature, without deciding the subject matter of the dispute. Further, an interim relief can be granted to preserve in *status quo* the rights of the parties, so that the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency of the proceeding. (see *Kihoto Hollohan v. Kachillhu*, (1992) 2 S.C.C. (Supp.) 651. In the instant case, if the interim relief granted in the writ petition without deciding the validity of the order confiscation is allowed to remain in force, the confiscated goods will be released to the party who will dispose them off in the open market or in other manner, thereby the goods could not be available for confiscation which will result in infructualising the order of confiscation. The jurisdiction under Art.226 of the Constitution of India shall not be exercised in such a case and in such a manner which will result in defeating the object of the law and causes loss to the public Revenue and does not advance the cause of justice.

6. A similar question arose before the Supreme Court in *State of Orissa v. Madan Gopal*, (1951) 2 M.L.J. 645; 1951 S.C.J. 764; A.I.R. 1952 S.C. 12. In that case, the High Court directed the authorities by issue of a writ in the nature of *mandamus* not to evict the petitioner therein from the mining quarry for a period of 90 days to enable the petitioner to file a suit after issuing notice under Sec.80, Code of Civil Procedure, 1908. The Supreme Court

while allowing the appeal preferred by the State, held thus:

"In our opinion, Art.226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of Sec.89, Civil P.C. and in our opinion that is not within the adopt of Art.226. An interim relief can be granted only in aid of and on ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of *mandamus* or any other direction of a like nature and pending such determination it might have made a suitable interim order for maintaining the *status quo ante*. But when the court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunction under Art.226 of the Constitution. In our opinion, the language of Art.226 does not permit such an action. On that short ground, the judgment of the Orissa High Court under appeal cannot be upheld."

7. Therefore, it is clear that jurisdiction under Art.226 of the Constitution cannot be exercised only for the purpose of granting the relief of interim nature, when the main matter is to be decided by another authority and further consequence of granting such interim relief is to infructuate the very order of confiscation as pointed out above.

8. In addition, to this, it may also be seen as to whether the Customs, Excise and Gold (Control) Appellate Tribunal has jurisdiction to issue interim orders. It may be pointed out here that Sec.129-B of the Act empowers the Customs, Excise and Gold (Control) Appellate Tribunal to confirm, modify or annul the decision or order appealed against. It is also open to it to remit the

matter back for fresh adjudication. In addition to this, Rule 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 specifically provides that the Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice. The words "secure the ends of justice" are wide enough to clothe the Tribunal with powers to pass such interim orders, as it may deem fit in the facts and circumstances of the case. In addition to this, the power of Appellate Tribunal to confirm, modify or annul the decision or order appealed against also takes in its fold to pass such interim orders as are necessary in order to aid the main relief sought for in the appeal. To put it in other words, the interim relief is granted to preserve *status quo* the rights of the parties see *Kihoto Hollohan*, (1992) 2 S.C.C. (Supp.) 651. In *Madan Gopal's case*, (1951) 2 M.L.J. 645; 1951 S.C.J. 764; A.I.R. 1952 S.C. 12; 1952 M.W.N. 13, it has been pointed out that the interim orders are passed in aid of the main relief. Therefore, it is quite inherent in the Appellate power and more so in the case of the CEGAT to pass such interim orders as are necessary for the purpose of ensuring that the main relief sought in the appeal is available to the party at the end of the proceeding. The fact that Sec. 129-B only provides for relieving the appellant from the undue hardship that would be caused to him in depositing the duty and interest as demanded or penalty as levied, does not in any way take away the inherent power of the Appellate Tribunal to pass such interim orders as are necessary. This is only re-stated in Rule 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982. Therefore, the contention of the learned counsel for the respondent/writ petitioner that there is no power vested in the Customs, Excise and Gold (Control) Appellate Tribunal to pass an interim order directing the release of the goods, therefore, it has become necessary to approach this Court for relief, cannot be accepted. However, the CEGAT while passing interim order, it has to bear in mind the interest of both the parties and availability of goods if the same are to be confiscated at the end of the proceedings, unless the goods are of such nature which are subject to natural decay or perishable, in such a case, it has to pass appropriate order for disposal.

9. We may also point out here that even otherwise also, it would not be just and appropriate for this Court to entertain the writ petition, because the order is appealable to the Customs, Excise and Gold (Control) Appellate Tribunal, which can go into questions of fact and law and can set aside or affirm or annul the order or remand it for fresh consideration. The order passed by the Customs, Excise and Gold (Control) Appellate Tribunal can also be challenged before the Supreme Court. When there is efficacious alternative remedy provided, it would not be just and appropriate for this Court even to adjudicate upon the validity of the Order of the Collector. Even otherwise, the validity of the order of Collector cannot appropriately be adjudicated ignoring the appeal provision. There would be no reason whatsoever to pass an order for directing the release of the confiscated goods, without adjudicating the validity of the order of the Collector, directing confiscation of the goods. It may be pointed out that directing or relating of the goods would arise only, if it is found that the confiscation ordered is not sustainable. The redemption of the goods can be allowed only if the goods are to be confiscated. Therefore, without going into the validity of the confiscation order, the direction of the nature issued in the writ petition is not permissible.

10. It is also argued before us that it has become almost a practice in this Court to entertain such petitions and grant the relief, therefore, there is no reason for distinguishing the case on hand from all other cases, in which such a direction has been issued. In support of this, learned counsel appearing for the respondent/writ petitioner has produced as many as 12 orders passed by this Court in 12 different matters. One of them is also passed by a Division Bench of this Court. We shall first take up the judgment passed by a Division Bench of this Court in W.A.No.1171 of 1990. The judgment reads thus:-

"This writ appeal is directed against the order of the learned single Judge W.P.No.17102 of 1990 decided on 12.11.1990.

2. We have perused the order and we find that while refusing to adjudicate on the question of correctness or otherwise of the assessment and leaving it to the writ petitioners to take recourse to the statutory appeal, the learned single Judge with a view to meet the existing situation, made an interim arrangement and

gave the following directions:

"It is now reported that an assessment has been made and a duty of Rs.3,25,000 has been claimed from the petitioners. On the basis of the preliminary investigation the respondents estimated the differential duty to be paid in the range of Rs.9,00,000. I permit the respondents to take such action as called for by issuing a show cause notice. Inasmuch as there is an assessment of the goods and the claim for duty to the tune of Rs.3,25,000 and a differential duty estimated at Rs.9,00,000. I direct that on payment of the duty of Rs.3,25,000 plus a bank guarantee of 25 per cent of differential duty and payment of cash to the tune of 25 per cent of differential duty and a personal bond for the balance. In other respects, it is open to the parties to file on appeal and seek relief. The goods will be released on the above conditions."

3. The directions given by the learned single Judge in the facts and circumstances of the case do substantial justice between the parties. The interest of the Revenue has been adequately safeguarded and at the same time the interest of the writ petitioner has also been safeguarded. We find that the discretion exercised by the learned single Judge cannot be termed as unreasonable much less perverse. There is therefore no ground for us to interfere with the impugned order. The writ appeal fails and is dismissed." Thus, it is clear that in the aforesaid decision, the question which we have considered, has not been decided. It has been only pointed out that the directions given by the learned single Judge in the facts and circumstances of the case do substantial justice between the parties. Inasmuch as interest of the Revenue has been adequately safeguarded, at the same time interest of the petitioner has also been safeguarded. Therefore, it is clear that except directing the release of the goods, no decision has been rendered on the question as to whether without going into the merits of the order passed by the Collector, a direction of the nature can be issued. In all other decisions which have been rendered by learned single Judge in W.M.P.No.13507 of 1986 in W.P. 9213 of 1988, dated 26.08.1988, C/83/1579/89 in AC/55/858/89 dated 21.08.1990. CEG

AC. W.P.No.15980 of 1990 dated 31.1.1990, W.P.No.15980 of 1990, dated 11.10.1990, W.P.No.17448 of 1990 dated 15.11.1990, W.A.No.1517 of 1991 dated 19.12.1991. W.P.No.494 of 1992 dated 30.1.1992. W.P.No.5496 of 1992 dated 28.4.1992, W.M.P.No.12164 of 1992 in W.P.No.8430 of 1992 dated 30.6.1992. Rev. Application Nos.38 and 39 of 1992 dated 31.07.1992, W.P.No.11563 of 1991 dated 13.8.1992 and W.P.No.13552 of 1992 dated 17.9.1992. The point in question has not been considered a direction is issued only on the assumption that such an order cannot be passed by the Tribunal, pending disposal of the appeal. Therefore, in none of the decisions, the question as to whether such a relief without deciding the correctness of the order of the Collector can be granted, has not even considered. Therefore, we are of the view that the practice that has been followed so far, does not accord with the position of law. Exercising of jurisdiction under Art.226 of the Constitution in such manner is quite contrary to the decision of the Supreme Court in *Madan Gopal's case*, A.I.R. 1952 S.C. 12 and it is opposed to the provisions of the Customs Act. Hence, we are of the view that the aforesaid decisions cannot be held to have laid down a valid and binding precedent and the same are apposed to the decisions of the Supreme Court referred to above as such the said decisions cannot be accepted as laying down a law enabling this Court to exercise jurisdiction under Art.226 of the Constitution in a case where the order of the Collector confiscating the goods and permitting redemption on payment of redemption fine, is challenged before the CEGAT and the writ petition is filed seeking a direction to release the goods, without going into the merits of the decision rendered by the Collector. Now that we have hold that the Tribunal has got the power to pass appropriate interim orders including an order directing to release to release the goods, it is deemed fit in the facts and circumstances of the case, it is open to the respondent/writ petitioner to approach the tribunal for appropriate relief."

11. For the reasons stated above, this writ appeal is allowed. The order dated 27.9.1993 passed in W.P.No.16738 of 1993 is not aside. It is also further declared that the decision rendered in the

aforesaid writ petition cannot be considered as laying down any law or binding precedent for exercise of jurisdiction under Art.226 of the Constitution in a matter like this. No order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: K.A.Swami, C.J. and Somasundaram, J.

W.A.No.7 of 1994 4th February, 1994.

N.Sathyabooshanam ...Appellant,
v.
The Commissioner, Hindu Religious and Charitable Endowments, Madras and another
...Respondents.

Constitution of India (1950), Art.226 - Jurisdiction under - Court's duty - Commissioner of Hindu Religious and Charitable Endowments holding that third respondent was a first hereditary trustee - Third respondent filing suit for declaration that she was hereditary trustee - Suit dismissed for default - Third defendant precluded from bringing fresh suit on same cause of action - Whether lost her right of hereditary trusteeship - Question if can be raised in writ petition.

In a jurisdiction under Art.226 of the Constitution, the court is required to see that justice does not suffer on account of any technical objection. The fact that O.9, Rule 9 of the Code of Civil Procedure precludes the third respondent from approaching the civil court on the same cause of action does not mean that the right of the 3rd respondent as hereditary trustee for all purposes has been lost. No court or no authority has declared that she is not entitled to function as hereditary trustee. In addition to this if the

petitioner/appellant is aggrieved by the order passed under Sec.63 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, he has a right of suit. He can approach the civil court and establish that the 3rd respondent is not entitled to act as hereditary trustee even though she is no other than the daughter of his own brother by name Subramania Mudaliar who was recognised to be the hereditary trustee. As such, as the petitioner/appellant is not deprived of his right to establish his exclusive trusteeship, the court does not consider that it would be in the interest of justice to interfere with the order passed by the Commissioner for H.R. and C.E. which, in the view of the court is in conformity with justice. [Para. 4]

Case referred to:

Commissioner, Hindu Religious and Charitable Endowments v. Vaidhinatha Gurukkal and others, (1974)1 M.L.J. 406. [Para. 3]

Appeal under Clause 15 of the Letters Patent against the Order of Govindaswamy, J. dated 13.11.1991 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.11699 of 1983 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* mandamus, calling for the records of the Commissioner, H.R. & C.E. (Admn.) Department, Madras, the first respondent herein relating to R.P.No. 40 of 1980 on his file and quash the order dated 4.3.1983 passed therein and direct the 1st respondent to dispose of the matter in accordance with law after notice to the petitioner herein. T.S.Subramaniam, Senior Advocate for M/s.K.Kumarasamy, R.Harikrishnan and R.Sasirekha, for Appellant.

The Judgment of the Court was delivered by K.A.Swami, C.J.: This writ appeal is preferred against the order dated 13.1.1991 passed in W.P.No.11699 of 1983. Learned single Judge has dismissed the writ petition. Hence, the petitioner therein has come up in the appeal.

2. In the writ petition, the petitioner sought for quashing the order dated 4.3.1983 passed by the Commissioner, Hindu Religious and Charitable Endowments in R.P.No.40 of 1980 holding that Thiru Nataraja Mudaliar, father of the petitioner and Thiru Subramania Mudaliar, father of the 3rd respondent were recognised as hereditary trustees, therefore, the 3rd respondent being the heir of Thiru Subramania Mudaliar must be declared to have been the hereditary trustee along with

Thiru Nataraja Mudaliar.

2.1. Learned single Judge has declined to interfere with the order of the Commissioner for Hindu Religious and Charitable Endowments on the ground that undisputedly, the 3rd respondent is the daughter of Subramania Mudaliar, who was recognised to be the hereditary trustee. Further, the Commissioner for H.R. & C.E. held by the order dated 19th April, 1975 in R.P.Nos.198 and 199 of 1974 that it was for the parties to establish before the appropriate forum as to who was entitled to succeed. Learned single Judge has also referred to the O.S.No.7396 of 1975 filed by the 3rd respondent, which was dismissed for default.

2.2. On taking into consideration all these aspects, learned single judge has held that this is not a case, in which interference is called for, as any interference would result in defeating the right of the 3rd respondent. Learned single Judge has specifically observed thus:

"On considering the entire history of the case, there is no warrant to interfere with the impugned order because the claim of the third respondent is also justifiable and that cannot be defeated by any technicalities as put forward by the petitioner. So long as there is no inhibition against the right to recognise the third respondent as one of the hereditary trustees of the temple in question the impugned order cannot be set aside."

3. It is contended by learned counsel for the appellant that as the suit filed by the 3rd respondent was dismissed for default, as such by reason of the provisions contained in Rule 9 of O.9 of Code of Civil Procedure, the 3rd respondent is precluded from bringing the suit on the same cause of action, therefore, it shall have to be held that she has lost the right of hereditary trusteeship. It is also further contended that the Commissioner once having directed the 3rd respondent to go to a civil court and establish her right, could not have again exercised the revisional power and held that the 3rd respondent being the heir of the deceased Subramania Mudaliar is also entitled to act as hereditary trustee. Reliance is also placed on a Division Bench decision of this Court in *The Commissioner, Hindu Religious and Charitable Endowments v. Vaithinatha Gurukkal and others*, (1974) 1 M.L.J. 406, in which on considering Sec.57(b) of the Madras Hindu Religious and Charitable Endowments Act, 1951 which is equiva-

lent to Sec.63(b) of the Tamil Nadu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as the Act) it has been held that the Deputy Commissioner is empowered to decide whether the trusteeship in relation to a religious institution is hereditary or not and it is not permissible to decide as to whether a particular person is entitled to function as hereditary trustee at a particular point of time with reference to a temple, the hereditary nature of trusteeship of which has been admitted.

4. It may be pointed out that it is not disputed that the original trustee was one Narayanaswamy. He had 3 sons by name Arumuga Mudaliar, Subramania Mudaliar and Nataraja Mudaliar. The line of Arumuga Mudaliar has become extinct, whereas the 3rd respondent is the heir of Subramania Mudaliar and so also, the petitioner/appellant is the heir of Thiru Nataraja Mudaliar. On an earlier occasion in O.A.No.161 of 1954, the Deputy Commissioner, H.R. & C.E. Administration Department, Coimbatore, by the order dated 14.2.1955 had recognised Subramania Mudaliar and Nataraja Mudaliar as hereditary trustees. A copy of that order is produced at page 1 of the typed set of papers and that order was not challenged. No doubt, subsequent to the death of Nataraja Mudaliar and Subramania Mudaliar, in the proceedings in R.P.Nos.198 and 199 of 1974, the Commissioner, H.R. & C.E. by the order dated 19th April, 1975 directed the parties to approach the civil court for decision as to the right of trusteeship. It is also true that thereafter, the 3rd respondent had filed a suit for declaration that she is the hereditary trustee of the temple in question, but that suit was not decided on merits, but it was dismissed for default. Subsequently, by the impugned order, the Commissioner has reiterated the order passed on 14.2.1955 recognising Subramania Mudaliar and Nataraja Mudaliar as the heirs of Narayanaswamy as the hereditary trustees of the temple. Therefore, in the light of these undisputed facts, the contention of the petitioner/appellant becomes highly technical. In a jurisdiction under Art.226 of the Constitution, court is required to see that justice does not suffer on account of any technical objection. The fact that O.9, Rule 9 of the Code of Civil Procedure precludes the 3rd respondent from approaching the civil court on the same cause of action, does not mean that the right of the 3rd respondent as

hereditary trustee for all purposes has been lost. No court or no authority has declared that she is not entitled to function as hereditary trustee. In addition to this, if the petitioner/appellant is aggrieved by the order passed under Sec.63 of the Act, he has a right of suit. He can approach the Civil court and establish that the 3rd respondent is not entitled to act as hereditary trustee, even though she is no other than the daughter of his own brother by name Subramania Mudaliar, who was recognised to be the hereditary trustee. As such, as the petitioner/appellant is not deprived of his right to establish his exclusive trusteeship, we do not consider that it would be in the interest of justice to interfere with the order passed by the Commissioner for H.R. & C.E. which in our view is in conformity with justice. At the same time we

keep the question open to be decided by the civil court. Hence, we agree with the learned single Judge and decline to interfere. Consequently, we dismiss the writ appeal. However, we make it clear that it is open to the petitioner/appellant to approach the civil court and establish his exclusive right of trusteeship. In that even that suit be decided in accordance with the pleadings of the parties and evidence that would be adduced and not with reference to any of the findings recorded in these proceedings including our judgment. We keep open all the contentions.

B.S.

Appeal dismissed.

[End of Volume (1994) I M.L.J. (Reports)]

Pratap Singh, J.

Srinivasan and Abdul Hadi, JJ.

**T.Thirumalai v.
The Madurai District Pandian
Consumers' Co-operative Whole
Sale Stores Limited, Madurai.**

**Semou Jean Picrra v.
Jacqueline Semou.**

8th December, 1993

20th August, 1993.

A.A.O.No.1192 of 1993 and
C.R.P.No.3099 of 1993.

C.R.P.No.2505 of 1987.

Civil Procedure Code, Sec.115 - Order of District Judge under Payment of Wages Act - Revision against that order - Whether maintainable.

Payment of Wages Act - Delay in filing claim - Condonation of - Pedantic and rigid approach - Not to be followed - Limitation for making claim.

Payment of Wages Act (4 of 1936) provides for making a claim by an employee against order of illegal recovery of her salary. Sec.15 of the said Act provides for determination of the claims prescribed by the authority.

A reading of sub-sec.(1) of Sec.15 shows that a person who had worked as a Judge of a civil court or as a stipending Magistrate was also eligible to be appointed as authorities under the section. That an appeal is provided under Sec.17 of the Act.

The judicial authority has to decide the claim as against the order of deduction made in his salary. That would amount to a judicial function. He performs the delegated judicial functions of the State and hence the authority appointed under Sec.15 of the Payment of Wages Act in the opinion of the court must be regarded as a civil court and court subordinate to High Court will come within the purview of Sec.115, Civil Procedure Code. The authority cannot act in an arbitrary manner. The function exercised by it is a judicial function. Appeal is provided to the District Judge. The authority would be one who must be regarded as a Court subordinate to High Court. The authority by under Payment of Wages Act and the appellate authority, viz. District Judge are "*persona designata*". Therefore, revision under Sec.115, Code of Civil Procedure will be allowed.

R.Shakuntaraj, for Petitioner.
Vijay Narayan, for Respondent.

R.S. ---- *Pention allowed.*

Divorce Act (IV of 1869), Sec.32 - Wife's petition for restitution of conjugal rights - Husband contesting - Wife's application for interim maintenance and legal expenses ordered - Husband not paying the interim maintenance and legal expenses - Defence struck off - Order, if maintainable.

No doubt, an order directing payment of maintenance was made by the learned Judge on 15.7.1993, but that order did not contain a default clause that, in the event of non-payment of maintenance, the defence of the appellant might be struck off. In the absence of such a clause in the order, the learned Judge erroneously struck off the defence which he is not entitled to law. Even if there had been such a clause, the Court should consider whether on the facts, the defence should be struck off.

R.Subramanian, for Appellant.
K.Kumaraswamy, for Respondent.

B.S. ---- *Appeal allowed and petition ordered.*

[Full Bench]
*Srinivasan, Bakthavatsalam
and Janarthanam, JJ.*

**M.Ranka v.
The Hon'ble Chief Justice of Tamil Nadu,
High Court, Madras and others.**

29th November, 1993.

W.P.No.20963 of 1993 and
W.M.P.No.32830 of 1993.

Constitution of India (1950), Art.226 - Writ of mandamus - Party or counsel - If can choose his judge in any cause - Advocate, if can claim that matters in which he is appearing should not be posted before

particular Judges of High Court.

Abdul Hadi, J.

It is not open to any party or counsel to choose his Judge. The petitioner is an advocate practising in this Court and he cannot claim that the matters in which he is appearing shall not be posted before respondents 2 and 5 who are Judges of this Court.

**Rajeswari v.
Dhanammal.**

23rd November, 1993.

C.R.P.No.3616 of 1992.

M.Ranka, for Petitioner.

B.S. ---- Petitions dismissed.

[Full Bench]
Srinivasan, Bakthavatsalam
and Abdul Hadi, JJ.

**Philip Jeyasingh v.
The Joint Registrar of Co-operative
Societies Chidambaram Region,
Tuticorin and others.**

22nd November, 1993.

W.P.No.6191 of 1990.

Constitution of India (1950), Art.136 - Special Leave Petitions under - Dismissed without giving reasons - Effect - It will not amount to a declaration of law - Special leave granted and appeal dismissed - Effect.

It has been held by the Supreme Court in several cases that mere dismissal of a special leave petition without giving any reasons will not amount to declaration of law laid down by the judgment against which the special leave petition was filed. Learned counsel contends that in any case where special leave has been granted and civil appeal has been taken file and a decision is rendered dismissing the appeal, it would automatically declare the law on the subject. This Court is unable to accept that contention.

V.Shanmugham, for Petitioner.
V.Raghupathy, Additional Government Pleader,
C.Chenniswamy, Senior Counsel, T.M.Vallinayagam
and Ponni Ambalavanan, for Respondents.

B.S. ----- Petition dismissed.

Civil Procedure Code (V of 1908), O.6, Rule 2 - Variance between pleadings and proof - Party if can abandon his case - Claim relief on basis of other party's plea - Party seeking relief on facts established on record though at variance with his own pleading - Relief, if can be granted.

It is no doubt true that the decisions in *Govindaraj v. Kandaswami Gounder*, (1956)2 M.L.J. 578, *Subramanian Mudaliar v. Ammapet Co-operative Society*, (1960)2 M.L.J. 477, *P.Saraswati v. Lakshmi*, A.I.R. 1978 Mad. 361 and *Madhavan v. Kannammal*, (1990)2 L.W. 274 reiterate the principle that a party cannot abandon his own case and claim relief only on the basis of the other party's case. But, it must be noted that even in the last of the abovesaid decisions viz., (1990)2 L.W. 274, it is pointed out that the principle that one party cannot abandon his own case and claim relief on the basis of the other party's plea is not applicable where one party does not seek relief on the basis of the plea of the other party but only on the facts established on record, though they are at variance with his own pleading.

P.Devadass, for Petitioner.
S.Balasubramanian, for Respondent.

B.S. ----- Petition allowed.

Abdul Hadi, J.

**Karupayi v.
Narayanan.**

8th November, 1993.

C.R.P.No.1399 of 1993.

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act (XVIII*

of 1973), Secs.10(3) (a)(i), 10(3)(c) and 10(5)(a) - Landlord filing eviction petition against all seven tenants - Securing possession through Court in five petitions - Not occupying those premises after getting possession and continuing petition against remaining two tenants - If cannot maintain them under Sec.10(3)(a)(i) - If will have to face consequence provided under Sec.10(5)(a).

3rd November, 1993.

W.P.No.9424 of 1984.

Land Acquisition Act (I of 1894), Sec.18 - Reference to Civil Court - Land acquired - Landholder disputing correctness of amount awarded as compensation - Receiving amount under protest - If sufficient to refer matter to Civil Court to decide issue.

In the present case, the landlord wanted the entire building, consisting of the above referred to all the portions thereof for his own residential occupation. That is why he filed seven rent control petitions against all the seven tenants. When such is the case, when he secures possession through court in the abovesaid five portions out of the seven if he does not occupy those five portions after he gets possession in each of the five cases, not only it could be said that his requirement itself for his own occupation was really not *bona fide*, but he would also face the statutory consequence provide under Sec.10(3)(a) of the Act, which says where a landlord who has obtained possession of a building in pursuance of any order under Sec.10(3) does not himself occupy it within one month from the date of obtaining possession, the tenant who has been evicted may apply to the Controller for an order directing restoration for possession to him.

It is seen that admittedly at the time of receiving the amount. The petitioner protested against the quantum of the said sum and that while receiving the amount, the petitioner made an endorsement on the receipt stating 'received under protest'. In the considered opinion of the court, the ratio laid down by the Division Bench of this Court, in *Venkataswami Naidu v. The State of Madras, (1964) 1 M.L.J. 262*, squarely applies to the facts and circumstances of the present case and applying the said ratio laid down by the Division Bench of this Court in the decision referred to above, this writ petition has to be allowed and the matter has got to be referred to the Civil Court for adjudication.

P.Shanmugham, for Petitioner.

M.M.Sundaresh, Government Advocate, for Respondents.

B.S.

Petition allowed.

(B) Practice and Procedure - Relief in suit moulding - Subsequent events - How far it be taken noted of.

If the court has to decide that the subsequent event has to be taken note to the mould the relief, it must see no specific provision on fairplay is violated and there is absence of other disentitling factors or just circumstances.

Ratnam, J.

Womens Indian Association (Regd.) represented by its Secretary, Parvathi Srinivasan v. V.Mangudi

S.Parthasarathy, for Petitioner.
N.Thiagarajan, for Respondent.

29th October, 1993.

C.R.P.No.1069 of 1991.

B.S. ----- *Petition dismissed.*

K.M.Natarajan, J.

Madras City Tenants Protection Act (III of 1922), Sec.9 - Tenant filing suit against landlord for relief of mandatory injunction direction landlord to restore electricity supply cut off by the landlord - Landlord filing written statement - Projecting a counter - Claim for recovery of possession of property from tenant and for relief of ejection of tenant - Copy of written statement not proved to have been served on

Narayanaswamy and another v. The Special Tahsildar for Land Acquisition, Adi-Dravidar Welfare, Tiruppur and another.

counsel for tenant - But reply statement of tenant filed - Tenant again filing application claiming benefits of Sec.9 more than thirty days after claim for relief of ejectment - Application if barred by time.

Under Sec.9 of the Madras City Tenants Protection Act, on the institution on a suit in ejectment or proceeding under Sec.41 of the Presidency Small Cause Courts Act, 1882, by the landlord, the tenant entitled to compensation under Sec.3 may apply to the Court within one month after the service on him of summons for an order that the landlord shall be directed to sell the whole or part of the land for a price to be fixed by the court from the aforesaid provision, it is clear that it is intended to apply to a case where a suit is instituted by the landlord for the ejectment of the tenant, in which case, on the service of summons in the suit on the tenant within thirty days from the date of such service, he may apply to the Court praying for the reliefs under Sec.9 of the Act. In this case the respondent (tenant) had instituted the suit O.S.No.5988 of 1986 and the claim for ejectment was made by the petitioner (landlord) herein in the written statement by way of a counter claim. While under O.8, Rule 6-A(4), Civil Procedure Code, the counter-claim made in a written statement treating it as a plaint. Where the purpose of service of summons is to put the opposite party, to a litigation on notice of the claim made and to enable him to meet it by appearing before the court on a date specified, the service of a written Statement containing a counter-claim on the counsel for the opposite party, as in this case, would, in any view be the same as service of summons in a suit, though in form, a counter-claim. In this case, only in the course of the counter-claim made by the petitioner, the possession of the respondent was actually threatened and the service of the written statement on the course, as in this case, would be sufficient, in the view of the court, to have put the respondent on notice of his threat to possession and the need to take steps to meet such a threat. Further, in this case, though there is no endorsement in such regarding service of the written statement containing the counter-claim on the counsel for the respondent before the trial court, yet, it is seen that on 17.12.1986, the respondent had filed a reply statement by way of a counter-claim. Even in regard to the reply statement filed by the respondent on 17.12.1986, no endorsement had been

obtained from the counsel for the petitioner (defendant in the trial court). However, the reply statement filed on 17.12.1986 could not have been so filed unless it be that a copy of a written statement containing the counter-claim was also made available to the counsel for the respondent and the respondent after the service of the written statement filed by the petitioner on 1.9.1986 on the counsel for the respondent appearing in the trial court. That would be effective service of summons for purpose of Sec.9 of the Act. On the facts of this case, it must be held that the earliest point of time when the respondent had knowledge of the threat held out in respect of his possession was on 1.9.1986 when the written statement containing the counter-claim was made or at least on 17.12.1986 when the respondent filed a reply statement, computing the period of thirty days from either of the aforesaid dates, the application in I.A.No.4611 of 1987 filed on 25.2.1987 was barred by time.

V.Ashok Viswanath, for Petitioner.

P.L.Narayanan, for Respondent.

B.S.

Petition allowed.

Ratnam, J.

**Palaniraja and others v.
Jayalakshmi.**

29th October, 1993.

C.R.P.No.288 of 1993.

French Code Civil, Art.2262 - French Code de Commerce, Art.179 - French Establishment (Application of Laws) Order, 1954, Sec.6 extending applicability of provisions of Negotiable Instruments Act (1881) - Effect of - Law in provisions of French Code de commerce in so far as bills of exchange, promissory notes etc., were concerned, if ceased to have effect - Limitation for suits on promotes - Three years or thirty years - Starting point for limitation - Promissory notes dated 18.8.1982 and 25.3.1983 - Demand for repayment made by notice dated 13.3.1988 - Suit instituted on 30.3.1988 - If barred by limitation.

Under Sec.6 of the French Establishments (Application of Laws) Order, 1954, unless otherwise specially provided in the Schedule, all laws in force

in the French Establishment immediately before the commencement of the order which correspond to the enactments specified in the schedule, shall cease to have effect save as respects things done or omitted to be done before such commencement. Serial No.2 in the schedule is the Negotiable Instruments Act, 1881 and no special provision has been made in the schedule with reference to the provisions of that Act. From this, it would follow that the provisions of the Negotiable Instruments Act became applicable on and from 1.11.1954 and the provisions of the French Code de Commerce, particularly Arts.183, 184, 185 and 179 would cease to apply in respect of the promissory notes, bills of exchange etc..... Though it may be that there was a provision in the French Code de Commerce in Art.179 providing for a period of limitation of three years, that provision also ceased to have effect on the extension of the applicability of the provisions of the Negotiable Instruments Act, 1881. In that view, it would follow as held in *Sendamarai Ammal's case*, (1984)1 M.L.J. 342, though in relation to a suit on a mortgage that Sec.29(2) read with Sec.3 of the Limitation Act, 1963 has the effect of preserving the period of limitation made available earlier under the French Code Civil and in view of Art.2262 of the French Code Civil which would be a local law within the meaning of Sec.29(2) of the Limitation Act, 1963, its provisions have to be read into the schedule to the Limitation Act *mutatis mutandis*. Viewed thus, under Art.2262 of the French Code Civil, the period of limitation is thirty years and that period would be available to the respondent for instituting the suit. Even assuming that Art.179 of the French Code de Commerce stood preserved despite Sec.6 of the French Establishments (Application of Laws) Order, 1954, the suit instituted cannot be regarded as barred by limitation *Kandaswami Mudaliar's case*, (1993)1 L.W. 574, relied on by the learned counsel for the petitioner referring to Art.179 held that the word 'Maturity' in relation to promissory note could refer only to the date of demand and in this case, the demand has been made on 13.3.1988 and the suit having been instituted on 30.3.1988 within three years from the date of demand even as per Art.179 would be in time.

Mrs. Pushpa Satyanarayanan, for *T.R. Rajagopalan* and *T.R. Rajaraman*, for Petitioners.

Miss. V. Sumathi, for Respondent.

B.S.

Petition dismissed.

Abdul Hadi, J.

**Nalli Sambasivan and another v.
The Deputy Registrar of Trade Marks.**

15th October, 1993.

T.M.A.Nos.7 and 8 of 1993.

(A) *Trade and Merchandise Marks Act (XLIII of 1958), Sec.21 - Period of three months from date of advertisements and a further period of one month - Computation of - Starting point for.*

Time begins to run from the date of despatch of the Journal containing the advertisement to the subscribers.

(B) *Trade and Merchandise Marks Act (XLIII of 1958), Sec.109(2) - Appeal under - Expression 'shall be' - Meaning of.*

The use of the expression 'shall be' does not mean that either the appeal under Sec.96, Civil Procedure Code or appeal and under O.43, Civil Procedure Code read with Sec.109(2) of the Trade and Merchandise Marks Act should necessarily be admitted automatically before ordering notice to the respondent.

(C) *Practice and Procedure - First appeals - High Court if can dismiss without serving notice on respondent.*

There is no doubt that this Court could dismiss even a first appeal under Sec.96, Civil Procedure Code (or the appeals under O.41, Rule 11, Civil Procedure Code or Sec.109 (2) of the Trade and Merchandise Marks Act after giving reasons but without serving notice on the respondent.

(D) *Trade and Merchandise Marks Act (XLIII of 1958), Sec.109(2) - Appeals under - Numbered as T.M.As. instead of C.M.As. - Effect.*

Simply because instead of numbering the appeals as C.M.As. they were numbered as T.M.As., as character of the appeals has, in no way, been changed since they still remain only appeals under Sec.109(?) of the Trade and Merchandise Marks Act.

T.R. Mani, Senior Counsel for *T.M. Hariharan* and *Aruna Ganesh*, for Appellant.

B.S.

Appeals dismissed.

AR.Lakshmanan, J.

**Pondy Bazaar Petty Shop Traders
Association represented by its
President M.S.M.Syed Abdul Khader
and others**

v.

**Commissioner, Corporation of Madras and
others.**

18th January, 1994

W.P.Nos. 4926, 5007 and 5178 of 1993.

Constitution of India (1950) - Art.19 - Pavement vendors - Whether they can claim any fundamental right to encroach - They are trespassers - Cannot evoke the discretionary jurisdiction of the Court to continue trespass.

The petitioners cannot establish any legal right to occupy the platform for the purpose of vending. The absence of any legal right it has to be necessarily held that the petitioners are encroachers on public roads. They have trespassed on the said roads. Consequently, applying the above Division Bench ruling the Court has no hesitation in holding that the writ petitioners are trespasses who cannot invoke the discretionary jurisdiction of this Court to continue their trespass.

Constitution of India (1950) - Art.226 - Unregistered Association - List of members not submitted- Writ Petition not maintainable.

In this case it is also significant to notice that none of the petitioners has chosen to furnish the list of members at the time of filing of the writ petition or at the time of final hearing. This assumes some importance because of the specific case of the respondents that it is very difficult to identify the encroachers because the encroachers hand over the place of encroachment to others periodically and also change places frequently.

Constitution of India (1950) - Art.19 Squatting and engaging in trade or business on the pavement - Not a fundamental right.

Persons encroaching upon public roads cannot claim fundamental right where they squat and

engage in trade or business. They cannot also insist that they will carry on their trade or business on the pavement. It is for authorities to decide whether hawking or trading should be permitted on the road or pavement having regard to the width of the road, traffic and public safety and other relevant consideration.

A citizen has no right to remain in a particular place or any part of pavement of the road and carry on his trade even though a right is available to trade on the streets by moving from one place to another instead of remaining stationary in one place.

Natural Justice Principle of - Audi Altrem Partem - Pavement encroachers moving from place to place on pavement - Allowing another encroachers to take their place - Notice unnecessary.

On question of notice it has to be stated that the persons who have trespassed on the pavements and public roads and squat on the particular pavement cannot insist that they should be heard before action is taken removing such encroachments. The Court also is in full agreement that it is not possible for the authorities to identify the encroachers because they move from place to place on the pavement and allow another encroacher to take their place. Consequently there is no need to issue any notice.

G.Subramaniam, Senior Advocate for M.Jagadeesan and E.Rajaram, for Petitioners.

R.Krishnamoorthi, Senior Advocate for A.Elango, for Corporation of Madras.

V.P.Sengottuvel, for Respondents Nos. 2 and 3.

R.S.

Petition dismissed